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THE
FEDERAL REPORTER.

VOLUME 136.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

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FEDERAL REPORTER, VOLUME 136.

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OF THE

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² Died April 14, 1905.³ Became Circuit Judge May 20, 1905.⁴ Appointed District Judge May 20, 1905.⁵ Appointed by Act of March 2, 1905.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

GERMAN SAVINGS & LOAN SOC. v. TULL et al.

(Circuit Court of Appeals, Ninth Circuit. March 6, 1905.)

No. 1,096.

1. FEDERAL COURTS—JURISDICTION—SUIT FOR PARTITION.

A suit for partition is a local action within the provisions of Act March 3, 1875, c. 137, § 8, 18 Stat. 472 [U. S. Comp. St. 1901, p. 513], and one in which any question between any of the parties, plaintiffs or defendants, affecting their rights or interests in the land may be put in issue and determined; and a federal court is not without jurisdiction because questions may arise between plaintiffs who are citizens of the same state, nor will it make a realignment of parties to defeat its jurisdiction because such questions may arise, where the bill, although properly setting out the interest of each party in the premises, does not disclose any controversy which renders it necessary.

2. ABATEMENT—ANOTHER ACTION PENDING—FEDERAL AND STATE COURTS.

The pendency of a suit in a state court cannot be pleaded in bar of a suit between the same parties on the same cause of action in a federal court.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Abatement and Revival, §§ 87-92.]

Pendency of action in state or federal court as ground for abatement of action in the other, see note to Bunker Hill & Sullivan M. & C. Co. v. Shoshone M. Co., 47 C. C. A. 205.]

3. RES JUDICATA—VALIDITY OF JUDGMENT—AFFIRMANCE IN DIRECT PROCEEDINGS.

Where a question as to the validity of a judgment of the Supreme Court of a state was raised in such court by a petition for rehearing, and decided adversely to the petitioner, who thereupon removed the case to the Supreme Court of the United States by writ of error, where the same question was raised, and the judgment of the state court was affirmed, such question is res judicata, and cannot be again raised collaterally between the parties.

4. SAME—MATTERS CONCLUDED BY JUDGMENT.

The heirs of a deceased wife brought suit in a state court to recover a half interest in certain real estate as community property in which their mother's interest descended to them. At the time of her death plaintiffs were minors, and their interests in the property were thereafter sold and conveyed by their guardian to their father under an order

of the probate court. The father then mortgaged the entire property to the defendant in the suit for money borrowed to improve the same, and such defendant subsequently bought it in on a foreclosure of the mortgage. By the final judgment of the court, entered pursuant to a mandate of the Supreme Court of the state, the guardian's deed, the mortgages to the defendant, and the conveyance based thereon were held void and set aside as to the half interest in the property held by the wife, and plaintiffs were adjudged the owners of an unincumbered, undivided half interest in the property, together with the tenements, hereditaments, and appurtenances thereto belonging, free and clear of all incumbrances, and free from any right or title of the defendant thereto. The defendant moved the Supreme Court to modify its decree so as to leave open for adjudication by the court below all questions as to the rents, taxes, and repairs, and the value of permanent improvements placed on the premises with money borrowed from it as mortgagee, which motion was denied. *Held*, that the judgment was an adjudication of the defendants' rights with respect to the improvements, rents, etc., and that such rights could not be again contested in a subsequent suit for partition brought by the heirs.

5. TENANCY IN COMMON—RECOVERY FROM CO-TENANTS FOR IMPROVEMENTS—BONA FIDE PURCHASER.

A tenant in common, who became such through a purchase by which he supposedly acquired the entire title, can only recover from his co-tenants for improvements made upon the property where he occupies the position of a bona fide purchaser; and he does not have such standing as against his co-tenants where at the time of his purchase he had full knowledge with respect to conveyances which purported to divest them of their interest, but which were in law fraudulent and void, merely because through mistake of law he relied on their sufficiency.

6. SAME.

A mortgagee, who acquired title to the property through foreclosure, and who had full knowledge, when he took the mortgage, of probate proceedings by which it had been sought to vest the interest of certain minor heirs in the property in the mortgagor, which proceedings were fraudulent in law, and were afterward set aside, is not entitled, as a tenant in common with such heirs, to recover from them for improvements placed on the property by the mortgagor either as a bona fide purchaser or through subrogation to the rights of the mortgagor, who, being a purchaser *mala fides*, could not recover for such improvements.

Morrow, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Eastern Division of the District of Washington.

Happy & Hindman, Hughes, McMicken, Dovell & Ramsey, and W. S. Goodfellow, for appellant.

Nash & Nash and James Dawson, for appellees.

Frederick W. Dewart, for cross-appellants.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The main facts of this case are stated in the opinion of our Brother MORROW, and it is therefore unnecessary to state them here. We agree with him in regard to the jurisdiction of the court and the conclusiveness of the judgment in the state court of Washington in the case between these parties in respect to all matters there determined. We are unable to agree that the equities now sought to be set up by the appellant were not among those matters. According to the express declaration of the Supreme Court of the state of Washington (*Dormitzer v. Ger-*

man Savings & Loan Soc., 23 Wash. 207, 62 Pac. 886) the decisive question in that case was "whether the respondent [appellant here] took its mortgages upon the property in controversy in good faith, without knowing, or having the means of information by which it might, by the exercise of common prudence, have known, of the acts of the guardian and F. M. Tull in transferring the property from the minor children to F. M. Tull, and whether those acts were fraudulent." The Supreme Court of Washington, as did the United States Circuit Court from which the present appeals come, acquitted the appellant German Savings & Loan Society of any intention to commit or participate in any fraud upon the minor children of Tull, for the reason that the appellant based its action in the proceedings upon the advice of its attorney and agent at Portland, Or., to the effect that such proceedings were not illegal, but, on the contrary, valid; the Supreme Court of Washington saying, in its opinion (23 Wash. 220, 62 Pac. 890):

"The proof is uncontradicted, and it is admitted by the respondent in its brief, that the probate proceedings were for the purpose of vesting title to the entire piece of property in the father, so that he might mortgage it to the respondent in order to get money to go on with the buildings in course of construction on part of the property, and that, in place of the children's interest being sold for cash, they were to get a mortgage, second and subordinate to the respondent's, for a sum the father was to go through the form of bidding, which had been agreed upon in advance by the probate court, on testimony taken as to the fair value of the children's interest. The testimony of P. D. Tull, the appointed guardian, shows that he was used as an instrument by the father to accomplish this end. He was in no sense of the word 'guardian.' He did just as he was directed to do by the father, and, it seems, with full knowledge of the probate court. The father was the actual guardian. The law as it existed at the time these alleged sales by the guardian were made authorized the probate court, when the estate was suffering waste, or a better investment of the value could be made, to sell the infant's interest in real estate. Here no bona fide sale in the open market to the highest bidder was contemplated. If we should uphold these transactions, the interest of infants in real property in this state would be under a very precarious tenure. It may be conceded that there was no intention—and we think that is a fact—on the part of the attorneys, the probate judge, Tull, and the respondent to injure the appellants, and that they acted from the best of motives; but the fact stands out, nevertheless, that they perpetrated in law a fraud upon the children."

The opinion of the Supreme Court of the state concluded with these words:

"The judgment and decree of the lower court is reversed, with costs to appellants. This cause is remanded to the court below, with instructions to enter a judgment and decree herein adjudging and decreeing that Dora May Dormitzer, William L. Tull, and Ernest B. Tull, the appellants herein, are entitled to an unincumbered undivided one-half of the real estate described in the pleadings in this action, and that the guardian deeds described in said pleadings and orders of the probate court of Spokane county, directing the sale of said half interest, or in any way affecting the same, and the said guardian deeds conveying the same to F. M. Tull by P. D. Tull, as guardian of said appellants, as set out in the pleadings, be declared fraudulent, null, and void; and also decreeing that the plaintiffs in the action below recover their costs."

We agree with the court below that the decision of the Supreme Court of Washington "fixes definitely and finally the rights of the

Tull children as owners of an undivided one-half of the property unincumbered against any title or claim or lien which the German Savings & Loan Society can ever assert arising out of any transaction previous to the date of the mandate." That counsel for the respondent in that case (appellant here) understood that decision to go to that extent, is, as said by the court below, clear; for, in addition to their petition for a rehearing of that cause, they moved the Supreme Court of the state, on the 25th day of January, 1901, to modify its order and decree so as to leave open for investigation and adjudication in the superior court of the state all questions relating to rents, issues, and profits of the premises, and all questions as to the value of permanent improvements placed upon the premises in question with moneys borrowed from the society, and all moneys advanced and paid by it for the necessary and proper repairs and maintenance of the property, for taxes, and for assessments for local improvements. If it be true that the remittitur from the supreme to the superior court of the state had then gone down, it was still within the power of the Supreme Court to recall the remittitur for the purpose of modifying or changing its judgment according to its decision in the case of *Bell v. Waudby*, 7 Wash. 204, 34 Pac. 917. We find it impossible to conclude that the Supreme Court of the state would have denied those motions, and adhered to its decision directing a decree adjudging the children "entitled to an unincumbered undivided one-half" of the property, and adjudging the deeds and orders in question "in any way affecting the same" fraudulent, null, and void, if it had considered the society entitled to the equities there, as well as here, set up. Indeed, it is impossible to see how that court could have held the society entitled to such equities, in view of its express adjudication to the effect that it was not a purchaser in good faith, but, on the contrary, that, while not intending to do so, it in fact participated in a legal fraud upon the children in acquiring its asserted rights. That judgment is, as held in the opinion of our Brother MORROW, *res adjudicata*, and conclusive upon that question, as well as every other issue in the case. We must therefore accept it as an established fact that the present appellant does not occupy the position of a bona fide purchaser. Even if that were not so, the evidence in the present suit shows the same thing; for while the appellant relied and acted upon the advice of its attorney and agent, and was therefore innocent of any intended wrong, it knew of the rights of the children, for they were matters of public record, of which it had not only constructive, but actual, notice. And as it, through its agents, knew of, and, indeed, was a party to, the proceedings through which F. M. Tull sought to divest the interests of the children and invest the same in himself, and as those proceedings constituted a fraud in law, as was adjudged by the Supreme Court of Washington and the Supreme Court of the United States, it is impossible to see how the appellant can, in any aspect of the case, be regarded in the light of an innocent purchaser for value of the children's interest. A mistake in regard to the legal effect of transactions, of which a party has notice, never makes of him a bona fide purchaser. In

other words, as said in *Bodkin v. Arnold*, 48 W. Va. 108, 35 S. E. 980 "plaintiff's belief, to be bona fide, must be founded on ignorance of fact, and not ignorance of law." To the same effect is *Milwaukee & Minnesota Ry. Co. v. Soutter*, 13 Wall. 517, 20 L. Ed. 543. In *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891, it was expressly held that "one having notice of facts rendering his title inferior to another, who, by mistake of law, regards his title as good, cannot claim for permanent improvements."

The equities here set up by the appellant are not always accorded a purchaser in good faith, and are never awarded a tenant in common who becomes such mala fide. In *Cosgriff v. Foss*, 152 N. Y. 104, 46 N. E. 307, 36 L. R. A. 753, 57 Am. St. Rep. 500, the Court of Appeals of New York refused to allow a tenant in common to recover for improvements; saying:

"They were not in the line of restoration, but of a business venture. We know of no well-considered case in this state that would authorize an allowance for improvements under the circumstances. * * * Equity requires contribution from tenants in common only to prevent injustice; and, unless the rule is kept well in hand, it is liable to cause more injustice than it prevents."

Authorities to the effect that a tenant in common who does not hold in good faith cannot recover for improvements put upon the property are too numerous to require citation. In *Gillespie v. Moon*, 2 Johns. Ch. 585, 7 Am. Dec. 559, Chancellor Kent said:

"Such an allowance would be confounding all moral distinctions, and be giving countenance and sanction to the most flagrant injustice."

And in the case of *Milwaukee & Minnesota Ry. Co. v. Soutter*, supra, the Supreme Court of the United States, in speaking of a fraudulent purchaser of property, and asking if it was ever known that such a purchaser, deprived of its possession, could recover for his repairs or improvements or for incumbrances lifted by him whilst in possession, answered the question thus:

"If such a case can be found in the books, we have not been referred to it. Whatever a man does to benefit an estate under such circumstances he does in his own wrong. He cannot get relief by coming into a court of equity."

Moreover, the improvements put upon the property in question, one-half the cost of which the appellant seeks to charge against the Tull children, were put upon it not by the appellant, but by its mortgagor, F. M. Tull. The appellant was not then a tenant in common. Certainly F. M. Tull was a mala fide purchaser of the children's interest, for which reason, under the eminently just and thoroughly established doctrine above adverted to, he could not recover from them in a court of equity for any repairs or improvements, or for any incumbrances lifted by him whilst in possession. It is just as certain that the appellant could not acquire from F. M. Tull, either by conveyance or by subrogation, any other or greater rights than he himself possessed. *Swarts v. Siegel*, 54 C. C. A. 399, 117 Fed. 13. The only rights, so far as appears, that the appellant acquired through conveyance from F. M. Tull, were those de-

rived from the mortgages executed by him to the appellant, and the foreclosure thereof, the full scope of which, as has been seen, was conclusively determined by the judgment of the Supreme Court of the state in the case between these parties, already referred to.

As regards the claimed right of subrogation, it is sufficient to say that, even if the facts of the case admitted of the subrogation of the appellant to the rights of F. M. Tull, the rights here asserted to charge against the interests of his children one-half of the cost of the improvements, etc., never existed in him, for the reasons already stated, and therefore the appellant could get nothing by reason of such subrogation. Subrogation is a doctrine of equity jurisdiction, which does not depend on privity or contract, express or implied, except in so far as the known equity may be supposed to be imported into the transaction, and thus raise a contract by implication. It is founded on the facts and circumstances of each particular case and on the principles of natural justice. In general, it will be applied "wherever any person, other than a mere volunteer, pays a debt or demand which in equity or good conscience should have been satisfied by another, or where a liability of one person is discharged out of a fund belonging to another, or where one person is compelled for his own protection, or that of some interest which he represents, to pay a debt for which another is primarily liable, or wherever the denial of the right would be contrary to equity and good conscience. Subrogation being the creature of equity, it will not be permitted where it would work injustice to the rights of those having equal or superior equities. Thus it will not be enforced against a bona fide purchaser for value without notice, or in favor of a person guilty of fraud, or for the benefit of one who would thereby be enabled to derive an advantage from, or to establish his claim through, his own wrong or negligence or inequitable or illegal conduct. Nor will it be enforced at the expense of a legal right, or where resort to a usurious agreement or security would be necessary for its establishment." 27 Am. & Eng. Enc. of Law (2d Ed.) 203, 204, and authorities there cited. See, also, *Ætna Ins. Co. v. Town of Middleport*, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537; *Prairie State Bank v. United States*, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412; *First National Bank of Seattle v. City Trust Safe Deposit & Security Co. of Philadelphia*, 52 C. C. A. 313, 114 Fed. 529. Moreover, it is admitted by the pleadings in this cause that the property in question is worth \$250,000, and it does not appear but that the appellant's one-half interest in the property itself and its one-half interest in the rents, issues, and profits thereof is enough to reimburse itself for its loans, with interest. To apply the doctrine of subrogation so as to enable a party to a wrong to make a profit at the expense of the injured and innocent parties to that wrong would be quite foreign to the principles upon which the doctrine of subrogation is founded.

In the light of the foregoing authorities it would seem clear enough that the appellant cannot be awarded the rights now and here asserted by it by means of subrogation to the rights of F. M. Tull, first, for the reason that F. M. Tull never possessed any such

rights; and, second, because upon the facts of the case as disclosed by the record the appellant is not entitled to the application of the doctrine of subrogation.

We are of opinion that, except in one respect, the judgment of the court below is right. It refused to allow "any interest on the account." We think that the one-half of the various amounts of money received by the appellant from the property belonging to the complainants and cross-complainant should bear legal interest from the date they were respectively received by the appellant, and that the appellant is entitled to like interest upon the various sums of money paid out by it on account of the property that were allowed by the court below from the date of their respective payments.

The judgment of the court below will be so modified, and, as thus modified, will stand affirmed.

MORROW, Circuit Judge (dissenting). This is a suit in equity for the partition of real estate and improvements thereon, and for an accounting for the proceeds of the property according to the rights and interests of the respective parties, and, in case partition thereof cannot be made without prejudice and loss to the owners thereof, then and in that event the said premises, or such part thereof as cannot be divided, to be sold by and under the direction of the court, and the proceeds of the sale divided between the parties. The real estate and improvements concerned in this case are situated in the city of Spokane, state of Washington. The complainants in the court below (appellees here) are William L. Tull, a citizen of the state of Washington, and Lucius B. and Lucius G. Nash, a firm of attorneys doing business under the name of Nash & Nash in the city of Spokane, Wash. The defendant German Savings & Loan Society is a corporation existing under the laws of California, the defendant Dora May Seeley is a citizen of Illinois, and the defendant Ernest B. Tull, a minor, a citizen of Iowa. The trial of the case resulted in a decree of partition dividing a portion of the property in question among the complainant William L. Tull and the defendants Dora May Seeley, Ernest B. Tull, and the German Savings & Loan Society, and for a sale of the remainder and the distribution of the proceeds between the parties in interest. From this decree an appeal is taken to this court by the German Savings & Loan Society, and a cross-appeal is prosecuted by Ernest B. Tull and Dora May Seeley.

The facts leading up to this litigation are, briefly, the following: F. M. Tull, the father of William L. Tull, Dora May Seeley, and Ernest B. Tull, parties herein, bought the lots which are the subject of suit in 1886, and commenced the construction of a building thereon. In order to complete the purchase price of the ground and to construct a suitable building thereon, he negotiated a mortgage on the property with the appellant herein in the amount of \$40,000, but before it was executed his wife died. The property was considered to be community property, and the wife's interest therein passed to the three children. As they were minors at the time of her death, a valid mortgage could not be given, under the laws of Washing-

ton. A guardian was appointed by the probate court for the minors, and upon his petition a sale was ordered of their interests in the property. The father became the purchaser at this sale, but paid no money for their interests, merely giving a mortgage for the amount bid to the guardian, which mortgage was afterwards canceled without further payment. The record title was thus completed in F. M. Tull, the father, who then secured the loan of \$40,000 from the appellant, and proceeded with the construction of buildings on the lots. In 1889 the buildings were destroyed by fire, and with the insurance collected F. M. Tull paid off the mortgages, leaving the ground free from incumbrance. He afterwards gave other mortgages to the appellant as security for loans made by it at different times, amounting to \$120,000, all of which was expended in the improvements now on the property. In 1894 F. M. Tull defaulted in the payment of interest, the mortgages were foreclosed, and at foreclosure sale the appellant became the purchaser and obtained possession of the property. In 1897 the Tull children brought suit in the state court of Washington against the appellant herein and others, seeking a decree declaring the act of their guardian in canceling the mortgage given by their father null and void, and to have said mortgage reinstated as a lien upon the property superior to any other interest or right, and for a foreclosure of said mortgage and sale of the property. The superior court decided against the complainants, and they appealed to the Supreme Court of the state, submitting the cause upon the transcript of the record and briefs. After submission of the case one of the justices of the Supreme Court resigned. Hon. William H. White was appointed in his place, and delivered the opinion of the court in the case on November 7, 1900, reversing the decision of the superior court, holding the proceedings in the probate court to be fraudulent, and restoring to the complainants the share of their mother in the property, namely, an undivided one-half interest, unincumbered. *Dormitzer v. German Savings & Loan Society*, 23 Wash. 132, 224, 62 Pac. 862. This judgment was affirmed by the Supreme Court of the United States in January, 1904. *German Savings & Loan Society v. Dormitzer*, 192 U. S. 125, 24 Sup. Ct. 221, 48 L. Ed. 373. Meanwhile the Tull children commenced an action in the superior court of Washington to have the property partitioned, and for an accounting from the appellant herein of the rents, issues, and profits of the property. This cause was removed to the United States Circuit Court for the District of Washington, where judgment was rendered in favor of the complainants. An appeal was taken therefrom to this court, resulting in a reversal of the judgment of the Circuit Court for want of jurisdiction, and the cause was ordered remanded to the state court. *German Savings & Loan Society v. Dormitzer*, 116 Fed. 471, 53 C. C. A. 639. While that cause was still pending and undetermined, the present suit was commenced in the Circuit Court on the 16th day of June, 1902, for partition of the property, and an accounting of rents and profits by the appellant herein; the complainants being but one of the Tull heirs, joined with Nash & Nash, attorneys, claiming a lien upon the property by virtue of express

contracts with the Tull heirs. The appellant answered, and also filed a cross-bill, setting out a want of jurisdiction in the Supreme Court of Washington to render the judgment in favor of the Tull heirs, and pleading a misjoinder of parties and causes of action. It alleged that it acquired the various mortgages upon the property in question in perfect good faith, and for valuable consideration; that there was no community interest in the property at the time F. M. Tull invested in it, and the Tull children were therefore not entitled to any rights therein upon the death of their mother; that appellant is the rightful owner of the legal title to the property in controversy; but that, in the event it should be adjudged that the Tull heirs own an interest in said property, as tenants in common with the appellant, it is prayed that appellant be decreed to have a lien upon such interest for money expended by it in the payment of taxes, assessments, mortgages, repairs, etc., and for a fair valuation of the improvements upon the property. Issues were joined between all the parties after answers and cross-bills having been filed by the other defendants, and the Circuit Court rendered judgment against appellant for partition and an accounting, withholding decision as to the other controversies presented.

It is assigned as error that the court erred in not dismissing the proceedings in this cause, for the reason that the court had no jurisdiction to proceed in the matter. This objection is based upon the joinder of Nash & Nash, citizens of the state of Washington, with William L. Tull, also a citizen of the state of Washington, as complainants. It is alleged in the bill of complaint that Nash & Nash were copartners in the practice of the law at Spokane, Wash.; that William L. Tull and the defendant Dora May Seeley, in their own behalf and in behalf of the defendant Ernest B. Tull, consulted and by agreement employed Nash & Nash to institute the necessary legal proceedings to determine their respective rights in and to said real estate, and to recover the same. It is further alleged that pursuant to such agreement Nash & Nash did institute the necessary legal proceedings in the superior court of Washington, and that such proceedings were thereafter had that a judgment and decree was entered adjudging and decreeing that Dora May Dormitzer (Seeley) and William L. Tull and Ernest B. Tull were entitled to an unincumbered, undivided one-half of the real estate described in the pleadings in this action. It is further alleged that the said Tull heirs, and each of them, were poor, and utterly without means or money to prosecute a suit to obtain relief from certain fraudulent acts referred to in the bill, and were compelled to secure the necessary legal assistance upon a contingent fee, which terms and agreement of employment between Dora May Seeley and William L. Tull and the firm of Nash & Nash were as follows, to wit:

"That said Dora May Seeley agreed to give as compensation to said Nash & Nash thirty-five per cent. of whatever the said Dora May Seeley recovered or established a right to in said real estate and the rents, issues, and profits thereof, and William L. Tull agreed to give as compensation one-half of whatever said William L. Tull recovered or established his right to in said real estate, and the rents, issues, and profits thereof; all compensation to be contingent upon the success of the litigation, which terms and conditions were accepted by said Nash & Nash."

It is further alleged that by virtue of the terms of this employment Nash & Nash are entitled to an undivided $\frac{7}{120}$ of the interest of Dora May Seeley in and to said real estate and all rents and profits of said real estate from April 23, 1896, and that by the terms of the agreement between Nash & Nash and William L. Tull Nash & Nash are entitled to one-half of the interest of said William L. Tull and all rents, issues, and profits of said real estate from the said 23d day of April, 1896. It is further alleged that the defendant Dora May Seeley is the owner in fee and entitled to the possession of one undivided one-sixth of the real estate described in the bill of complaint and an undivided one-sixth of all rents, issues, and profits arising out of such real estate since the 23d day of April, 1896, less 35 per cent. thereof belonging to Nash & Nash; that William L. Tull is the owner in fee simple and entitled to the possession of one undivided one-sixth of the said real estate, and an undivided one-sixth of all rents, issues, and profits arising out of said real estate since the 23d day of April, 1896, less one-half thereof belonging to Nash & Nash; Nash & Nash are entitled to an undivided $\frac{17}{120}$ of the said real estate and an undivided $\frac{17}{120}$ of all the rents, issues, and profits thereof since the 23d day of April, 1896; that the defendant Ernest B. Tull is the owner in fee simple and entitled to the possession of an undivided one-sixth of the said real estate and an undivided one-sixth of all rents, issues, and profits arising out of the said real estate since the 23d day of April, 1896; that the defendant German Savings & Loan Society is the owner in fee simple of an undivided one-half of said real estate and an undivided one-half of all rents, issues, and profits arising out of said real estate. In the prayer for relief the court is asked to ascertain and adjudge the respective rights and interests of the parties to the action in and to the real estate described in the complaint, and the rents, issues, and profits thereof. Nash & Nash also ask that they be allowed the sum of \$15,000 as attorneys' fees for their services in the present suit.

Upon these allegations the appellant contends that the Circuit Court was without jurisdiction of the cause, for the reason that there was a lack of diversity of citizenship as required by the statute; that Nash & Nash are complainants against the Tull heirs as defendants, and that each of the separate contracts alleged to have been made by them with the Tull heirs, respectively, constitutes a separate and independent cause of action as against each of said heirs, and that each of these alleged causes of action set up by the Nashes must be separately tried out, ascertained and adjudged; that Nash & Nash cannot maintain their cause of action alleged in the bill of complaint against William L. Tull in the Circuit Court, for the reason that they are citizens of the state of Washington, and as between them there is no diversity of citizenship which is required to give the court jurisdiction of all the parties to the suit. A sufficient answer to this objection is the fact that the bill of complaint does not allege any controversy between Nash & Nash and William L. Tull. The bill alleges that Nash & Nash have an interest in the real estate in controversy, and in the rents, issues, and profits thereof, and sets forth the source of their title; but no separate controversy is alleged to exist between them and their co-com-

plainant William L. Tull, from whom part of their interest has been derived, and no decree is asked as against him. *Pacific R. R. v. Ketchum*, 101 U. S. 289, 298, 299, 25 L. Ed. 932. This is a suit to partition real property, and under the law of the state of Washington the interest of all persons in the property must be set forth in the complaint specifically and particularly, as far as known to the complainant. *Ballinger's Ann. Codes & St. Wash.* § 5558. That is what has been done in this bill of complaint. It is a local action, brought to enforce a claim and settle the title to real estate, and comes within the provisions of section 8 of the act of March 3, 1875, c. 137, 18 Stat. 472 [U. S. Comp. St. 1901, p. 513], as declared by the Supreme Court in *Greeley v. Lowe*, 155 U. S. 58, 67, 74, 15 Sup. Ct. 24, 39 L. Ed. 69.

It is further contended that in arranging the parties in accordance with their interests as against the appellant the complainants would be Nash & Nash and William L. Tull, citizens of the state of Washington, Ernest B. Tull, a citizen of the state of Iowa, and Dora May Seeley, a citizen of the state of Illinois, against the appellant, a citizen of the state of California, as defendant. By this arrangement Nash & Nash and William L. Tull, who are citizens of the state of Washington, where the suit is brought, would be joined as complainants with Ernest B. Tull, a citizen of the state of Iowa, and Dora May Seeley, a citizen of the state of Illinois, and a lack of jurisdiction would arise under section 1 of the act of March 3, 1887, c. 373, 24 Stat. 552, as amended by the act of August 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 514], as construed by the Supreme Court in *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635, where it was held that the Circuit Court did not have jurisdiction on the ground of diverse citizenship if there were two plaintiffs to the action who were citizens of and residents in different states, and the defendant was a citizen of and resident in a third state, and the action was brought in the state in which one of the plaintiffs resided. But it was held in *Greeley v. Lowe*, *supra*, that the case of *Smith v. Lyon* involved only the rights of parties to personal actions residing in different districts, and had no bearing upon a case involving a local action brought to enforce a claim and settle the title to real estate. But, aside from this distinction between a local action and a personal action, there is nothing in the allegations of the bill that would justify the court in arranging the parties as proposed by the appellant. Any question affecting the right of the plaintiff to a partition, or the rights of each and all of the parties in the land, may be put in issue, tried, and determined in such action. *De Uprey v. De Uprey*, 27 Cal. 329, 335, 87 Am. Dec. 81. And where the bill in such a case shows on its face diverse citizenship as between the parties complainant and defendant; that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000; and the suit is brought in the district of the residence of either the plaintiff or defendant—the court has jurisdiction of the case, and no rearrangement of the parties will be made with respect to a subordinate question to defeat that jurisdiction. For the reasons stated, the bill is not open to the further

objection that it is multifarious. *Brown v. Guarantee Trust Co.*, 128 U. S. 403, 410, 9 Sup. Ct. 127, 32 L. Ed. 468.

To the bill of complaint the appellant in the court below interposed a plea in abatement, setting up the pendency of an action in the state court, commenced by the plaintiff in this action and the defendant Dora May Seeley against the appellant and the defendant Ernest B. Tull in the superior court of the state of Washington, for a partition of the property mentioned and described in the complaint herein; that upon the petition of the appellant the action was removed to the Circuit Court for the District of Washington, and thereafter a decree was rendered in said court adverse to the appellant; that thereupon the case was appealed to this court, and upon a hearing the case was remanded to the Circuit Court, with directions to remand said cause to the superior court of the state of Washington (*German Savings & Loan Society v. Dormitzer*, 116 Fed. 471, 53 C. C. A. 639); that said remanding order has never been made by the Circuit Court in accordance with the order of this court. It appears from the opinion of this court in that case that the petition for the removal of the cause from the state court to the United States Circuit Court was insufficient, for the reason that the case presented no separable controversy, nor did such diverse citizenship exist as would confer jurisdiction upon the Circuit Court. It is contended by the appellant that the plea setting up the pendency of the action in the state court should have been sustained as a bar to the maintenance of the present action, and that the bill should have been dismissed. The pendency of a suit in a state court between the same parties cannot be pleaded in abatement of a suit for the same cause in a federal court. *Stanton v. Embrey*, 93 U. S. 554, 23 L. Ed. 983; *Insurance Co. v. Brune's Assignee*, 96 U. S. 588, 592, 24 L. Ed. 737; *Gordon v. Gilfoil*, 99 U. S. 168, 178, 25 L. Ed. 383; *Bunker Hill & Sullivan M. & C. Co. v. Shoshone M. Co.*, 47 C. C. A. 200, 109 Fed. 504.

The next question to be considered is the validity of the judgment of the state court upon which the present proceeding for partition is based. The judgment and all the facts connected therewith are fully set forth in the case of *Dormitzer v. German Savings & Loan Society*, 23 Wash. 132, 62 Pac. 862, and in the same case on writ of error to the Supreme Court of the United States, 192 U. S. 125, 24 Sup. Ct. 221, 48 L. Ed. 373. But it appears further that the appeal from the judgment of the superior court to the state Supreme Court was taken in the May term, 1900; that the appeal was docketed on the 7th of May, and set down for argument on May 16th; that the appeal was not orally argued, but submitted on briefs of counsel; that at the last-named date the Supreme Court consisted of Judges Dunbar, Reavis, Anders, Fullerton, and Chief Justice Gordon; that afterwards, on May 20th, Chief Justice Gordon resigned; that his resignation was accepted June 1st, and that on June 5th William White was appointed judge to fill the vacancy caused by the resignation, and took the oath of office, and entered upon his duties; that thereafter the case was taken under consideration by the court, and on November 7, 1900, the

opinion in the case written by Judge White was filed, in which two of the four judges concurred, and from which two dissented. The opinion recites that:

"The judgment and decree of the lower court are reversed, with costs to appellants. The cause is remanded to the court below, with instructions to enter a judgment and decree herein adjudging and decreeing that Dora May Dormitzer, William L. Tull, and Ernest B. Tull, the appellants herein, are entitled to an unincumbered undivided one-half of the real estate described in the pleadings in this action, and that the guardian deeds described in said pleadings and orders of the probate court of Sopkane county directing the sale of said one-half interest, or in any way affecting the same, and the said guardian deeds conveying the same to F. M. Tull by P. D. Tull, as guardian of said appellants, as set out in the pleadings, be declared fraudulent, null, and void; and also decreeing that the plaintiffs in the action below recover their costs."

Thereafter the respondents filed a petition for rehearing in the Supreme Court of the state in which the facts just stated were called to the attention of the court in support of the contention that Judge White was not present and sitting as a member of the court when the case was submitted for decision, and, with respect to the four judges who were present and sitting as members, they were equally divided in opinion, and, as a consequence, the judgment of the court below should have been affirmed. On January 7, 1901, the petition for a rehearing was denied, and the cause remanded to the superior court for further proceedings in accordance with the opinion. Thereafter, and on January 25, 1901, the respondent moved the Supreme Court to modify its order and decree so as to leave open for investigation and adjudication in the superior court all questions relating to rents, issues, and profits of the premises, and all questions as to the value of permanent improvements placed upon said premises with moneys borrowed from respondent as mortgagee, and all moneys advanced and paid by respondent for the proper and necessary repairs and maintenance of said premises, and for all moneys paid by respondent for taxes and local assessments upon said premises for street and sidewalk and other local improvements made and charged upon said premises. This motion was denied March 19, 1901. While this motion was pending in the Supreme Court, the superior court, on March 2, 1901, entered its judgment and decree pursuant to the decision and decree of the Supreme Court. Thereafter appellant presented its petition to the Supreme Court of the United States for a writ of error, citation, and other process directed to the Supreme Court of the state of Washington, to the end that the judgment of the latter court in this cause might be corrected. This petition was allowed. A writ of error was issued, and the records and proceedings in the cause were certified to the Supreme Court of the United States for inspection and correction of the judgment upon errors assigned. Among others, it was assigned as error that the decision of the Supreme Court of the state of Washington lacked the concurrence of a majority of the said court, as constituted at the time of the hearing of said cause, and its submission to the said Supreme Court for its determination; wherefore it was alleged the said decision was null and

void, and in violation of article 5 of the amendments to the Constitution of the United States, which provides that no person shall be deprived of life, property, or liberty without due process of law. It was also assigned as error that the decision of the Supreme Court of Washington was entirely aside from and outside of the issues raised by the pleadings and record in the cause, and was therefore null and void, because it in effect took the property of the appellant without due process of law, in violation of article 5 of the amendments to the Constitution of the United States. The case was heard in the Supreme Court of the United States on a motion to dismiss and on the merits. The motion to dismiss was based upon the ground that the federal question involving the constitutional rights of the appellant was not set up in the court below. This motion was overruled, the case was considered on the merits, and the decree of the Supreme Court of Washington was affirmed. The effect of this affirmance was that none of the claims of error were well founded. *Mutual Life Ins. Co. v. Hill*, 193 U. S. 551, 24 Sup. Ct. 538, 48 L. Ed. 788.

Notwithstanding these proceedings, appellant contends that the judgment of the Supreme Court of the state of Washington is not conclusive, and cites the case of *Reynolds v. Stockton*, 140 U. S. 255, 11 Sup. Ct. 773, 35 L. Ed. 464, as establishing a doctrine authorizing this court to disregard that judgment. We do not so understand that case. It was there contended that the Court of Chancery of the state of New Jersey had refused to give effect to section 1 of article 4 of the Constitution of the United States, providing that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." The judgment to which full faith and credit had not been given in that case was a judgment of the Supreme Court of the state of New York. The Supreme Court of the United States, referring to the constitutional provision, and applying it to the judgment in question, said:

"It does not demand that a judgment rendered in a court of one state, without the jurisdiction of the person, shall be recognized by the courts of another state as valid, or that a judgment rendered by a court which has jurisdiction of the person, but which is in no way responsive to the issues tendered by the pleadings, and is rendered in actual absence of the defendant, must be recognized as valid in the courts of any other state."

It appears that the defendant in the New York suit appeared in the action, and filed an answer to the complaint, but took no further part in the proceedings, and was not present at the trial. Referring further to this feature of the case, the court said:

"Nor are we concerned with the question as to the rule which obtains in a case in which, while the matter determined was not in fact put in issue by the pleadings, it is apparent from the record that the defeated party was present at the trial, and actually litigated that matter. In such a case, the proposition so often affirmed that that is to be considered as done which ought to have been done, may have weight, and the amendment which ought to have been made to conform the pleadings to the evidence may be treated as having been made. Here there was no appearance after the filing of the answer, and no participation in the trial or other proceedings. Whatever

may be the rule where substantial amendments to the complaint are permitted and made and the defendant responds thereto, or where it appears that he takes actual part in the litigation of the matters determined, the rule is universal that where he appears and responds only to the complaint as filed, and no amendment is made thereto, the judgment is conclusive only so far as it determines matters which by the pleadings are put in issue."

In the present case the appellant took actual part in the entire proceedings in the Supreme Court of the state, and upon a writ of error litigated the questions in controversy in the Supreme Court of the United States. In our opinion, those questions are now *res adjudicata*, and beyond the reach of collateral attack. The judgment of the Supreme Court of the state and the judgment of the superior court of Spokane county entered in pursuance of that judgment must be treated as valid, and binding upon the parties.

The remaining question involved in this appeal relates to the scope of this judgment with respect to certain improvements placed on the property by F. M. Tull. To determine this question a clear understanding must be had of the relation of the appellant to the property at the time the judgment was entered, on March 2, 1901. Passing over the earlier dealings between F. M. Tull and the appellant, we come to the transactions and proceedings which, as a purchaser, placed appellant in the possession of the property, and which possession it held at the time of the judgment. On May 5, 1892, F. M. Tull executed a mortgage on this property to the appellant to secure a promissory note for the sum of \$100,000. This amount represented two prior notes secured by mortgages on the same property, amounting to \$75,000, and a further loan at that time of \$25,000. A second mortgage was executed by F. M. Tull on the same property in favor of the appellant on July 10, 1893, to secure a further loan of \$20,000. Tull defaulted in the payment of the interest on these two mortgages in 1894. At that time the improvements now in controversy had been placed upon the lots by Tull with the money borrowed from the appellant. The appellant proceeded to foreclose these mortgages, and at the foreclosure sale on April 23, 1896, became the purchaser of the real estate and improvements, and obtained possession of the property. It was this possession and the rights obtained by the appellant as a purchaser at the foreclosure sale that it had at the time of the judgment. In the judgment and decree entered in the superior court of Spokane county on March 2, 1901, pursuant to the judgment of the Supreme Court of the state, these mortgages executed by Tull to the appellant were declared fraudulent, and of no effect, and were canceled and set aside so far as they, or either of them, in any way affected or created any right to or lien upon the undivided one-half right, title, or interest of William L. Tull, Dora May Dormitzer, and Ernest B. Tull in and to said premises. It was further adjudged that the appellant obtained no title to said undivided one-half of said premises as against the plaintiffs in that suit and Ernest B. Tull by reason of the foreclosure of said mortgages and the purchase of the premises at foreclosure sale. It was further adjudged and decreed that William L. Tull, Dora May Dormitzer, and Ernest B. Tull, as heirs at law of Lucy A. Tull, were the owners of and entitled to (share and share alike) an undivided one-

half of the lands and premises in controversy, together with the tenements, hereditaments, and appurtenances thereto belonging, free and clear of all incumbrances, and free from any right, title, or decree of the appellant in, upon, or to said undivided one-half. The principal question before the court was the lien of these two mortgages upon the undivided one-half interest of the Tull heirs in the property in controversy, and the title to that interest acquired by the appellant at the foreclosure sale. And it was to remove these incumbrances from that interest that the judgment and decree was directed. There were other questions relating to prior transactions concerning the property that were necessarily considered and determined in reaching the final question at issue. But, aside from appellant's petition for a rehearing in the Supreme Court, and its motion to modify the order and decree of that court, we do not find that anywhere or at any time the equitable rights now insisted upon by the appellant with respect to the improvements placed upon this property were submitted to the state court for consideration, or that they were considered or determined by that court. It is true that in the petition for a rehearing appellant represented to the court, among other things, the inequity of decreeing to the Tull heirs the ownership of one-half of the premises without requiring them to submit to an equitable accounting for the money advanced by the appellant for the erection of the buildings upon the premises, and it was represented that an accounting for the money thus advanced might be allowed, either upon such a partition of the premises as would give to the appellant the reimbursement of its proper proportion of the cost going into the half interest of the heirs in such buildings, or, if the property could not be partitioned, that it be sold, and out of the proceeds of the sale such fair and equitable division be made between the parties as the court of equity might determine. Appellant's motion to modify the order and decree was for the purpose of leaving these asserted equitable rights open for further adjudication. But that was not a suit in partition, and the denial of the petition for a rehearing in that case upon that ground did not determine that the appellant could not set up its equities in a partition suit. There was nothing in the pleadings or in the judgment that called for a determination of that question, and the most that can be said of the effect of the denial of the petition for a rehearing was that the court was of the opinion that the equities claimed by appellant were not within the issues of that case.

The conclusions which the writer of this opinion draws from the foregoing proceedings in the state court do not meet with the approval of his associates. What follows is therefore the opinion of only one member of the court.

The present action is a suit in partition, and all the rights of the parties have been put in issue for trial and determination. Ballinger's Ann. Codes & St. Wash. § 5563. The buildings on the lots were erected by F. M. Tull with money borrowed from the appellant. The allegations of the bill that Tull and the appellant acted in bad faith in these transactions are not supported by the evidence. We agree with the judge of the Circuit Court that the parties acted in good faith. He says:

"In the pleadings and arguments on the side of the complainants the case has been heavily weighted with denunciation of the German Savings & Loan Society as a fraudulent conspirator with an unnatural father to wrongfully appropriate the inheritance of minor children, all of which I consider as unnecessary and untrue. * * * Tull, however, regarding the property as the product of his own business enterprise, he had to face the probable loss of all, or the best part of it, by the foreclosure of mortgages and liens to which it was then subject, unless he could make it produce an income by completing the building. * * * Under the advice and guidance of his lawyer, Mr. Tull undertook to rescue the estate from threatened ruin by first removing the legal impediments, and then mortgaging the property and using the money thus obtained to clear off existing incumbrances and complete the building."

The Supreme Court of the state, in its decision, was of the same opinion. Speaking of the previous guardian's sale of this property by order of the probate court, the illegality of which was the basis of that decision, the court said:

"It may be conceded that there was no intention—and we think it is a fact—on the part of the attorneys, the probate judge, Tull, and the respondent, to injure the appellants, and that they acted from the best of motives." *Dormitzer v. German Savings & Loan Society*, 23 Wash. 220, 62 Pac. 862.

The appellant having acted in good faith in loaning its money to F. M. Tull to save the property and make improvements, and having also acted in good faith in purchasing the property at the foreclosure sale, we think it is entitled to have its equities considered and determined in these partition proceedings; or, to state the proposition in another way, the appellant is entitled to ask the court of equity in these proceedings to require the complainants to do equity as a condition incident to the decree of partition. In the case of *Leake v. Hayes*, 13 Wash. 213, 43 Pac. 48, 52 Am. St. Rep. 34, the Supreme Court of Washington reached the same conclusion in a partition suit with respect to similar equities claimed by a co-tenant for improvements placed upon the premises. The court said:

"We also think that the court should not have awarded a partition of the premises without first having ascertained the value of the appellants' improvements thereon. While it is a well-settled general rule of law that one tenant in common cannot, at his own suit, recover for improvements placed upon the common estate without the request or consent of his co-tenant, yet a court of equity will not, if it can avoid so inequitable a result, enable a co-tenant to take advantage of the improvements for which he has contributed nothing. When the common lands come to be divided, an opportunity is offered to give the co-tenant who has enhanced the value of a parcel of the premises, the fruits of his expenditures and industry by allotting to him the parcel so enhanced in value, or so much thereof as represents his share of the whole tract. It is the duty of equity to cause these improvements to be assigned to their respective owners (whose labor and money have thus been inseparably fixed on the land), so far as can be done consistently with an equitable partition. *Freeman on Cotenancy and Partition* (2d Ed.) § 509. This principle is but an exemplification of the ancient and well known maxim that 'he who asks equity must do equity.' Now, if this be true, as appellants allege, that at the time of the death of Charles Washburn the land was almost wholly in a wild state, and therefore unproductive, and that they have not only put valuable and permanent improvements upon it, but have cleared it for cultivation, and made it capable of yielding valuable profits, and have done all this in good faith under the belief that Mrs. Hansen was the absolute owner, it seems to us that it would not only be extremely unjust

and inequitable to allow them nothing for their expenditures and labor, but contrary to reason and the great weight of the authorities."

And, after quoting from Pomeroy's Equity at section 1240, and citing other authorities, the court proceeds, as follows:

"The respondent can lose nothing by the application of this just principle. The improvements have cost her nothing, and, if the appellants are allowed their present value in case partition cannot be made without prejudice to the interests of the several owners, or are awarded the particular portion of the premises which are thereby enhanced in value, she will receive all she would have received if appellants had permitted the land to remain unimproved, and that is all she can justly claim."

In *Hall v. Piddock*, 21 N. J. Eq. 313, the doctrine of equitable partition is stated as follows:

"The rule that a tenant in common, who has made improvements on the land held in common, is entitled to an equitable partition, is well established, and is hardly disputed by counsel. The only good faith required in such improvements is that they should be made honestly for the purpose of improving the property, and not for embarrassing his co-tenants, or incumbering their estate, or hindering partition. And the fact that the tenant making such improvements knows that an undivided share in the land is held by another, is no bar to equitable partition."

In the case of *Bright v. Boyd*, 1 Story, 478, Fed. Cas. No. 1,875, Mr. Justice Story, referring to the right of a bona fide purchaser to be allowed compensation for improvements, says:

"It appears to me, speaking with all deference to other opinions, that the denial of all compensation to such a bona fide purchaser, in such a case, where he has manifestly added to the permanent value of an estate by his meliorations and improvements, without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity. Take the case of a vacant lot in a city, where a bona fide purchaser builds a house thereon, enhancing the value of the estate to ten times the original value of the land, under a title apparently perfect and complete. Is it reasonable or just that in such a case the true owner should recover and possess the whole, without any compensation whatever to the bona fide purchaser? To me it seems manifestly unjust and inequitable thus to appropriate to one man the property and money of another who is in no default. The argument, I am aware, is that the moment the house is built it belongs to the owner of the land by mere operation of law; and that he may certainly possess and enjoy his own. But this is merely stating the technical rule of law by which the true owner seeks to hold what in a just sense he never had the slightest title to; that is, the house. It is not answering the objection, but merely and dryly stating that the law so holds. But then, admitting this to be so, does it not furnish a strong ground why equity should interpose, and grant relief? * * *

The case was referred to a master to take account of the enhanced value of the premises in controversy by reason of the meliorations and improvements placed thereon by the plaintiff. Upon hearing the report of the master the court held the improvements to be a lien or charge upon the estate for the increased value, and made the following statement in connection therewith:

"I wish, in coming to this conclusion, to be distinctly understood as affirming and maintaining the broad doctrine, as a doctrine of equity, that, so far as an innocent purchaser for a valuable consideration, without notice of any infirmity in his title, has, by his improvements and meliorations, added to the permanent value of the estate, he is entitled to a full remuneration, and that such increase of value is a lien and charge on the estate, which the

absolute owner is bound to discharge before he is to be restored to his original rights in the land. This is the clear result of the Roman law, and it has the most persuasive equity, and, I may add, common sense and common justice, for its foundation." *Bright v. Boyd*, Fed. Cas. No. 1,876.

I am of the opinion that the appellant's equities are in line with these cases, and entitle it, upon a partition of the property, to such an equitable division as will allow it the benefit of the improvements placed upon the one-half interest owned by the Tull heirs. But, if such a division cannot be had, then the property should be sold, and out of the proceeds of the sale the appellant should be allowed one-half thereof, and, in addition, such further sum as the value of one-half of the improvements bears to the value of the entire property. There should also be an accounting of rents, issues, and profits for the period the property has been in the possession of the appellant, to wit, from April 23, 1896, and such proportion thereof awarded to the appellees as is provided herein for the distribution of the proceeds resulting from the sale of the property.

W. P. WALKER & CO. v. WALBRIDGE.

(Circuit Court of Appeals, Fifth Circuit. March 14, 1905.)

No. 1,340.

FRAUDULENT REPRESENTATIONS—ACTION FOR DECEIT—MEASURE OF DAMAGES.

A declaration in an action of deceit which alleges that plaintiffs purchased from defendant a ranch for the lump sum of \$20,000 in reliance upon defendant's representations, which were supported by an abstract of title produced by him, and the certificate of a county clerk that the ranch contained 43 sections of land, including 13 sections of state land held under a long-term lease, which representation was false, in that defendant had no lease or other title to 11 of such 13 sections, and that plaintiff obtained none, states a cause of action for the recovery of the value of the leasehold interest in said 11 sections, had defendant held title thereto as represented.

Shelby, Circuit Judge, dissenting on the ground that the measure of damages recoverable for deceit inducing a purchase of property is the amount of plaintiff's loss by the purchase, and that a declaration does not state a cause of action for such recovery unless it alleges that the property obtained was not worth the price paid.

In Error to the Circuit Court of the United States for the Western District of Texas.

W. M. Walton, Geo. S. Walton, A. B. Storey, and P. J. Greenwood, for plaintiffs in error.

T. W. Gregory and R. L. Batts, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. The declaration in this case avers, substantially: That the plaintiffs and the defendant about July 1, 1901, entered into negotiations for the purchase by the plaintiffs of a ranch owned by the defendant, known as the "Old Murphy Ranch," situated in Jeff Davis, Presidio, and Brewster counties, Tex. That the defendant at that time represented to the plaintiffs that the ranch con-

tained between 41 and 43 sections of land, held by the defendant under various titles; some of them being by fee-simple title, other parts by tax title, and still other parts as leased lands. That the plaintiff G. C. Walker and the defendant at the time of entering on this negotiation made a partial personal examination of the ranch, during which examination Walker stated to the defendant that it would be fruitless for him (Walker) to attempt to ascertain the location and size of the ranch from a personal examination, as he was a stranger in the country, and might be shown over only a small portion of the land, and not know but that he had seen all of it; and, upon inquiry of the plaintiffs, the defendant again assured the plaintiffs that the ranch contained between 41 and 43 sections of land, of the kinds above described. An understanding was finally reached, by the terms of which the plaintiffs agreed to purchase a ranch of the size and character mentioned by the defendant for the lump sum of \$20,000 for the land, and so much per head for certain cattle thereon. No difference in price was fixed, agreed on, or understood in regard to the several different kinds of land constituting the ranch; but the ranch, as a whole, consisting of from 41 to 43 sections of the various kinds of land above described, was valued at, and sold by the defendant to the plaintiffs for the agreed price of, twenty thousand dollars, which sum was paid to the defendant. On July 6, 1901, a written agreement between plaintiff G. C. Walker and the defendant in regard to the sale of the ranch was signed. This written agreement included the terms and price of the land, but did not specify the quantity of land which the ranch contained, because of the request of the defendant that this item should be omitted, and the obligation upon his part to furnish the necessary abstracts of title; and although the plaintiff at the time requested that the written contract should show the number of acres of land contained in the ranch, and to be transferred by the contract of sale, upon the repeated assurances of the defendant that the ranch contained between 41 and 43 sections of land, and that defendant would furnish to plaintiffs the leases, title papers, and abstracts showing the amount of land in the ranch, the specification as to the number of acres in same was omitted from the written contract; and, relying upon the assurances of the defendant, plaintiffs waived the insertion in the contract of the quantity of land contained in the ranch, the title to which was to pass to plaintiffs by the sale. That at no time prior to the consummation of the sale did plaintiffs know the quantity of land in the ranch, except as the same was represented by the defendant, but that they relied implicitly on the representations and statements of the defendant. That, as an inducement to the plaintiffs to purchase the ranch, defendant represented to them that the ranch contained, among other lands, as many as 11 or 13 sections held by the defendant under a 10-year lease from the state, which had yet more than 9 years to run; that the 10-year leases were very valuable, as the state had lowered the lease period, and no more 10-year leases could be secured; that the 10-year lease land was situated in Presidio county, and was included in the ranch; that the defendant would furnish abstracts showing therein everything concerning the lands constituting the ranch, including that land held under the leases; that these representations made by the defendant in regard to the

quantity of 10-year lease lands included in the ranch were confirmed in defendant's presence by the defendant's agent, Stewart, by showing plaintiffs a list including 13 sections of land in Presidio county held, according to that list, under a 10-year lease from November 2, 1900. That these representations were made by the defendant to the plaintiffs prior to the execution of the contract of sale. The plaintiffs believed the same to be true, and, relying implicitly upon the truth of the same, were induced to buy the ranch because of these representations. That the defendant did furnish and deliver to the plaintiffs abstracts of title to all the lands represented by the defendant to be in the ranch. That, according to the abstract so furnished plaintiffs by the defendant, the ranch contained 43.3 sections of land, among which were included 13 sections of land lying in Presidio county, purporting to be held by the defendant from the state under 10-year lease contracts, dating from November 2, 1900. That, in addition to the abstracts, defendant also furnished plaintiffs a certificate from D. Alarcon, county clerk of Presidio county, showing the leases to have been made as claimed by the defendant, and as shown by the abstracts, only in that 2 of the sections were by the certificate shown to be in one block, and the remaining 11 in another block, whereas in the abstracts all 13 were shown to be in one block. That, believing the representations made by the defendant to the plaintiffs as to the number of sections of land in the ranch to be true, and believing the abstracts furnished by the defendant to the plaintiffs to be true and correct, and relying upon the truth and correctness of the representations, abstracts, and statements, the plaintiffs did on October 5, 1901, enter into a contract of purchase of the ranch, and paid to the defendant the agreed price, and received the title papers, abstracts, etc., and that thereupon the defendant reiterated his assurance to the plaintiffs that the ranch was as defendant had represented it to be, and plaintiffs went into immediate possession of the ranch. That on January 1, 1902, for the purpose of paying the amount due the state on the leased lands represented by the defendant to be included in the ranch, and so shown to be by the abstracts, etc., furnished the plaintiffs by the defendant, and which the plaintiffs relied upon as true, and verily believed to be true, the plaintiffs forwarded to the State Treasurer the amount so due the state, including the amount due on the 13 sections lying in Presidio county, held under the 10-year lease contracts. That thereupon plaintiffs discovered for the first time that the ranch, instead of containing the 13 sections of 10-year lease land, as represented by the defendant, contained only 2 sections of 10-year lease land. That plaintiffs immediately made full investigation, and discovered for the first time that the ranch contained less land than had been represented by the defendant and shown by the abstract furnished by the defendant, and that the shortage thus appearing for the first time was made up wholly of the 10-year lease lands represented by the defendant to be included in the ranch. That plaintiffs implicitly relied upon the statements and representations made by the defendant, and upon the abstracts of title and the clerk's certificate, as to the number of sections of land included in the ranch, and verily believed and thought that they were buying a ranch containing 43 sections of land. That they in fact bought and paid for 43

sections. That defendant conveyed to them only 32 sections, leaving a shortage of 11 sections, which shortage they did not discover until January 1, 1902. That the statements and representations and the abstract furnished by the defendant to the plaintiffs were wholly false and untrue. That the plaintiffs would never have purchased the ranch, had they known that the ranch contained only 32 sections, instead of 43 sections. That the plaintiffs were guilty of no negligence in accepting the statements and representations and abstracts as true. That the 11 sections of lease land represented by the defendant to be embraced in the ranch had at the time plaintiffs purchased a market value of 75 cents per acre, and that plaintiffs were damaged to the extent of their value by the false representations of the defendant. That in the purchase of the ranch the 11 sections of 10-year lease land represented by the defendant to be included in the ranch, and which the plaintiffs, relying on the representations of the defendant, believed were included in the ranch, were estimated by the plaintiffs and the defendant, because of the long time which the leases had yet to run, and because of the privilege of re-leasing the same from term to term, as of the same values as the fee-simple title lands, or at a value of 75 cents per acre, aggregating \$5,280, for which sum the plaintiffs sue, which has never been paid, nor any part thereof, and is now justly due to the plaintiffs.

To these pleadings of the plaintiffs, on which the case went to trial, the defendant demurred generally that "the same is insufficient in law," and submitted special exceptions or demurrers to the effect that the petition sets forth oral negotiations which resulted in a contract reduced to writing, which superseded and replaced the oral negotiations; that the petition undertakes to set aside a part of the contract, without attempting to set aside the contract as a whole; that the alleged false representations are matters that plaintiffs could easily have informed themselves about, and were therefore chargeable with notice; that the matters averred, resting in parol, are absolutely void under the statute of frauds. These demurrers were sustained by the Circuit Court, and, plaintiffs electing to stand on their pleadings, their case was dismissed. This action of the Circuit Court is assigned as error, and we are of the opinion that the assignment is well taken. The plaintiffs allege that the defendant made positive and repeated representations that the ranch contained between 41 and 43 sections of land; that the titles to the various sections were of different kinds; that there were included in the ranch 13 sections of land situated in Presidio county, Tex., that defendant held under a 10-year lease contract with the state, which had yet more than 9 years to run; that defendant furnished abstracts and a certificate from the county clerk of Presidio county substantiating his verbal statements. These were defendant's fact statements, as alleged by plaintiffs. Plaintiffs believed and relied upon them, and, so believing and relying upon them, bought the ranch; paying therefor on the basis of its including 43 sections. Subsequently, plaintiffs allege, when they attempted to pay the lease money to the state on the 13 10-year lease sections lying in Presidio county, they learned for the first time that defendant had never held a lease to 11 of these sections, and

that they were not included in the ranch. These are allegations as to the falsity of material representations. The intention of the defendant in this, as in all cases where it is not expressed, can be ascertained from the facts and circumstances surrounding the making of the false representations, the inducements by way of financial gain to him for making them, his actual or chargeable knowledge of their truth or falsity, and with the knowledge with which he must be charged as to the effect such statements would be likely to have upon plaintiffs, in inducing them to purchase the ranch. The false representations were material, and affected things of value. If true, there were 13 sections of 10-year lease land in Presidio county, valuable in themselves, and the lease on them could be, as represented by defendant, continued from term to term; making them, for pasture purposes and use, practically equivalent to the lands held by fee-simple title. The plaintiffs alleged that these statements did induce them to close the deal, that they believed and relied upon these statements implicitly, and that because of them the plaintiffs paid the defendant \$20,000 for 43 sections of land represented by the defendant to be included in the ranch, and in reality received title to only 32 sections. That is to say, plaintiffs allege that they bought a body of land from the defendant, represented by him to contain between 26,240 acres and 27,520 acres, at an agreed lump-sum price, and that they received from him only 20,480 acres, or more than 7,000 acres less than they bought. The defendant could not be heard to say, and therefore it would be no defense for him to answer, that he was honestly mistaken in his statements to the plaintiffs in regard to the 10-year lease sections. "The charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made, as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make any further proof of an actual intent to deceive. The fraud consists in stating that the party knows the thing to exist, when he does not know it to exist; and, if he does not know it to exist, he must ordinarily be deemed to know that he does not. Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not warrant or excuse a statement of actual knowledge." *Chatham Furnace Co. v. Lawrence Moffatt*, 147 Mass. 404, 18 N. E. 168, 9 Am. St. Rep. 727. In the case of *Leicher v. Keeney* (Mo. App.) 72 S. W. 145, we find it stated in the headnotes, which correctly represent the holding of the court:

"That a petition alleging that a vendor fraudulently represented that a tract of land had been surveyed, and found to contain 160 acres, for the purpose of inducing the vendee to purchase the same in gross, and injuring him, and that plaintiff relied on the representations, and seeking to recover damages therefor, states a cause of action. A vendee relying upon the vendor's fraudulent representations as to some specific fact affecting the value of the land may, on the discovery of the fraud, stand by the purchase, and sue for the fraud. Where a vendor's fraudulent representations relate to the quantity of the land sold, it is immaterial whether the sale is in gross or by the acre. The doctrine that a written contract is conclusively

presumed to merge all prior negotiations, so as to exclude parol evidence of the previous negotiations, does not apply to an action based on defendant's fraud in procuring the contract. The representations of a vendor that a tract of land contained 160 acres, while it contained over 18 acres less, is a material representation. A vendor sued by a vendee for fraudulent representations inducing the vendee to purchase a tract of land cannot defend by showing negligence on the vendee's part, when the negligence was caused by the vendor's own conduct."

To the same effect, substantially, is the case of *Wright v. U. S. Mortgage Company of Scotland*, decided by the Court of Civil Appeals of Texas. 42 S. W. 789. In the case of *Labbe v. Corbett*, 69 Tex. 509, 6 S. W. 808, the Texas Supreme Court adopts the rule asserted in the case of *Railway Company v. Kisch*, L. R. 2 H. L. 120, and states the rule as follows:

"When once it is established that there has been any fraudulent misrepresentation * * * by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by further inquiry. He has a right to retort upon his objector: 'You, at least, who have stated what is untrue * * * for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty'"—and makes this comment: "The rule is reasonable and well sustained by authority."

In the case of *Scalf v. Tompkins*, 61 Tex. 477, differing in its details from this, but involving substantially principles applicable here, that court held, as shown by the headnote, that:

"After discovering the defect in the machinery, the defendant had a right to rescind in a reasonable time, and recover the purchase money, or sue for damages, and recoup them against the balance of the purchase money."

In the case of *Blythe v. Speake*, 23 Tex. 437, it seems to be assumed as settled law that:

"A party defrauded in a contract has his choice of remedies. He may stand to the bargain, and recover damages for the fraud, or he may rescind the contract, and return the thing bought, and receive back what he paid. *Campbell v. Fleming*, 1 Ad. & E. 40."

In support of the action of the Circuit Court, the defendant cites the case of *Smith v. Bolles*, 132 U. S. 125, 10 Sup. Ct. 39, 33 L. Ed. 279, and the case of *Sigafus v. Porter*, 179 U. S. 122, 21 Sup. Ct. 34, 45 L. Ed. 113. In the first of these cases the plaintiff had purchased 4,000 shares of stock in a corporation, at \$1.50 per share, for which he had paid the purchase price, \$6,000, which he alleged he was induced to do by the false and fraudulent representations of the seller as to the value of the stock, which he averred was at the time of the purchase and of his pleading wholly worthless, and that, had the same been as represented by the defendant, it would have been worth at least \$10 per share. The ruling in that case was that:

"The measure of damages was not the difference between the contract price and the reasonable market value if the property had been as represented to be, even if the stock had been worth the price paid for it; nor, if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff might have gained is not the question, but what he had lost by being deceived into the purchase. The suit was not brought for breach of contract. * * * If the jury believed from the evidence that the defend-

ant was guilty of the fraudulent and false representations alleged, and that the purchase of stock had been made in reliance thereon, then the defendant was liable to respond in such damages as naturally and proximately resulted from the fraud. He was bound to make good the loss sustained, such as the moneys the plaintiff had paid out and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct, but this liability did not include the expected fruits of an unrealized speculation."

In *Sigafus v. Porter* it is said:

"There are adjudged cases holding to the broad doctrine that in an action for deceit, based upon the fraudulent representations of a defendant as to the property sold by him, the plaintiff is entitled to recover, by way of damages, not simply the difference between its real, actual value at the time of purchase, and the amount paid for it by the seller, but the difference, however great, between such actual value and the value (in excess of what was paid) at which the property could have been fairly valued if the seller's representations concerning it had been true. * * * We held in *Smith v. Bolles* that such was not the proper measure of damages; that case being like this, in that the plaintiff sought damages covering alleged losses of a speculative character. We adhere to the doctrine of *Smith v. Bolles*."

It seems clear to us that these cases do not apply to the case we have before us. It is not a supposed speculative profit which this action seeks to recover, but the actual value, be it more or less, of a large quantity of land which the plaintiffs were induced to purchase and pay for, and were induced to believe they had actually received and entered into possession of, which in point of fact they never received, but which they might have received and would have received if the defendant had truly been the owner thereof, as he represented himself to be, and which at that time certainly had some substantial value, be it the amount claimed, or any lesser amount, as may easily be ascertained by a proper inquiry before the court and jury. They seek only to recover this excess cash payment made to the defendant on his false representation of physical facts.

The judgment of the Circuit Court is reversed, and the case is remanded to that court, with directions to award the plaintiff a new trial.

SHELBY, Circuit Judge (dissenting). This is an action for damages for deceit in the sale of real estate. The declaration shows that the plaintiffs purchased of the defendant a certain ranch for the lump sum of \$20,000. It is averred that the defendant, to make such sale, represented that the ranch contained 43 sections, and that the plaintiffs subsequently ascertained that it only contained 32 sections—that there was a shortage of 11 sections. It is averred, in effect, that the 11 sections found not to be included in the ranch were worth not less than \$7,000. The declaration contains no statement of the value of the 32 sections of land which were really included in the ranch, and embraced in the contract of purchase. The defendant demurred to the declaration as showing no cause of action, and the trial court sustained the demurrer. The plaintiffs declined to amend the petition, and it was dismissed.

A declaration in a suit for damages shows no cause of action unless it states facts which, if true, show that the plaintiff has been

damaged. It is averred that the plaintiffs have paid to the defendant the agreed price of \$20,000, and have possession of the ranch. There is no offer to rescind the sale. The suit, in effect, ratifies and confirms the sale, and seeks damages for the deceit as to the quantity of the land. On proof of the deceit, the plaintiffs would be entitled to recover, on proper allegations, the amount of their loss. If the land which they received was worth \$20,000, it seems clear that they have lost nothing. If it was worth more than \$20,000, they have profited to the amount of the excess by the purchase. In *Sigafus v. Porter*, 179 U. S. 116, at page 123, 21 Sup. Ct. 34, at page 37, 45 L. Ed. 113, which was an action for deceit in the sale of real estate, the Supreme Court has laid down the rule for the measure of damages in such cases:

"The true measure of the damages suffered by one who is fraudulently induced to make a contract of sale, purchase, or exchange of property is the difference between the actual value of that which he parts with and the actual value of that which he receives under the contract."

The question in such case is, how much worse off are the plaintiffs than if they had not bought the land? If they had not bought the land, they would have in their pockets \$20,000. It is clear that, to ascertain their loss, we must deduct from that amount the real value of the land they received. There is no other way in which to ascertain the loss which the plaintiffs have sustained by acting on the alleged representation of the defendant. That is the distinct rule established by the Supreme Court of the United States, by the English Court of Appeal, and by many state courts of last resort. *Sigafus v. Porter*, *supra*, and cases there cited; *Smith v. Bolles*, 132 U. S. 125, 10 Sup. Ct. 39, 33 L. Ed. 279; *Peek v. Derry*, 37 Ch. Div. 541, 591, 594.

Wilson v. New U. S. Cattle Ranch Company, 73 Fed. 994, 20 C. C. A. 241, decided by the Circuit Court of Appeals of the Eighth Circuit, was a suit involving the failure of the vendor to convey to the vendee the quantity of land which he had agreed to convey. In stating the proper rule of damages on that branch of the case, the court said:

"Upon an action for damages for the deceit and fraud which induced the purchase, the measure of damages is what the vendee has lost. It is the difference between that which he had before and that which he had after the contract of purchase was made."

Smith v. Bolles, *supra*, is cited as sustaining this rule. The same rule is also applied, in cases involving purchases of real estate in *Atwater v. Whiteman* (C. C.) 41 Fed. 427; *Glaspell v. Northern Pac. R. Co.* (C. C.) 43 Fed. 900; and *Greenwood v. Pierce*, 58 Tex. 130.

The declaration in this case contains no averment of fact that will enable the court to apply this rule. Every averment of fact which it contains may be true, and the plaintiffs, instead of being damaged, may have profited more than \$10,000 by the purchase, for the land they hold under the purchase may be worth \$30,000 instead of \$20,000. Unless it is averred that the land which they received is

worth less than \$20,000, there is certainly no averment of damage.

For these reasons, I think the Circuit Court ruled correctly in sustaining the demurrer, and that the judgment of the Circuit Court should be affirmed.

GROTON BRIDGE & MFG. CO. v. CLARK PRESSED BRICK CO.

(Circuit Court of Appeals, Eighth Circuit. March 24, 1905.)

No. 2,030.

1. JUDGMENT—ENTRY NUNC PRO TUNC.

Where the clerk of a court of record fails to enter up judgment in full, in fact ordered by the court, at the proper time, the judgment may be amended by the court at a subsequent term, so as to express the order formerly made, either on motion or sua sponte.

2. SAME—NOTICE TO PARTIES—COLLATERAL ATTACK.

Where such nunc pro tunc entry is made at a subsequent term, based on the certain knowledge of the judge of the court, prior notice thereof to the parties is not essential, so as to render the amended judgment amenable to attack in a collateral proceeding.

3. SAME—RES ADJUDICATA.

Where, to an action based on a contract for the sale and delivery of brick, the defendant appears and files answer and a counterclaim in the same plea, alleging a breach of the contract claimed by the defendant to have been entered into by the parties, and then bases on such allegations a counterclaim for damages resulting from the alleged breach by the plaintiff, and, when the case is called for trial, fails to appear, and leaves his plea on record without withdrawing it, thereby imposing upon the plaintiff the production of proof to establish its cause of action, and the court proceeds on the evidence to find the issues for the plaintiff on the pleadings, the judgment therein constitutes an estoppel against a subsequent action brought by the defendant in another jurisdiction based on the same state of facts set up in the counterclaim.

Even if the court rendering such judgment, on the failure of the defendant to appear at the trial, should have treated the counterclaim as withdrawn, its failure to do so would, at the most, have been only an irregularity in proceeding, and did not render the judgment liable to attack as void in a collateral proceeding.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

For opinion below, see 126 Fed. 552.

In May, 1898, the plaintiff in error, hereinafter for convenience called the "Bridge Company," had under construction a bridge over the Ouachita river, at Monroe, in the state of Louisiana; and the defendant in error, hereinafter designated for convenience as the "Brick Company," was then engaged in the manufacture of brick at Malvern, state of Arkansas. A contract at that time was entered into between said parties, whereby the Brick Company was to furnish the Bridge Company brick to be used in said bridge work. On December 7, 1898, the Brick Company brought suit by attachment against the Bridge Company in the state circuit court at Hot Springs, Ark. for the recovery of \$438.27 on account of balance due for brick sold and delivered, growing out of said contract. To this action the Bridge Company filed answer on the 16th day of February, 1899, which began as follows: "Comes the defendant, by Rose & Coleman, its attorneys, and for answer and by way of counterclaim says: Defendant admits that it is a corporation duly organized under the laws of the state of New York and engaged in the business of building bridges. It admits that at or about the time mentioned

in the complaint the plaintiff contracted to sell to the defendant a kiln of brick containing about five hundred thousand of brick, more or less, and to ship the same to the defendant at Monroe, La., at the rate of six cars a day." The answer then alleged that the plaintiff was informed at the time that the brick were to be used for building piers in said bridge, and that the contract for construction of the bridge required that plaintiff's brick should be used therein, and that with this knowledge the plaintiff sold to the defendant a particular kiln of brick that was then being burned; that in pursuance of said contract the brick mentioned in the complaint were shipped to the defendant; that the plaintiff refused and failed to carry out its said contract by delivering the brick, although often requested thereto; that the plaintiff was notified by defendant that it could not carry out its building contract without said brick, and that in consequence of plaintiff's failure to keep and perform said contract it sustained great loss and damage, in the manner set forth in the answer; that it had to buy brick from other sources at an advance price of two dollars per thousand over the contract price with the plaintiff; and that in consequence of the delay to obtain the material a rise in the river injured defendant's work in process of construction. It asked judgment against the plaintiff in the sum of \$4,600. To this answer the Brick Company, on the 16th day of February, 1899, made reply. It denied that it ever contracted to sell the Bridge Company a kiln of brick, or any particular quantity, but only agreed as to the price to be paid for the quantity delivered. It denied any information that the Bridge Company's contract prohibited it from using any brick other than those of the Brick Company. It denied that it failed or refused to carry out its contract with the defendant, or that the defendant was compelled to stop work by any action or nonaction on the part of the plaintiff, and took issue on other new matter pleaded in the answer. In the second paragraph of the reply it alleged that on December 10, 1898, after the institution of plaintiff's suit against defendant, the defendant brought suit in the Circuit Court of the United States for the Eastern District of Arkansas, in which the Bridge Company set up and relied upon the same identical cause of action set out in its counterclaim in this action, which suit was still pending and undetermined.

At the trial term of said suit in the state court the Bridge Company made application for a continuance until the next term of court; and afterwards, on the 14th day of March, 1899, the cause was continued by consent until the August term, 1899. At said August term, the cause coming on for trial, the record recites that the plaintiff appeared by its attorney, and the defendant is three times called and comes not. "Whereupon the cause is submitted to the court on the complaint of the plaintiff, the affidavit for attachment, the answer of the defendant heretofore filed, and reply of the plaintiff, and written and oral evidence introduced in open court; and the court, being well and sufficiently advised as to what judgment to render herein, finds the issues of law and of fact for the plaintiff, and finds the following facts." The judgment then proceeded to recite that the defendant was indebted to the plaintiff in the sum of \$438.27, with interest on \$351.27 of said sum from the 10th day of November, 1898, at 6 per cent. per annum, and with interest on \$87 of said sum from the 1st day of December, 1898, at 6 per cent. per annum, for which sum judgment was rendered, which was directed to be executed on the attached property. It appears that one Jabez M. Smith had been appointed attorney ad litem for the defendant, and there was taxed in said judgment the sum of \$10 as costs for his services. It seems that to the action pending in the United States Circuit Court, referred to in the answer, the Brick Company appeared, and, inter alia, interposed the plea of res adjudicata, based upon said judgment in the state court. That action was afterwards discontinued; and on the 31st day of July, 1901, the present suit was instituted by the Bridge Company against the Brick Company in the said United States Circuit Court in which the Bridge Company sets out substantially the same facts pleaded in its answer and counterclaim in said action in the state court respecting said contract and its breaches by the Brick Company, and prays judgment for the sum of \$3,000. To this suit the Brick Company made answer, setting up the sale and delivery of the

brick, which was the basis of its action in the state court, aggregating the sum of \$1,479, and, after allowing credits, left due and unpaid a balance in the sum of \$438.27, for which it brought suit as aforesaid and recovered judgment in the state court. The answer then set out in detail the appearance and answer of the Bridge Company to said suit in the state court, and the facts pleaded and alleged therein, substantially the same as the facts and matters alleged in the present suit, and pleaded the judgment therein as res adjudicata. The answer then further pleaded substantially the same facts set up in its reply to the action in the state court respecting said contract, claiming that it fully complied with the contract it did make, and that the Bridge Company failed to keep the contract on its part by paying the Brick Company for the brick delivered. The Bridge Company demurred to that portion of the answer which set up the plea of res adjudicata, which demurrer was overruled.

It appears from the transcript of the record and proceedings from the state court in said case of the Brick Company against the Bridge Company that the judgment originally entered therein omitted, in the recitation, the words "and reply of plaintiff" in the paragraph, to wit: "Whereupon this cause is submitted to the court upon the complaint of plaintiff, the affidavit for attachment, the answer of the defendant heretofore filed, and written and oral evidence introduced in open court." This judgment of the state circuit court, on the 10th day of February, 1900, was amended by an entry nunc pro tunc, which is as follows: "On this day comes the plaintiff and suggests to the court a diminution of the record in this action; and, it being within the knowledge of this court that this case was on the 17th day of August, 1899, submitted to the court upon the complaint of plaintiff, the answer of the defendant, and the reply of the plaintiff, and written and oral evidence, and that the record of the judgment fails to mention the reply as one of the pleadings on which the case was submitted, it is by the court ordered that the record on the trial and judgment of this action made on the 17th day of August, 1899, as appears on page 43, Record B of the records of this court, be amended by interlineation, so as to show that the cause was submitted on the reply of the plaintiff to defendant's answer, among other pleadings, and the amendment is accordingly made." A trial by jury having been waived on written stipulation of the parties, the cause was submitted to the court for trial. The court made a finding of the facts substantially as aforesaid respecting the judgment obtained in the state court, and the nunc pro tunc entry inserting the word "reply" as aforesaid, which the court finds was made without notice to the Bridge Company and without its knowledge. Evidence was introduced to disprove the allegations in the counterclaim. Upon such findings the court decided that the defendant, the Clark Pressed Brick Company, was entitled to judgment sustaining its plea of res adjudicata, and rendered judgment for the defendant, to reverse which judgment the Bridge Company prosecutes this writ of error.

C. T. Coleman, W. E. Hemingway, and G. B. Rose, for plaintiff in error.

W. L. Terry, W. J. Terry, and N. P. Richmond, for defendant in error.

Before SANBORN, Circuit Judge, and PHILIPS and RINER, District Judges.

PHILIPS, District Judge, after stating the case as above, delivered the opinion of the court.

The question to be decided is whether the judgment of the state court in the suit of the Brick Company against the Bridge Company creates an estoppel against the maintenance of the action brought in the United States Circuit Court.

The first contention on behalf of plaintiff in error is that the

nunc pro tunc entry, whereby the word "reply" was inserted in the judgment, should be regarded as a nullity, for the reason that it was made without notice to the defendant therein. The emendation of court records by subsequent entries was expressly authorized by St. 8 Hen. VI, c. 12, which declared that:

"The justices are further empowered to examine and amend what they shall think, in their discretion, to be misprisions of their clerks, in any record, process, word, pleading, power of attorney, writ, panel or return." Tidd's Prac. (Am. Ed.) § 712.

This statute is a part of the common law of the state of Arkansas. It does, however, but give sanction to the inherent power which, from its very constitution and responsibility, must reside in every court of high jurisdiction, to enable it to see to it that its records speak the truth, as a false record is an offense to the law. A judgment is what the court pronounces. The entry made by the clerk may be evidence of what the pronouncement of the court was; but, as it is but the act of the scrivener of the court, his failure to properly and exactly put down what the court in fact ordered is a mere misprision of the clerk, which the court at any time can, and should, rectify by having the order or judgment the court in fact directed entered nunc pro tunc. This is succinctly expressed in St. 8 Hen. VI, supra, empowering the judges "to examine and amend what they shall think, in their discretion, to be misprisions of their clerks."

In re Wight, 134 U. S. 136, 10 Sup. Ct. 487, 33 L. Ed. 865, the petitioner had been indicted in the United States District Court for the Southern District of Michigan. After conviction he filed a motion for new trial and in arrest of judgment, the hearing of which the District Court certified and remitted to the next Circuit Court of the district. On hearing before Circuit Judge Jackson, and Brown, District Judge, the motions were denied; and on the same day the judge of the District Court proceeded to judgment of sentence against Wight, who thereupon applied for his discharge on writ of habeas corpus, to Mr. Justice Harlan, the justice assigned at that time to the Sixth Circuit. The basis of this application was that the record failed to show that on the overruling of said motions by the Circuit Court there was an order remitting the case back to the District Court. Confessedly, after the transfer of the case to the Circuit Court, unless the District Court regained jurisdiction of the case by proper order of the Circuit Court remitting the case to the District Court, the latter had no jurisdiction to sentence the petitioner. This fact being called to the attention of the judges of the Circuit Court, they caused an order to be made, nunc pro tunc, based "upon the inspection of said records," remanding the cause to the District Court; and thereupon the writ of habeas corpus was discharged. In reviewing this action of the Circuit Court Mr. Justice Miller went quite fully into the question, and approved that line of decisions which holds that the power is inherent in courts of record, by entry nunc pro tunc at a term subsequent to that at which the judgment was rendered, to make the record show fully the order or judgment the

court in fact made at the proper term, but which the record failed to disclose.

In no jurisdiction is this practice more fully recognized than by the courts of Arkansas. In *Bobo v. State*, 40 Ark. 231-232, Chief Justice English presented a summary of the decisions of that court touching this practice, the sum of which is that:

"Courts have a continuing power over their records, not affected by the lapse of time. Should the record in any case be lost or destroyed, the court whose record it was possesses the undoubted power, at any time afterwards, to make a new record. In doing this it must seek information by the aid of such evidence as may be within its reach tending to show the nature and existence of that which it is asked to re-establish. There is no reason why the same rule should not apply, when, instead of being lost, the record was never made up, or was so made up as to express a different judgment than the one pronounced by the court. Hence the general rule that a record may be amended, not only by the judge's notes, but also by other satisfactory evidence"—Citing *Frink v. Frink*, 43 N. H. 514, 80 Am. Dec. 189, 82 Am. Dec. 172.

He also cited with approbation what Fletcher, J., said in *Balch v. Shaw*, 7 Cush. 284, as follows:

"There can be no doubt that it is competent for a court of record, under its general, inherent, and necessary authority, to correct the mistakes and supply the defects of its clerk or recording officer, so as to have the record conform to the actual facts and truth of the case; and this may be done at any time, as well after as during the term, *nunc pro tunc*. * * * This was not a case of want of jurisdiction, in which the record cannot be amended, because, there being an omission to act, there is nothing to record. In such case the defect is not in the record, but in the action of the court."

The answer to all this, made by the learned counsel for plaintiff in error, is that there was no notice given of the motion for the *nunc pro tunc* entry. In *Balch v. Shaw*, *supra*, in discussing this question, the court said:

"The court of common pleas, having the exclusive right and jurisdiction in the matter, were the proper judges of the necessity and propriety of extending the record, and of the proofs and of the sufficiency of the proofs upon which to proceed. Such a record, when made up, is conclusive, until altered or set aside by the same or some other court having jurisdiction; but it cannot be drawn in question collaterally when such record is used or relied upon in support of a title. It was further said that the extended record was invalid, because made without notice. But this was not a case for notice. Surely a court of record need not give notice to all the world to come in and show cause why it should not make its record conform to the truth of the case. Any party, who supposes he can show such cause, should apply to the court to have the record set aside or expunged, after it is made. * * * The court might amend their records upon their own motion, or upon the motion or suggestion of any one interested. It is not a proceeding in which there need be any parties. It is the act of the court itself, correcting its own records, to make them conform to the truth of the case."

In *Lewis v. Ross*, 37 Me. 230, 59 Am. Dec. 49, the court said:

"On general principles it is competent for a court of record, and incident to its authority, to correct mistakes in its records which do not arise from the judicial action of the court, but from the mistakes of its recording officer. In doing this it may regulate its own actions upon its own sense of responsibility and duty, and proceed, upon suggestion or motion of those interested, or upon its own 'certain knowledge and mere motion.' * * * It would not be an adversary proceeding, in which, of necessity, there should be parties, or in which notice would be required."

In *Odell v. Reynolds et al.*, 70 Fed. 656, 17 C. C. A. 317, the court, in discussing the practice of such entries *nunc pro tunc*, said:

"Sometimes the propriety of such action exists in cases where the correction may be made upon that which appears in the record itself, and is necessary to make it consistent and harmonious, one part with another. In other cases it is necessary, in the interests of justice, to act upon matters not appearing from the record; for example, things resting in the recollection of the judge, or evidence adduced aliunde. In the former case notice to the parties is not necessary. No new thing is brought upon the record. * * * There is nothing to litigate. No right is substantially affected. * * * If it is the recollection of the court, it is doubtful whether notice is required, for the reason that it is not open to contest. At all events, it would seem, upon the authorities, that corrections of the record made by the court upon its own recollection would not be collaterally assailable, though made without notice."

The order of the court amending the record in the case here under review shows that it was based upon the knowledge of the court of the facts. It was, therefore, a matter appealing to the conscience of the judge to have the record of his court contain the truth, the whole truth, and nothing but the truth. The requirement of notice to a party implies the right to appear and contest. A challenge to the court on an entry directed to be made, based upon its own knowledge, would present an unseemly contention before the presiding judge. How could such an issue be tried? The presiding judge says, "Within my own knowledge the case was tried on the petition, answer, and reply." Would the defendant, in the face of the court's statement, be heard to say, "I deny it"? If the court is to try it out, is the judge to yield his own knowledge, his inward consciousness, to what some witness may say? The inevitable presumption that the court would follow its own knowledge and conscience is, in itself, a contradiction of such practice. At no time during this controversy has the plaintiff in error challenged the truth of the fact recited in the *nunc pro tunc* entry.

The next contention on behalf of the plaintiff in error is that when it, in the state court, failed to appear and prosecute its counterclaim, it was tantamount to a nonsuit, or withdrawal of the counterclaim, and the court should have so treated it. Therefore there should have been no trial of the issues raised by the answer and reply, and no judgment thereon. If this were conceded, would it follow that the action of the court in proceeding to trial and judgment on the whole issues presented by the pleadings rendered the judgment subject to collateral attack? The defendant therein having appeared and filed answer, it remained in court for all purposes connected with the litigation until such answer was withdrawn, which was never done. The court being one of general jurisdiction over the parties and the subject-matter, it had the power to adjudicate. At the utmost, therefore, its action in not treating the failure of the defendant to urge its counterclaim as a constructive abandonment thereof was only an irregularity in a matter of procedure, a voidable error, and not a judgment *coram non iudice*.

In *Shaver & Son v. Shell*, 24 Ark. 122-123, the justice of the peace, where the suit was on an open account and the plaintiff failed to appear, instead of entering a nonsuit against the plaintiff, as con-

templated by the practice act, rendered judgment by default against the defendant. Of a collateral attack made on this judgment, English, C. J., said:

"The justice should have nonsuited the plaintiffs; and it was an error for him to render judgment by default against the defendant, which she could have corrected by appeal; but, failing to appeal, the judgment became final. The justice having jurisdiction of the subject-matter of the suit, by service of the process, which affirmatively appears, the judgment could not be regarded as null and void, when presented to the circuit court collaterally, on account of the error of the justice in rendering it without evidence"—citing *Hill v. Steel*, 17 Ark. 440; *Alston*, Ex parte, Id. 580.

Such a proceeding was merely erroneous, correctable by writ of error. *Patting v. Spring Valley Coal Co.*, 98 Fed. 811, 39 C. C. A. 308. It is not subject to collateral attack. *Dowell v. Applegate*, 152 U. S. 339, 340, 14 Sup. Ct. 611, 38 L. Ed. 463. *Freeman on Judgments*, p. 252, § 135, says:

"Jurisdiction being obtained over the person and the subject-matter, no error or irregularity in its exercise can make a judgment void."

The defendant having left its answer on file, the plaintiff therein could not have moved to strike it from the files, nor could the court disregard it; and this for the palpable reason that the answer contained something more than a counterclaim. It opens with the statement: "Comes the defendant, and for answer and by way of counterclaim says." It then proceeds to state that the plaintiff contracted to sell to the defendant a kiln, containing about 500,000 brick, more or less, and to ship the same to Monroe, La., at the rate of six cars a day; that it had information of the use to which the defendant was to put the brick, and that the plaintiff, therefore, agreed to furnish the defendant a particular kind of brick; that the brick sued for by plaintiff were shipped "in pursuance of said contract; * * * that it afterwards failed and refused to carry out its said contract by delivering the brick, although the delivery thereof was continually demanded, but sold said brick to other parties, and utterly failed and refused to carry out its contract."

So, while it is true that on the plaintiff's alleged breaches of the contract the defendant laid the predicate of its counterclaim, the facts alleged stated a complete defense to the plaintiff's right of recovery. As the account sued on was for brick delivered under the contract, the contract being an entirety, if the plaintiff itself, as alleged in the answer, broke the contract, it was not entitled to recover thereon, on the ground that he who commits the first substantial breach of a contract cannot maintain action against the other party for a subsequent default in the performance thereof. *Cattle Company v. Martindale*, 63 Fed. 84-89, 11 C. C. A. 33-38; *Guarantee Co. v. Mechanics*, etc., Co., 183 U. S. 402, 22 Sup. Ct. 124. 46 L. Ed. 253; *Imperial Fire Insurance Company v. Coos Co.*, 151 U. S. 463-467, 14 Sup. Ct. 379, 38 L. Ed. 231; *Hubbard v. Association*, 100 Fed. 719, 40 C. C. A. 665; *National Surety Company v. Long*, 125 Fed. 887, 60 C. C. A. 623. If the Bridge Company preferred to try its counterclaim in the federal court, the proper course, and the only course open to it, was to withdraw its answer in the

state court, relieving the plaintiff of the burden of introducing any evidence to support its action. As said in *Eastmure v. Laws*, 7 Dowling, 435, 436, by Bosanquet, J.:

"I have always understood that when issue is joined between two parties in a cause, on a second action on the same matter, the verdict, judgment, and issue in the first suit may be pleaded by way of estoppel, and are conclusive. * * * That is the case here, and there is averment that the sum which was the subject of set-off in the first action is the same which is now in controversy."

After stating that the defendant was not bound to plead the set-off, he added:

"It is for the defendant, therefore, to say whether he will defend the action without pleading the set-off, and, if he pleads, he must suffer the consequences of leaving it on record. Here he has abandoned the opportunity of taking the plea off the record, on payment of all costs, which he might have obtained on going to the judge at chambers, up to the very last moment before the trial was called on. But he puts the plaintiff to the trouble of coming down to contest the plea set up."

By leaving its answer on file in the case, judgment by default against the defendant could not go. It placed the plaintiff under the necessity of going to trial on the issues, and adducing proof to show what the contract was and that it had not violated it. That particular fact, therefore, was included in the matter adjudged. The very foundation of the suit in the federal court is that the Brick Company did not observe and keep its contract, but broke the same, to the damage of the Bridge Company in the sum of \$3,000. As under the Code of Arkansas no reply is required, except as to counterclaims and the like set up in the answer, the judgment pleaded as an estoppel, with or without the amendment made by the state court, concluded the controversy as to who had broken or kept the contract, because it was directly involved in the issues made by the defendant's answer. *Durham v. Bower*, 77 N. Y. 80, 33 Am. Rep. 570; *Patrick v. Schaffer*, 94 N. Y. 423-507; *Cromwell v. Sac County*, 94 U. S. 353, 24 L. Ed. 195; *Southern Minn. Ry. Co. v. St. Paul, etc., Ry. Co.*, 55 Fed. 695, 696, 5 C. C. A. 249.

It results that the judgment of the Circuit Court must be affirmed.

CRIM et al. v. WOODFORD.

(Circuit Court of Appeals, Fourth Circuit. February 21, 1905.)

No. 522.

1. BANKRUPTCY—APPEAL—JOINDER OF APPELLANTS HAVING SEPARATE INTERESTS.

Where but a single order or judgment is made by a district court in a bankruptcy proceeding which determines a question affecting alike different claimants, they may unite in an appeal therefrom, although their interests are several and distinct.

[Ed. Note.—Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

2. SAME—PETITION FOR REVIEW OF REFEREE'S ORDER—TIME FOR FILING.

There is no provision of the bankruptcy act or of the general orders in bankruptcy fixing the time within which a petition for review of an order

of a referee must be filed, and, in the absence of a rule of court on the subject, the time within which such a petition may be entertained is discretionary, subject only to the limitation that it must be filed within a reasonable time in view of the general purpose of the act to expedite the proceedings.

3. SAME—REVIEW OF REFEREE'S ORDER—FAILURE TO SUMMARIZE EVIDENCE.

The provision of general orders in bankruptcy No. 27 (89 Fed. xi, 18 Sup. Ct. viii), requiring a referee on the filing of a petition for review of an order made by him to certify a summary of the evidence relating thereto to the judge, should be observed; but where it appears from the referee's certificate that, instead of making a summary, he has returned all the evidence taken, and the matter has been determined by the judge without any motion having been made to require the evidence to be summarized, the proceeding for review will not be invalidated, where it involves substantial matters, because the rule was not observed by the referee.

4. SAME—LIENS—VALIDITY.

Liens given by an insolvent within four months prior to his bankruptcy to secure loans made him at the time, which were valid under the laws of the state, and were accepted by the lenders in good faith and without knowledge of the borrower's insolvency, or good cause to believe him insolvent, are protected by Bankr. Act July 1, 1898, c. 541, § 67d, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], and the fact alone that a lender knew that the borrower had overdrawn his bank account did not charge him with knowledge of insolvency where the borrower was a man of excellent reputation, and engaged in large contracts, supposed to be profitable, and requiring the use of considerable sums of money.

Appeal from the District Court of the United States for the Northern District of West Virginia, at Clarksburg, in Bankruptcy.

Melville Peck and John Bassell (Fred. O. Blue and W. T. Ice, on the briefs), for appellants.

J. Hop. Woods and W. T. George, for appellee.

Before GOFF and PRITCHARD, Circuit Judges, and BRAWLEY, District Judge.

BRAWLEY, District Judge. This is an appeal from the District Court of the United States for the Northern District of West Virginia, in bankruptcy, and a correct understanding of the questions involved can best be had by printing in full the judgment entered October 8, 1903. It is as follows:

"In the Matter of J. M. Proudfoot, Bankrupt. In Bankruptcy.

"An application having been made heretofore to this court by J. N. B. Crim, S. A. Moore, J. F. Manown, J. M. Carlin, and others to review the decree made by W. Frank Stout, referee herein, on the 5th day of June, 1902, wherein said referee fixed the liens and priorities upon the estate of said J. M. Proudfoot, bankrupt, the same came on this day to be heard upon the papers and certificates of said referee, certifying the said questions presented for review, and the court heard the argument of counsel. Upon consideration whereof, it appearing to the court that no summary of the evidence taken in said matter, as provided for by rule 27 of the Supreme Court of the United States [89 Fed. xi, 18 Sup. Ct. viii], governing proceedings in matters of bankruptcy, was made by said referee, and nothing appearing in the said record as presented to show that there was any error in the said findings of said referee, it is therefore adjudged, ordered, and decreed that the findings of the said referee made on the said 5th day of June, 1902, be, and the same are hereby, con-

firmed, and the said referee is directed to proceed to disburse the funds belonging to the said bankrupt's estate in accordance with said findings and the laws governing bankrupt proceedings."

There is a motion to dismiss the appeal because the interest of the petitioners Crim, Moore, and Manown are not joint, but are several and distinct, and therefore it is claimed they cannot collectively join in the appeal. It is true that each of the appellants named has a separate interest, but, as the court below entered but one judgment and allowed the joint appeal, there appears to be no good reason why they should not all be heard together, as the main question determined by the court below and for consideration here is common to all the appellants, and separate appeals would have served no good purpose, and involved additional and unnecessary expense. The motion to dismiss the appeal on that ground therefore is refused.

The second ground is, "because the petitioners Moore and Manown did not file a petition before the referee for a review within the time prescribed by law." The order of the referee adjudging and decreeing that the liens claimed by the appellants should be set aside was entered June 5, 1902. Crim's petition for review was filed June 9, 1902, Moore's petition June 24, 1902, and Manown's July 1, 1902. It does not appear from the record that any objection was made in the court below to the hearing of the petitions on the ground that they were not filed in due time, but it is now claimed that, inasmuch as Moore and Manown did not file their petitions within 10 days, they had no right to be heard. There is nothing in the bankrupt act nor in the general orders which fixes a time within which petitions for review of the referee's decisions must be filed. Section 25 (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]) requires that in the cases therein enumerated appeals to the Circuit Courts of Appeal shall be taken within 10 days after the judgment appealed from has been rendered. There is no apparent reason why a longer time than this should be allowed for the filing of a petition for a review of the order of a referee, for in nearly all of the provisions of the bankruptcy act which require notices the time limit of 10 days is adopted, and in some jurisdictions there is a rule to that effect; but it does not appear that there is any such rule in the district from which this appeal comes. There being no time limit fixed by the statute or by rule, it seems to be left to the discretion of the judge, and the practice, so far as adjudicated cases which we have examined enlighten us on this point, is that the petition may be filed within a reasonable time. The Circuit Court of Appeals of the First Circuit in *Re Worcester County*, 4 Am. Bankr. Rep. 501, 102 Fed. 808, 42 C. C. A. 637, held as follows:

"The original decree was entered, as we have already said, on July 21, 1899, and petition to review was filed in this court on December 7, 1899; that is, within six months. The statute fixes no time within which a petition of this nature must be filed, so that unless some time is fixed by a rule, as was the case in *Re Hien*, 166 U. S. 432, 17 Sup. Ct. 624, 41 L. Ed. 1066, or by following some analogous provision of statute, petitions of this character can be filed with reference to any proceeding in bankruptcy so long as the decree is executory or the case has not been closed. The bankruptcy act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517) in like manner omitted any limitation on the exercise of the revisory power of the Circuit Court, so that in this circuit

a rule was entered September 15, 1870, requiring that the petition should be filed within fifteen days after the ruling, order, or decree appealed from. Inasmuch as there is no statutory limitation fixing the time for filing bills for review of matters arising on the face of the record, *Central Trust Company v. Grant Locomotive Works*, 135 U. S. 207, 10 Sup. Ct. 736, 34 L. Ed. 97, already referred to, determined that the time must be limited to that given by the statute for taking an appeal from the decree sought to be reviewed. After a careful consideration of the question the Circuit Court of Appeals for the Ninth Circuit, in *Reed v. Stanley*, 97 Fed. 521, 38 C. C. A. 331, held that from the same rule the time within which a bill for review might be filed, since the act establishing the Circuit Court of Appeals was passed, is limited by analogy to the six months allowed by statute for taking of appeals to the last-named court. By parity of reasoning it would seem to follow that the time for filing a petition for revision under section 24 must be limited to six months. Certainly it can be no shorter; and we have already shown that the petition was filed within that period."

In the reporter's note to this case attention is called to the fact that appeals in bankruptcy are limited by section 25 to 10 days. In *Re Chambers, Calder & Company*, 6 Am. Bankr. Rep. 709, there is an opinion of Littlefield, referee, upon a petition for review filed September 23, 1901, from a decision made May 20, 1900, wherein the referee held that it came too late to entitle the petitioner to the remedy, and that, while no time limit was fixed for the filing of such petition, he considered that, inasmuch as the whole scope and purpose of the bankrupt act was to facilitate and expedite the settling of the estates of bankrupts as rapidly as possible, a petition for review should be promptly filed by the party who deems himself aggrieved by an order of the referee; and says:

"Whether it should be held that ten days or six months is the proper limit for filing such a petition, or that a reasonable time is implied, the right has been lost, for certainly a period of 18 months after the rendering of the decision is not a reasonable time for the filing of such a petition."

As these petitions were filed within 20 and 25 days from the date of the filing of the order of the referee, and the record does not show that any objection was made in the court below for the reason that they were not filed within a reasonable time, in the absence of a statutory provision or rule fixing a time limit, this objection is not sustained.

The third and fourth objections are that there was no proper record before the District Court for review, "because appellants had not complied with general order 27 of the rules prescribed by the United States Supreme Court (89 Fed. xi, 18 Sup. Ct. viii), governing procedure in such matters," and the judgment of the court below, cited above, gives color to these objections. General order No. 27 is as follows:

"When a bankrupt, creditor, trustee or other person shall desire a review by the judge of any order made by the referee he shall file with the referee his petition therefor, setting out the error complained of, and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

Section 39 of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 555 [U. S. Comp. St. 1901, p. 3436], which prescribes the duties of referees, provides in subdivision 5 that they shall "make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do

so by either of the parties thereto, together with their findings therein, and transmit them to the judges"; and in subdivision 9 it is provided that they shall "upon application of any party in interest preserve the evidence taken, or the substance thereof, as agreed upon by the parties before them, when a stenographer is not in attendance." The general order above cited is intended, manifestly, to carry into effect these provisions, so as to avoid as far as possible the sending of the original proofs to the judge, and to substitute therefor, where the ends of justice would permit, a summary thereof. *Cunningham v. German Insurance Bank*, 4 Am. Bankr. Rep. 193, 103 Fed. 932, 43 C. C. A. 377. It is important that this rule be enforced, for in the manifold and onerous duties devolved upon the District Judge in the administration of bankrupt estates he ought not to be required to sift out the testimony in order to determine the exact question of fact which could be presented in a summary of the evidence. The Court of Appeals of the First Circuit, in *Re Boston Drygoods Company et al.*, 11 Am. Bankr. Rep. 102, 125 Fed. 226, 60 C. C. A. 118, says:

"It would be detrimental to the authority of the District Court, injurious to its administration of the bankrupt statutes, and involve the numerous and useless delays which those statutes evidently have been framed to avoid, if in the administrative matters, where no substantial interests are concerned, we became meddlesome beyond what the law requires of us."

And this court would be loth to hold that there was any error in the court below in refusing to hear a petition for review where rule 27 had not been complied with. But the learned judge below did more than that. After reciting that no summary of the evidence had been made by the referee, the judgment is:

"And nothing appearing in the said record as presented to show that there was any error in the said findings of said referee, it is therefore adjudged, ordered, and decreed that the findings of said referee made on the said 5th day of June, A. D. 1902, be, and the same are hereby, confirmed, and the said referee is directed to proceed to disburse the funds belonging to said estate in accordance with the said findings and the laws governing bankrupt proceedings."

So we have a final decree involving substantial interests, and it does not clearly appear whether such judgment is predicated upon the failure of the referee to send up a summary of the evidence, or whether the court decided adversely to the petitioners because "nothing appeared in the said record as presented to show that there was any error in the said finding of said referee."

The report of the referee in the matter of Crim's claim is as follows:

"I, W. Frank Stout, one of the referees of said court of bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings: whether the judgment confessed by said James M. Proudfoot on the 28th day of October, 1901, for the sum of \$1,000 and \$3.75 costs, in favor of J. N. B. Crim, is a valid lien against the estate of the said bankrupt, and has priority over other debts. The referee held that judgment was in fraud of the bankrupt act of 1898, and therefore should be set aside, but allowing the said Crim to prove his claim, and be allowed his pro rata share with other creditors, for the reason that the evidence was clear to the referee that the judgment was confessed by the bankrupt while he was totally insolvent, and that the said Crim had knowledge, or ought to have had knowledge, that the said Proudfoot, bank-

rupt, was insolvent when he confessed the judgment to him, that said judgment was within four months prior to the filing of the petition in bankruptcy, and that it would work a preference, and therefore ought to be set aside. The evidence and decree and the proof of claim are herewith filed. And the said question is certified to the honorable judge for his opinion thereon."

The other certificates are similar, and it appears that all of the testimony relating to each of the said claims was certified to the judge. If the judge desired a summary of the evidence, it was clearly within his province to direct the referee to prepare and submit it, and either party might have moved for an order to that effect; but the record does not show that any such motion was made. It may well be, in a question which involved the bona fides of the claims and the pecuniary condition of the bankrupt at the time the alleged liens were executed, that all of the testimony taken was pertinent to the issue, and that no summary thereof that the referee could prepare would have been acceptable to the parties to the controversy. In a case of this nature every question and answer presumably has some bearing upon the point at issue, and a skilled lawyer might find it difficult to prepare a satisfactory summary. However that may be, it seems to us that it would be manifestly unjust to deprive petitioners of the opportunity to be heard upon questions of substantial right because an officer of the court omitted to summarize the evidence in the belief that all of the testimony would the better present the questions at issue than any part of it which he might undertake to summarize.

The printed record before us is certified to by the clerk as being a "true transcript of the record and proceedings of said court in a certain bankruptcy proceeding." etc., "now of record and on file in my office." The referee certifies that he filed the evidence, the testimony is certified by the stenographer, and the learned judge below in a statement preliminary to the judgment says, "The same came on this day to be heard upon the papers and certificates of said referee," so we cannot doubt that the case as now presented in this record was in the court below. If the judge failed to read the testimony because of noncompliance with rule 27, we cannot be absolved from that duty, for the appeal brings the whole case before us, and finding, as we do, upon the face of the record, plain error of law in the findings of the referee, the judgment must be reversed. The facts of the case upon which the decision of the referee is predicated are practically undisputed. There is no conflict in the testimony, and therefore we are not confronted with the difficulty which arises when the referee and judge concur in findings of fact.

The evidence is that Proudfoot, the bankrupt, was a contractor and builder in the town of Pulaski, in the state of West Virginia; that he was a man of excellent character, and was supposed to be engaged in a lucrative business, having at the time of the transactions hereinafter stated contracts for the building of half a dozen or more houses in the town, and employing a number of laborers. Among other buildings upon which he was engaged was one or more for the petitioner Moore, who was a merchant with whom Proudfoot kept a running account. On August 24, 1901, Proudfoot borrowed from Moore \$1,250 in cash, and executed a deed of trust as security therefor by way of mortgage

of his house and lot in the town of Philippi. The money was received in two checks—one for \$100, which was used for payment of sundry bills due for freight; and the remainder, less the discount, was deposited by Proudfoot in the bank where he kept his account, and the proof shows that it was so deposited and that it was disbursed in the usual course of business. The testimony is that at the time this money was loaned Moore supposed that Proudfoot was doing a good business, and that this money was sufficient to relieve him from any immediate embarrassment, and, as confirmation of the fact that Moore did not have doubts as to his financial responsibility, he did not put the deed of trust on record. His explanation of such failure to record it is: "I did not record it because I did not see the necessity of recording it. I possibly neglected it, thinking Mr. Proudfoot was perfectly good, and I let the matter run along until I heard that Mr. Manown had recorded a deed of trust for \$2,000, and I immediately took my deed of trust to the county clerk for record." It was recorded October 29, 1901, and on November 4 Proudfoot filed his petition in bankruptcy. According to Proudfoot's testimony, the running account between him and Moore at the time of this loan about balanced, and from Moore's testimony it appears that there was some \$80 due him on the account. The indebtedness to Crim, according to his testimony, arose in this way: On the evening of October 28, 1901, Proudfoot went to him and said that he wanted to borrow \$1,000 to pay a draft of the Penn Door & Sash Company, of Pittsburg, that was in the bank of which Crim was president. Being asked in what condition his business was, Proudfoot told him that he was all right, but if this draft went to protest it would affect him very much, he thought; that there was a good deal of money coming to him on his contracts, and he was very sure he could pay it in a few days. Thereupon they went to the clerk's office, and Proudfoot confessed judgment for \$1,000. The next morning he went to the bank, gave the cashier a check for \$904.98, the amount of the draft on Proudfoot, and gave Proudfoot his check for \$95.02, which made up the \$1,000. After a little reflection, Proudfoot said, "I was to pay this money back the last of the week, but I will just give you this check back; I can get along very well without it;" and the same evening he gave him \$125, which he said he had just collected. This reduced the amount due on the judgment to about \$802. The testimony further is that Proudfoot is indebted to Crim to the amount of \$1,600 for money theretofore loaned, and for which there is no security. Crim further testifies that at that time he had no knowledge or suspicion of Proudfoot's insolvency; that he "always had a great deal of confidence in Jacob M. Proudfoot. He was a man of the highest integrity." This witness was not cross-examined, and there is no testimony whatever which raises a doubt as to the good faith of the transaction. Manown was cashier of the bank where Proudfoot did business. On October 17, 1901, he loaned him \$2,000, taking his note therefor, secured by the deed of trust which is in evidence. He testified that Proudfoot stood high in the community for his honesty and for the payment of his debts until this time, that he was the largest contractor and builder in the town, and that he had no suspicion of his insolvency. The evidence is

that at the time of this loan Proudfoot had overdrawn his account in bank to the amount of something over \$1,000, but it appears that he had frequently overdrawn his account before that time. There is no doubt that at the time of all of these loans Proudfoot was in fact insolvent in the sense that his actual property was insufficient in amount to pay his debts; but it is equally clear from doubt that at the same time he was a man of good standing in the community, that he had at that time contracts for buildings amounting to \$15,000 or \$20,000, that it was supposed that he was making money out of these contracts, and that the loans were made for the purpose of tiding over what was thought to be temporary embarrassments. It is true that there were circumstances calculated to awaken suspicion in Manown as to Proudfoot's solvency, because his account in the bank was largely overdrawn; but as is said by Mr. Justice Davis in *Tiffany v. Boatman's Savings Institution*, 18 Wall. 376, 21 L. Ed. 868, a case arising under the bankrupt act of 1867 (Acts March 2, 1867, c. 176, 14 Stat. 517):

"There is nothing in the bankrupt law which interdicts the lending of money to a man in Darby's condition, if the purpose be honest, and the object not fraudulent. And it makes no difference that the lender had good reason to believe the borrower to be insolvent if the loan was made in good faith, without any intention to defeat the provisions of the bankrupt act. It is not difficult to see that in a season of pressure the power to raise ready money may be of immense value to a man in embarrassed circumstances. * * * His estate is not impaired or diminished in consequence, as he gets a present equivalent for the securities he pledges for the payment of the money borrowed. Nor in doing this does he prefer one creditor over another. * * * The preference at which the law is directed can only arise in case of an antecedent debt."

As to the liens of Crim and Moore, there is no ground for a suspicion that they were given to secure antecedent indebtedness. As to Manown's lien, there is a suspicion arising from the fact that Proudfoot at the time of the loan was indebted to the bank of which he was cashier by overdrafts to the amount of about \$1,000, and, if the loan had been made by the bank, the lien would have been voidable as a preference to the extent that it secured the antecedent indebtedness and valid as to the remainder, under the principle settled by this court in *City National Bank v. Bruce*, 109 Fed. 69, 48 C. C. A. 236; but the loan was made by Manown individually, and, according to the testimony, in good faith and without knowledge of insolvency. Overdrafts are in themselves no evidence of insolvency, and in the circumstances they rather tend to show that Proudfoot was in good credit, for the bank had paid his checks when he had no funds to his account.

Such being the facts, the referee is clearly in error in holding as he did that the trust deeds and confession of judgment "should be set aside because all of these liens were given by the bankrupt when insolvent, and within four months of the time that he filed his petition herein in bankruptcy." Section 67e of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], provides that all conveyances, etc., made or given by a person within four months prior to the filing of his petition in bankruptcy, with the intent and purpose on his part to hinder, delay, or defraud his creditors, shall be null and void except as to purchasers in good faith and for a present fair consideration, and "all conveyances, transfers or incumbrances of his property

made by a debtor at any time within four months prior to the filing of a petition against him and while insolvent which are held null and void as against the creditors of said debtor by the laws of the state, territory or district in which said property is situate, shall be null and void under this act against a creditor of such debtor, if he be adjudged a bankrupt," etc. Under the insolvent laws of West Virginia preferences by insolvent creditors are prohibited, but chapter 74, § 2, of the Code of West Virginia of 1899, provides "that nothing in this section shall be taken to prevent the making of a preference as security for the payment of purchase money or a bona fide loan of money or other bona fide debts contracted at the time such transfer or charge was made"; so it seems clear that there can be no question as to the validity of these liens under the laws of West Virginia, and they are expressly protected under subdivision "d" of section 67 of the bankrupt law, which is: "Liens given or accepted in good faith and not in contemplation of or in fraud upon this act and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act." All of these liens fall so plainly within the protection of subdivision "d" that it would be useless to cite authorities to sustain them. Moore's deed of trust is, of course, invalid as a lien as against any creditor who in good faith gave credit to the bankrupt between the date of its execution and the date when it was recorded, and who was in ignorance of its existence. The record does not enable us to determine whether there are such creditors, and there must be a reference for that purpose, and for the purpose, also, of determining the relative priorities of the liens of Crim, Moore, and Manown, as that question has not been presented to us; nor has there been any question presented in this record as to whether there are any claims paramount to the liens mentioned.

The judgment of the court below is reversed, and the case is remanded for further proceedings in conformity with this opinion.

Reversed.

UNITED STATES v. WISHKAH BOOM CO.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1905.)

No. 1,034.

1. NAVIGABLE STREAMS—OBSTRUCTIONS—INJUNCTION—BILL—DEMURRER.

Where a bill to restrain defendant from obstructing a navigable stream alleged that the river was a navigable stream—navigable for small steamboats—and was the only practicable highway for the residents along its upper border to A. and other markets on a certain harbor, and that it was used largely for floating logs and foreign products to market, it was not demurrable for want of equity, in that it failed to allege facts showing an actual use of the river in navigation.

2. SAME—STATUTES.

The provision of Act Cong. Sept. 19, 1890, c. 907, 26 Stat. 454, prohibiting the maintenance of obstructions to navigation in navigable streams, is not inconsistent with Act Cong. March 3, 1899, c. 425, 30 Stat. 1151 [U. S. Comp. St. 1901, p. 3541], prohibiting the erection of such obstructions.

3. SAME.

Act Cong. Sept. 19, 1890, c. 907, 26 Stat. 454, prohibits the maintenance of obstructions to navigation in navigable streams; and Act March 3, 1899, c. 425, 30 Stat. 1151 [U. S. Comp. St. 1901, p. 3541], prohibits the construction of such obstructions, and repeals only "all laws or parts of laws inconsistent" therewith, providing that no action begun or right of action accruing prior to the passage of the act shall be affected by such appeal. *Held*, that where proofs were admitted without objection that the bill failed to specify the date at which an obstruction in a river was constructed, or during what period it was maintained, under a bill alleging that defendant maintained and continues to maintain an obstruction to navigation in the navigable waters of the river, the bill was maintainable under the act of 1890.

4. SAME—FEDERAL COURTS—JURISDICTION—EVIDENCE.

Where a river within a state was navigable for some distance from its mouth, and was actually navigated by small steamboats and river craft for the purpose of carrying up groceries, supplies, clothing, loggers' tools, etc., to the head of navigation, and returning with farmers' products, a bill was maintainable in the federal courts to restrain a boom company from maintaining a boom in the river in such a manner as to be an obstruction to navigation, though the river was chiefly valuable for floating logs, and there was no proof of actual carriage of goods on the river in interstate commerce.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Washington.

On May 3, 1901, the appellant filed its bill in equity against the appellee to enjoin obstruction to the navigation of the Wishkah river. The bill alleged that the Wishkah river is a navigable stream of the United States, and of the district of Washington, which empties into the Chehalis river and Grays Harbor; that its waters are navigable for small steamboats and other craft from its mouth to a distance of 16 miles or more toward its source; that it is used largely for "floating logs and foreign products to market"; that throughout said navigable portion of said river the tide ebbs and flows; that it is the only practicable highway for the residents along its upper waters to Aberdeen and other markets on Grays Harbor; that the appellee has maintained and continues to maintain an obstruction to navigation in the navigable waters of said river, consisting of a boom located in the bed of said stream for logging purposes, said boom being constructed in such a manner as to block the river, and render navigation therein impossible during low tide, and difficult and impracticable at all times; that the appellee has not obtained permission of the Secretary of War of the United States to construct, continue, or maintain said boom, or any part thereof; and that the same was constructed and is maintained without such permission, and is continued in said navigable waters without the consent of said Secretary of War. The appellee interposed a demurrer to the bill on the ground that it failed to state facts sufficient to constitute a cause of complaint, or to entitle the appellant to any relief against the appellee. The demurrer was overruled; the court holding that it would take judicial notice of the principal geographical features of the country, and of rivers which are in fact highways of commerce, and which appear upon the maps of the country. The appellee answered the bill, admitting that said river is navigable for small boats and other craft, where the tide ebbs and flows therein, and admitting that the said river is used largely for floating logs and timber products to market, and alleging that, of the settlers on said river, only 12 are not engaged in the logging business; that more than 200 men are directly employed in various logging enterprises; that the value of the output of logs from said river above said boom during the year 1900 was nearly \$250,000; that the total value of all other products and merchandise whatsoever coming down said river at any time is merely nominal; that the chief use and value of said river, from its source to its mouth, is, and always has been, for the floating of timber and timber products to the mills situate

in the county of Chehalis; and that all the trade and traffic and commerce whatsoever carried on or done on said river is carried on and done by the citizens of the state of Washington, and wholly within said Chehalis County, and consists in carrying supplies of various kinds to the settlers, and is altogether for the support of the logging camps, and men engaged in the logging industry. The answer further alleged that the boom of the appellee is constructed in accordance with the laws of the territory and state of Washington, and that it is so constructed as not to interfere with the navigation of the river; that said Wishkah river is not, and never was, in any part, a navigable water or stream of the United States; that Congress has never exercised legislative control or supervision over said river, or any part thereof; and that the court has no jurisdiction to grant relief in the premises.

Upon these issues testimony was taken, which showed that, beginning with the year 1888, small boats had regularly carried freight and passengers on said river from its mouth to the forks, a distance of about 15 miles; that said boats were small steamboats and gasoline boats of about 50 feet in length, with a draft varying from 2 feet to 3½ feet; that they carried up the river settlers' supplies and loggers' supplies, such as groceries, clothing, shoes, axes, and chains; and that they brought down from settlers on the river products of their farms, such as fruits, potatoes, vegetables, etc. One of the storekeepers of Aberdeen testified that his sales of merchandise to go up the river amounted to from \$200 to \$350 a month, and that he purchased from the settlers their products which were brought down the river, amounting to from \$50 to \$100 per month. Another testified that his business with settlers on the river, in goods shipped by boat to and from Aberdeen, was from \$3,000 to \$5,000 per year. Another testified that he purchases from the settlers products amounting to from \$300 to \$400 per year, and sells to them goods to the average amount of \$200 per month. A witness testified that in 1901 500 tons of freight came down the river on the boats, and that about 1,000 tons were sent up; that the produce which came down went to Aberdeen; and that none of the freight which went up the river was shipped directly from points outside the state, although a considerable proportion thereof was goods imported by merchants at Aberdeen, and by them shipped up the river in original packages. There was testimony that there were from 25 to 30 settlers along the river, aside from those engaged in the logging business, who received goods from Aberdeen by way of the river, and furnished the produce which was sent down. The court, upon the pleadings and the evidence, reached the conclusion that the Wishkah river is chiefly useful for floating saw logs and timber, and is not such a public, navigable river as to have been in contemplation in the enactment of laws by Congress relating to public waters of the United States; that only the smallest class of steam vessels and gasoline boats have ever used it, and that the local traffic by these boats "is insignificant, compared with the use of the stream for floating timber; and that the river has not been used, and in its ordinary condition is not adapted to be used as a highway for the transportation of interstate or foreign commerce," within the authority of *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, and *Leovy v. United States*, 177 U. S. 621, 20 Sup. Ct. 797, 44 L. Ed. 914. On the authority of the decision last named, the court dismissed the bill.

Jesse A. Frye and Edward E. Cushman, for appellant.

Sidney Moor Heath, Roger S. Greene, and Austin E. Griffiths, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is contended that the demurrer to the bill for want of equity should have been sustained, for the reason that it failed to set forth facts showing an actual use of the river in navigation. The bill alleges that the river is a navigable stream—navigable for small steamboats; that it is

the only practicable highway for the residents along its upper waters to Aberdeen and other markets on Grays Harbor; and that it is used largely for floating logs and foreign products to market. The floating of foreign products to market could only be accomplished in some kind of water craft, and these averments are sufficient, we think, to show that the river was actually used in navigation. In *The Daniel Ball*, 10 Wall. 557, 563, 19 L. Ed. 999, it was said:

"Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States, within the meaning of the acts of Congress, in contradistinction from the navigable waters of the states, when they form, in their ordinary condition, by themselves, or by uniting with other waters, a continued highway, over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water."

The appellee now contends, further, that there is no equity in the bill, for the reason that it specifies no violation of either the act of September 19, 1890, c. 907, 26 Stat. 454, or the act of March 3, 1899, c. 425, 30 Stat. 1151 [U. S. Comp. St. 1901, p. 3541]; that it contains no averment that the obstruction to navigation which is complained of was created since the passage of the act of March 3, 1899, which act prohibits the construction of obstructions, and not the maintenance thereof; and that the offense charged is not within the act of 1890 because that act is repealed by section 20 of the act of 1899 (30 Stat. 1154 [U. S. Comp. St. 1901, p. 3547]), and, further, that the cause of suit is not within the saving clause of the repealing section, for the reason that the bill does not allege facts to show that a cause of action had accrued before the passage of the act of 1899. The averment of the bill is "that the appellee has maintained and continues to maintain an obstruction to navigation in the navigable waters of said river." Under this averment the proofs were admitted without the interposition of any objection on the ground that the bill failed to specify the dates at which the booms were constructed, or during what period they were maintained. Section 20 of the act of 1899 repeals only "all laws or parts of laws inconsistent with the foregoing sections," and contains the proviso "that no action begun or right of action accrued prior to the passage of this act shall be affected by this repeal." It is only necessary to quote the repealing clause to show that both the act of 1890 and that of 1899 are operative, as far as the present case is concerned. The provision of the earlier act prohibiting the maintenance of such obstructions is not inconsistent with the later act prohibiting the erection thereof, and, again, it is evident that a right of action had accrued under the first act prior to the date of the repeal.

We think that the decision of the present case on the merits must be ruled by the case of *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, 20 Sup. Ct. 343, 44 L. Ed. 437. We find it impossible to distinguish it from that case in any essential particular. The Bellingham Bay Boom Company had established a boom which interfered with navigation in the Nooksack river—a small river situate in What-

com county, emptying into Bellingham Bay, and thence into the Pacific Ocean, navigable by light water craft to Lynden, a distance of some 16 miles. In that case, as in this, the logging business was the principal business on the river, and there was the same disparity between its importance and that of the other traffic. In that case, as in this, there was no proof of the actual carriage of goods on the river in interstate commerce. In that case, as in this, groceries, supplies, clothing, and loggers' tools were carried from the mouth of the river to the head of navigation by small steamboats, which on their return trips brought back farmers' produce. In that case, as in this, the logging company attempted to justify its obstruction to navigation under the authority conferred by the act of the Legislature of Washington (1 Hill's Ann. St. & Codes Wash. § 1592), which provided:

"Such corporations shall have power and are hereby authorized in any of the waters of this state, or the dividing waters thereof, to construct, maintain and use all necessary sheer or receiving booms, dolphins, piers, piles, or other structure necessary or convenient for carrying on the business of such corporations: provided, that such boom or booms, sheer booms or receiving booms shall be so constructed as to allow the free passage between any of such booms and the opposite shore for all boats, vessels or steam craft of any kind whatsoever or for ordinary purposes of navigation."

The court in that case affirmed the doctrine that the power of Congress to pass laws for the navigation of public rivers, and to prevent any and all obstructions therein, cannot be questioned, and held that the trial court was bound to decide whether the boom, as existing, was authorized by any law of the state, when such law was relied upon as justification for its creation and continuance. The court said in conclusion:

"There is no doubt that the boom in question in this case violates the statute under which it was built, because it does not allow free passage between the boom and the opposite shore for boats and vessels, as provided for in the state law. For this reason the government was entitled to a decision in its favor."

It is urged against the conclusiveness of that decision as applied to the present case that there is great difference in the size and usefulness of the two rivers, and that the fact that the Nooksack river was navigable, and was used for purposes of interstate commerce, was not questioned, but was taken for granted. It may be true that the Nooksack river is a larger and deeper river than the Wishkah river, but, according to the proofs in the two cases, there is no very considerable difference in the amount of traffic carried on the rivers by boats. We find no warrant for the statement that the navigability of the Nooksack river for purposes of interstate commerce was not questioned, but was taken for granted. The record in that case was before the Supreme Court, and it is not to be supposed that it was disregarded. The testimony as to the extent and nature of the commerce carried on on the Nooksack was not materially different from the testimony on the same subject in the present case. There was no allegation or proof of any interstate commerce of the Nooksack, nor was there proof even of the carriage of goods thereon in original packages, as they were imported from points without the state.

The appellee, as did the court below, relies on the decision in *Leovy v. United States*, 177 U. S. 621, 20 Sup. Ct. 797, 44 L. Ed. 914. In that case the state of Louisiana, under the authority of the act of Congress of March 2, 1849 (chapter 87, 9 Stat. 352), and other statutes giving it full power to authorize the construction and maintenance of levees, drains, and other structures necessary and suitable to reclaim swamp and overflowed lands within that state, and in the exercise of its police power so conferred, had caused to be constructed a dam across Red Pass Crevasse—a crevasse which had been made by the overflow of water from the Mississippi river. The crevasse had been formed some time before the date of the act. At the time when it was closed by the dam, only the smallest craft attempted to pass through it. There was some evidence, said the court, “that small luggers or yawls, chiefly used by fishermen to carry oysters to and from their beds, sometimes went through this pass; but it was not shown that passengers were ever carried through it, or that freight destined to another state than Louisiana, or, indeed, destined for any market in Louisiana, was ever—much less, habitually—carried through it.” The court, after reviewing its prior decisions, said:

“It is a safe inference from these and other cases to the same effect which might be cited that the term ‘navigable waters of the United States’ has reference to commerce of a substantial and permanent character to be conducted thereon. The power of Congress to regulate such waters is not expressly granted in the Constitution, but is a power incidental to the express power to regulate commerce with foreign nations and among the several states and with the Indian tribes, and with reference to which the observation was made by Chief Justice Marshall that ‘it is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states.’ *Gibbons v. Ogden*, 9 Wheat. 1, 194, 6 L. Ed. 23. While, therefore, it may not be easy for a court to define the size and character of a stream which would place it within the category of navigable waters of the United States, or to define what traffic shall constitute commerce among the states, so as to make such questions sheer matters of law, yet, in construing the legislation involved in the case before us, we may be permitted to see that it was not the intention of Congress to interfere with or prevent the exercise by the state of Louisiana of its power to reclaim swamp and overflowed lands by regulating and controlling the current of small streams not used habitually as arteries of interstate commerce.”

Referring to the instructions which were given to the jury in the court below, the court said:

“If these instructions were correct, then there is scarcely a creek or stream in the entire country which is not a navigable water of the United States. Nearly all the streams on which a skiff or small lugger can float discharge themselves into other streams or waters flowing into a river which traverses more than one state; and the mere capacity to pass in a boat of any size, however small, from one stream or rivulet to another, the jury is informed, is sufficient to constitute a navigable water of the United States. * * * But we do not so understand the legislation of Congress.”

The court further said:

“We think the defendant was entitled to the instructions asked for, but refused—that the jury should be satisfied from the evidence that Red Pass was, at the time it was closed in the indictment, substantially useful to some purpose of interstate commerce.”

The construction of the dam was further justified in the opinion of the court on the ground that it was a legitimate exercise of the police power of the state, and it was intimated that the trial court might well have taken judicial notice that the public health is deeply concerned in the reclamation of swamp and overflowed lands. Said the court:

"If there is any fact which may be supposed to be known by everybody, and therefore by courts, it is that swamps and stagnant waters are the cause of malarial and malignant fevers, and that the police power is never more legitimately exercised than in removing such nuisances."

There are expressions in the opinion on which the appellee relies which are said to indicate that the Supreme Court was of the opinion that, in order to justify the interference of the United States to prevent the obstruction of navigable water within a state, it must appear that the commerce on such water extends to or affects other states. But these utterances must all be taken in the light of what was actually decided by the unanimous opinion of the court in the Bellingham Bay Boom Co. Case but a few months before the decision in the Leovy Case. The court, in so quoting in the Leovy Case the language of Chief Justice Marshall in *Gibbons v. Ogden*, and affirming the power of the state of Louisiana to regulate and control the current of "small streams not used habitually as arteries of interstate commerce," must have had in mind its prior decision, in which it had assumed jurisdiction to interfere with obstructions to navigation of water which, uniting with other waters, formed a continuous highway, over which commerce was or might be carried on with other states or foreign countries, within the definition of the court of "navigable waters of the United States" in the *Daniel Ball Case*, the language of which was subsequently quoted with approval in the recent case of *The Robert W. Parsons*, 191 U. S. 17-26, 24 Sup. Ct. 8, 48 L. Ed. 73. It is to be observed that the Leovy Case differs materially from the present case, in the fact that no freight was ever carried to market by the Red Pass Crevasse, and no commerce of any kind was conducted over it. It differs, also, in the fact that the state of Washington has not authorized by its statutes a total obstruction to navigation in the Wishkah river. It has authorized only the construction of booms so placed as to allow free passage between the boom and the opposite shore for boats or vessels, while it has declared that such boom "shall not be construed to be an obstruction to the navigation of a stream if no unreasonable delay is caused thereby." The appellant was entitled, we think, to the judgment of the court upon the question whether the boom was constructed and maintained in compliance with the state law.

The decree is reversed, and the cause is remanded to the court below for further proceedings in accordance with the views herein expressed.

GREAT NORTHERN RY. CO. v. HERRON.

(Circuit Court of Appeals, Eighth Circuit. March 13, 1905.)

No. 2,015.

1. PLEADINGS—AMENDMENT—DISCRETION OF COURT.

Federal courts have large discretion to permit the correction of defects in pleadings or process by amendment, and rulings on the subject constitute no ground for reversal unless the discretion is grossly abused.

2. SAME—DEFECTIVE ALLEGATION.

Where a complaint contains any allegation of a ground of recovery, although only inferential, it is within the discretion of the court to permit the defect to be cured by amendment.

3. SAME.

In an action against a railroad company to recover for property of plaintiff destroyed by a prairie fire alleged to have been started from defendant's train, the complaint alleged that the property, consisting of stacks of hay and a cattle shed, was all situated on a section described. *Held*, that it was an abuse of discretion to allow an amendment during the trial alleging that the shed was three-quarters of a mile from said section and from the hay, without imposing terms, by way of a continuance or otherwise, which would prevent the possibility of prejudice resulting to defendant.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 626, 653, 677.]

In Error to the Circuit Court of the United States for the District of North Dakota.

Herron recovered a judgment against the railway company for damages suffered through the burning of his hay and other property by fire claimed to have been communicated thereto through the negligence of the company. Without contradiction, the evidence established plaintiff's ownership of the property; its value; its destruction by fire in the afternoon of the day named; the location of the property at a distance of about three miles northeasterly from defendant's railroad; the presence of fire in dead grass in close proximity to the railroad, and on the north side of the track, immediately after the passage of one of defendant's trains, in the forenoon of the day named; and the existence of a wind from the southwest. The plaintiff testified that marks indicating the course of the fire showed that it approached his property from the southwest. One of plaintiff's witnesses, William Sipple, who was riding on a horse and driving some cattle in the vicinity of the railroad, and on the south side thereof, testified: "Saw a fire start in that vicinity on that day. There was a train passed there on the Great Northern while I was there. * * * Saw the fire start that day about the vicinity where I was. * * * The right of way was not burned over where the fire started at all. The breaks were plowed up, but they were not burned out there. The fire started near the railroad. I was off from the track about a quarter of a mile. It might have been ten feet from the track, or it might have been forty feet. I cannot just exactly say. They had plowed the breaks up, but I do not know how many furrows. I think the fire started inside the breaks. I saw fire immediately after the train passed. Grass was dead that season of the year. Watched the fire go northeast. * * * I saw the fire after it reached the hay meadow of the plaintiff. * * * I know it was the same fire. * * * I do not know just how high the grade is along at the point of this fire. Not very high. Not three or four feet. * * * The only means I have of judging where it started—at what particular point—was by looking over the railroad grade between me and the place where it started. * * * The land on the right of way where I was at the time I saw the fire was level. It was higher a little closer to the track. The railroad and land at the place where the fire

started was in plain view. I had been along there the day before. The land where the fire started was in plain view. * * * The right of way had been burned east of the fire on the top of the hill. It had not been burned where the fire started. I rode by a day or two before, and it was not burned. Grass was heavy and dry at point of fire when I passed the point prior to the fire. * * * At the time I saw the fire start, * * * the prairie north and east of the place where I saw the fire was covered with grass. At the time I saw this fire start near the railroad track, I could see no other fire near there." Referring to a statement which he had previously signed, saying: "I was probably a half mile or more from the fire when it started. The wind seemed to take the fire northeasterly. I do not know where it went. * * * Went near enough so I could see Herron's hay burning. * * * I did not trace the fire, but supposed it was the same fire that I saw down at the track"—the witness further said: "That is a true statement. * * * But what I meant by that there was where the fire went when it left Herron's place." Sven Svenson, a witness for plaintiff, testified that he was at plaintiff's premises on the afternoon of the day of the fire, and further: "The plaintiff's hay meadow was a little northeast of fire. The fire was burning northeast. * * * So far as I could see west and southwest, it was fire all the way along. * * * I saw the fire going in the direction of Mr. Herron's land. I went down to see where it was going. * * * At the time I started for home the fire was about forty rods from the Herron's fire break."

It is conceded that there were other fires in that general vicinity at the time, but there was evidence on behalf of plaintiff tending to show that the fire described as traveling northeasterly from the railroad was nearer to plaintiff's premises than any of the others, and was the one which destroyed his property. The brakeman and fireman on defendant's train, and the section foreman, who was one-half mile away at the time, gave testimony for defendant, which, while containing some elements of improbability, as did the testimony of the witness, Sipple, for plaintiff, tended to show that, when the train passed the point indicated by Sipple as the place where the fire started, there was a fire in the grass on the north side of the track, distant therefrom 175 to 250 feet; that this fire had originated elsewhere, and was then "back-burning" against the wind and towards the track; and that no new fire was started in that vicinity at that time. The brakeman, in answer to the question, "Was there any place left in that vicinity where the right of way was not burned off?" said, "There was dirt and grass, and one thing and another, that was not burned." The width of the right of way and the distance from the track to the north line of the right of way were not disclosed, except as indicated in the testimony of the witness Sipple.

The complaint contained these allegations of negligence on the part of defendant: "That the defendant, by reason of allowing grass and other inflammable material to exist and remain along their right of way, and by reason of their careless and negligent manner of operating said engines and trains along said railway, did permit and allow fire to escape from said engines and trains. * * * By reason of said fire being allowed and permitted to escape from said engines and trains, the property of the plaintiff herein was entirely burned and destroyed. * * * That the plaintiff has been damaged by reason of the foregoing acts," etc. There was also an allegation that the property burned and destroyed, including a cattle shed, "was located on section 36" of a designated township and range. The record shows the following rulings relating to these allegations were made during the course of the trial: "Q. Do you know what the condition of the right of way was where you saw this fire start? (Objected to by the defendant * * * because there is no averment as to the condition of the right of way in the complaint.) The Court: That there is no averment that the fire originated in any inflammable matter upon the right of way, or that that had anything to do with the destruction of your property, is a more serious defect, I should think. Mr. Burke: Of course, that probably ought to be amended, and I ask leave to amend it in that particular. They are not taken by surprise in that at all. Mr. Wellington: Now, your honor, I object to any amendment in the pleading in that particular. We are taken by surprise. We come to meet the complaint as it stands. We haven't an inspection of the engine here, or any-

thing of the kind. The Court: I think the complaint is very informal, but I will allow evidence in regard to the conditions of the right of way, and its connection with the fire. You may proceed. (Objection overruled, and exception allowed defendant.) Plaintiff moves to amend his complaint so that same will allege that the cattle shed therein referred to was located about three-quarters of a mile southeast of section 36. The defendant objected for the reason that, relying upon the allegations of the complaint, it has prepared its case and had its witnesses examine on school section 36, to determine the existence of any of said cattle sheds as alleged, and, being now taken by surprise, it is not prepared to meet the evidence in that regard. (Objection overruled, and defendant allowed an exception.)" The largest value given to the cattle shed by the evidence was \$150. At the conclusion of the evidence, defendant requested that a verdict be directed in its favor. The request was denied, but the court withdrew from the consideration of the jury the charge that the engines and trains had been carelessly and negligently operated, because not sustained by any evidence, and submitted to their consideration the charge that defendant was guilty of negligence in permitting an unreasonable accumulation of dry grass and inflammable material upon its right of way, that this material was ignited by fire which escaped from the locomotive of the train named in the evidence, and that this fire was carried by the wind to plaintiff's premises, and destroyed his property. This was excepted to by defendant.

C. J. Murphy (F. S. Duggan, on the brief), for plaintiff in error.

John Burke (D. C. Greenleaf, K. E. Leighton, and Henry G. Midgah, on the brief), for defendant in error.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

VAN DEVANTER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The statute invests the courts of the United States with large discretion in permitting the correction of defects in pleadings and process by amendment, and rulings of this character constitute no ground for reversal unless the discretion is grossly abused. Rev. St. § 954, U. S. Comp. St. 1901, p. 696; *Lange v. Union Pacific R. Co.*, 62 C. C. A. 48, 126 Fed. 338; *Rucker v. Bolles* (C. C. A.) 133 Fed. 858.

The complaint only imperfectly charged the defendant with negligence in the care of its right of way, and only inferentially charged that such negligence was a proximate cause of the destruction of the plaintiff's property; but it did contain an allegation upon the subject, and that allegation, although defective, could not reasonably have failed to apprise the defendant that the recovery sought by the plaintiff was rested upon the existence of an unreasonable accumulation of inflammable material upon the right of way, and not solely upon the negligent operation of the engines and trains. Some purpose was to be attributed to that allegation, and its only possible purpose was to charge negligence in the care of the right of way, as a proximate cause of the plaintiff's loss. Instead of introducing into the complaint a new charge of negligence, the first amendment merely corrected a defect in an existing allegation, the purpose of which was apparent, and the effect of which had been permitted to go unchallenged up to that time. As the defendant could not reasonably have been taken by surprise by the amendment, there was no abuse of discretion in its allowance.

The other amendment wrought such a change in the plaintiff's claim

that it should not have been permitted, except upon terms which would have been just to the defendant, such as a continuance of the cause, and payment by the plaintiff of the costs incident to the continuance. The complaint alleged that the cattle shed, with the other property destroyed, was located on section 36; and the defendant, acting upon this statement, caused investigation to be made to ascertain what improvements and property were on that section at the time of the fire, and prepared its defense according to the result of that investigation. If the plaintiff intended to claim damages because of the burning of a cattle shed widely separated from the other property, and located three-fourths of a mile away from section 36, the allegation in the complaint was misleading; and quite naturally the amendment took the defendant by surprise, and deprived it of an opportunity to defend against that part of the plaintiff's claim. The allowance of the amendment, without imposing any terms to prevent its working prejudicially to the defendant, was an abuse of discretion, and the error will require a reversal of the judgment unless the plaintiff shall remit therefrom a sufficient sum to make the error without possible prejudice.

In support of the contention that a verdict for the defendant should have been directed, it is said there was no substantial evidence that the fire was started in the inflammable material upon the right of way by the passing train, or that that was the fire which destroyed the plaintiff's property. As shown in the foregoing statement, the evidence respecting the origin and identity of the fire was somewhat meager, but it was almost necessarily so, because the fire occurred in a sparsely settled locality, where its origin and course might not be observed by many witnesses, and might be observed only from a considerable distance. Obviously, this did not justify the submission of the case to the jury without evidence that the origin of the fire, and its connection with the destruction of the plaintiff's property, were such as to make the defendant liable, but it did have a bearing upon the degree and character of proof which could be reasonably required of the plaintiff. We are of opinion that the evidence justified the submission of the case to the jury.

The judgment will be reversed, and the case remanded for a new trial, unless the defendant in error, by a proper remittitur in the court below, remits from the judgment \$150, the largest value given to the cattle shed by the evidence, together with a proportionate amount of any interest which may have accrued upon the judgment, and files a certified transcript of such remittitur in this court within 40 days from the filing of this opinion, in which event the judgment will be affirmed at the costs of the defendant in error.

EWING v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 20, 1905.)

No. 1,048.

1. POST OFFICE—FRAUDULENT USE OF MAILS—SCHEME TO DEFRAUD.

An indictment alleged that defendant and another devised a scheme to defraud certain persons named, "which said scheme to defraud was to be effected by opening correspondence and communication with such persons and by distributing advertisements, circulars, prospectuses and letters by means of the post-office establishment of the United States and by inciting such persons to open a correspondence through such post-office establishment, with them, the said [defendants named], concerning said scheme, which scheme was then and there as follows, to wit," etc., followed by a specification of the scheme, in which it was alleged that defendants made through the mails a number of representations, which were all false and known by them to be false, and that, in reliance upon such representations, persons named in the indictment were induced to, and did, give to defendant and his associate certain sums of money, and that, in furtherance of such scheme, a certain specified letter was placed in the mails, etc. *Held*, that the indictment was not fatally defective, in that it was not directly charged therein, and that it did not appear therefrom, that the alleged scheme to defraud included or contemplated a use of the mails or post-office establishment of the United States.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Post Office, § 72.]

2. SAME—FALSITY OF REPRESENTATIONS.

Where an indictment for misuse of the mails in furtherance of a scheme to defraud alleged that the representations made by letters, circulars, etc., sent through the mails, were utterly false and untrue in fact, and were known by defendant and his accomplice to be so, and it did not appear that defendant made any objection to the introduction of evidence on such branch of the case, he could not object for the first time on appeal that the indictment did not negative the truth of the representations alleged, on the ground that the allegations made were mere conclusions of law.

3. SAME.

The gist of the offense being the scheme to use the mails in furtherance of a purpose to defraud, and an act done to carry out the same, and not the obtaining of money by means of false representations, the indictment was not defective for failure to negative the truth of such representations.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Post Office, § 72.]

4. SAME—INTENT TO DEFRAUD.

Where an indictment for misuse of the mails charged a scheme to defraud by means of false representations to be disseminated through the mails, that the scheme was carried out, that the representations were false and fraudulent, and that thereby certain named persons were induced to part with their money and give it to defendant, it was not necessary that the indictment should also allege that the scheme was formed by defendant with intent to defraud.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Post Office, § 72.]

In Error to the District Court of the United States for the Northern District of California.

Frank McGowan and Bert Schlesinger, for plaintiff in error.

Benjamin L. McKinley and Marshall B. Woodworth, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error was convicted of a violation of the provisions of section 5480 of the Revised Statutes, as amended March 2, 1889 [U. S. Comp. St. 1901, p. 3696]. The indictment alleged that on December 31, 1900, the plaintiff in error and one George B. Chaney devised a scheme to defraud certain persons named, "which said scheme to defraud was to be effected by opening correspondence and communication with such persons and by distributing advertisements, circulars, prospectuses and letters by means of the post-office establishment of the United States and by inciting such persons to open a correspondence through such post-office establishment, with them, the said William Baer Ewing and George B. Chaney, concerning said scheme, which scheme was then and there as follows, to wit." Then follows the specification of the scheme, in which it is alleged that the defendants in the indictment made through the mails a number of representations, which were all false, and known by the defendants to be false, and that, in reliance upon said representations, persons named in the indictment were induced to, and did, give to the plaintiff in error and his associate certain sums of money; and it was further alleged that, in furtherance of the scheme to defraud, a certain letter was placed in the mails. Before the introduction of evidence in the cause, objection was made to the indictment on the ground that it was not directly charged therein, and that it did not appear therefrom, that the alleged scheme to defraud included or contemplated a use or abuse of the mails or the post-office establishment of the United States. The same objection is now urged in this court.

The essential averments of an indictment under the statute are pointed out in *Stokes v. United States*, 157 U. S. 187, 15 Sup. Ct. 617, 39 L. Ed. 667, where it was said that three matters of fact must be charged therein and established by the evidence:

"(1) That the persons charged must have devised a scheme or artifice to defraud. (2) That they must have intended to effect this scheme by opening or intending to open correspondence with some other persons through the post-office establishment, or by inciting such other person to open communication with them. (3) And that, in carrying out such scheme, such person must have either deposited a letter or packet in the post office, or taken or received one therefrom."

Counsel for the plaintiff in error cite and rely upon that case in support of their contention that the indictment in this case is defective. The statute thus defines the offense:

"If any person having devised or intending to devise any scheme or artifice to defraud * * * to be effected by either opening or intending to open correspondence or communication with any person whether resident within or outside the United States by means of the post office establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice or attempting so to do, place or cause to be placed any letter," etc.

In the *Stokes Case* the indictment, after setting forth the nature of the scheme, proceeded to allege "that the post-office establishment of the United States was to be used for the purpose of executing such scheme and artifice to defraud, as aforesaid, pursuant to said conspiracy, by opening correspondence * * * by means of the post-office estab-

lishment of the United States." The indictment in that case was sustained by the court. It is attempted to distinguish the present case from that by pointing out the fact that it is alleged in the indictment herein that the fraudulent scheme "was to be effected" by the use of the post-office establishment of the United States, and it is said that there is absence of averment that such use was designed or intended as part of the scheme. We find no merit in this contention. There is no substantial difference in the language of the indictment in this case from that of the indictment in the Stokes Case. The averment that the fraudulent scheme of the plaintiff in error was to be effected by the use of the post-office establishment is a distinct averment that it was a part of the scheme; that it had its inception when the scheme was formed, and was within the original contemplation thereof. This is all that is required of the pleader. It is enough if it appear that the use of the mails was intended as an essential part of the scheme, and not a mere possibility or an adjunct or an incident thereto. The plaintiff in error cites, also, *United States v. Smith* (D. C.) 45 Fed. 561; *United States v. Harris* (D. C.) 68 Fed. 347; and *United States v. Long* (D. C.) 68 Fed. 348. In the first of these cases the indictment set forth particularly the scheme to defraud, and the means adopted to accomplish that end, and then proceeded to allege that the defendant, "having theretofore devised as aforesaid the aforesaid scheme to defraud to be effected by opening correspondence * * * by means of the post-office establishment of the United States, and by inciting * * * to open communication with him, did, in and for executing said scheme and in attempting so to do, deposit in the post office * * * a certain letter." The court, while admitting that it is no objection to charge the design to open correspondence through the mails in the very words of the statute, without further expansion, held that the pleading was defective in not charging directly that the scheme embraced the design to use the mails; the statement being made merely by way of recital. In *United States v. Harris* the indictment was properly held defective for the reason that it contained no direct allegation that the fraudulent scheme included the use of the post-office establishment of the United States in its aid or furtherance. It alleged only that in pursuance of the scheme the defendants placed and caused to be placed in the United States post office the letter set out in the indictment, and that the letter so deposited was to further and effect the object of the conspiracy, which was alleged to be "to misuse the post-office establishment of the United States by devising a scheme to defraud." In *United States v. Long* the defendant was charged with having devised a scheme to defraud one J. W. Strickler, "to be effected by opening correspondence and communication with said Strickler by means of the post-office establishment of the United States." The court said that this "seems to be more in the nature of a recital than a positive allegation," but that "the more serious objection remains that the indictment fails to allege that it was the defendant's intention, as a part of his fraudulent scheme, to open correspondence through the mail." "Nor," said the court, "is it any answer to this objection to say that the language of the indictment is the same as that employed in the act of Congress creating the offense." The decision of the learned judge

in that case is not, we think, sustained by the authorities. In *United States v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516, it was held that the offense defined in section 5480 may be described in the general language of the act, although the description, it was said, must be accompanied by a statement of all the particulars essential to constitute the offense, and to acquaint the accused with what he must meet on the trial. The indictment in that case alleged that the defendant, "having theretofore devised a scheme to defraud divers other persons to the jurors aforesaid as yet unknown," which said scheme he "intended to effect by inciting such other persons to open communication with him * * * by means of the post-office establishment of the United States." The court adjudged this averment to be sufficient, but held that the indictment was defective for want of specification of other particulars of the alleged scheme. It may be observed further that the form of the indictment in the present case, in the particular referred to, is substantially the form used in the indictments which were sustained in *Culp v. United States*, 82 Fed. 990, 27 C. C. A. 294; *Hume v. United States*, 118 Fed. 689, 55 C. C. A. 407; *O'Hara v. United States*, 129 Fed. 553, 64 C. C. A. 81; *Kellogg v. United States*, 126 Fed. 323, 61 C. C. A. 229; and *Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709.

It is contended that the indictment is fatally defective, in that it fails to negative the truth of the representations alleged to have been made. The indictment alleges that the representations were utterly false and untrue in fact, "and were well known by the said William Baer Ewing and George B. Chaney to be utterly false and untrue in fact." This, it is said, is a mere statement of a conclusion of law, and is not sufficient. This objection to the indictment was not presented to the court below, nor is it included in the assignments of error. The testimony upon that branch of the case not having been presented here, it must be presumed to have been introduced without objection on the part of the plaintiff in error. He should not be permitted to escape the just penalty of the law through defects of form, if such defects there were, which could not have prejudiced him. These considerations alone are sufficient to dispose of such an objection made for the first time in an appellate court. But we find no defect in the indictment in the respect specified. It is true, and counsel present authorities which so hold, that, in drawing an indictment for an offense, the substance of which is matter falsely sworn to, or fraud perpetrated by means of matter falsely represented, it is necessary to allege not only that such matter was false, but the pleader must go further, and allege the truth as it is in the facts. But here the gist of the offense is not the obtaining of money by means of false representations. It is a scheme to use the mails of the United States in furtherance of a purpose to defraud, and an act done to carry out the same. It was such use of the mails that the statute was intended to prevent. The fraud contemplated by the law need not necessarily be a fraud at common law or by statute. Said Mr. Justice Brewer in *Durland v. United States*, 161 U. S. 315, 16 Sup. Ct. 512, 40 L. Ed. 709:

"It is enough if, having devised a scheme to defraud, the defendant, with a view of executing it, deposits in the post office letters which he thinks may

assist in carrying it into effect, although, in the judgment of the jury, they may be absolutely ineffective therefor."

It is urged that the indictment is fatally defective for want of averment that the plaintiff in error intended to defraud any one. The indictment charges that the false representations were made "solely for the purpose of obtaining money, goods, and property of the said persons whom they might induce to enter into correspondence with them," and further alleges that, "by reason thereof, certain persons named were induced to, and did, give to the plaintiff in error and his associate certain money." But it is urged that there was no allegation of an intent on the part of the plaintiff in error to convert the money so obtained to his own use. Such an allegation was unnecessary. The indictment charged a scheme to defraud by means of false representations to be disseminated through the mails, that the scheme was carried out, that the representations were false and fraudulent, and that thereby certain named persons were induced to part with their money and give it to the plaintiff in error. The indictment thus charged all the essential elements of an offense under the statute. *United States v. Bernard* (C. C.) 84 Fed. 634; *Kellogg v. United States*, 126 Fed. 325, 61 C. C. A. 229.

We find no error for which the judgment should be reversed. The judgment is affirmed.

MURRAY v. CITY OF ALLEGHENY.

(Circuit Court of Appeals, Third Circuit. October 4, 1904.)

No. 5.

1. MUNICIPAL CORPORATIONS—POWER TO CONVEY PUBLIC GROUNDS—INJUNCTION.

A municipal corporation has no implied power or authority to convey away for private purposes property dedicated to or held by it for the public use, such as ground, lying between lots fronting on a navigable river and low water-mark, dedicated by the original plat by which the lots were sold as a public highway to give lot owners and the public access to the water front, and at suit of a lot owner a court of equity will enjoin such conveyance, when not expressly authorized by statute.

2. SAME—GRANT FOR PUBLIC USE—RAILWAY TRACKS ON WHARF.

A grant by a city to a railroad company of the right to lay its tracks to and upon a public wharf is for a public use, and within the city's power.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1532.]

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

M. A. Woodward, for appellant.

Stephen G. Porter, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and KIRKPATRICK, District Judge.

ACHESON, Circuit Judge. Victoria Murray, a citizen of the state of Maryland, and the owner in fee simple of a lot of ground in the

city of Allegheny, Pa., abutting on River avenue (formerly Bank lane), brought this bill in equity to restrain the alienation by said city of certain land pursuant to an ordinance then pending in the city councils and about to be passed. The ordinance contained a proposed article of agreement which the mayor, by the terms of the ordinance, was authorized and directed to execute, in behalf of the city, with the Pittsburgh & Western Railway Company, a corporation, and its receiver, Thomas M. King (designated "the parties of the first part"), whereby, in consideration of the payment by the railway company of certain specified sums toward the cost of the improvement of South avenue and River avenue, on which property of the railway company abuts, the city of Allegheny agreed to "execute and deliver to the parties of the first part, their successors and assigns, a quit claim deed conveying and releasing unto the said parties of the first part, all its right, title and interest, of in and to all that land commonly known as the 'old inner channel' between the south line of Bank Lane or South Avenue, and the north side of Smoky or Killbuck Island; and that it will not at any time hereafter, in any way or by any means, question or dispute the title of the parties of the first part thereto." By the proposed agreement the city was also to grant to the said railway company the right to lay additional track upon the Allegheny wharf from Darrah street to Herr's Island Bridge.

The Pennsylvania act of assembly of September 11, 1787 (2 Smith's Laws, p. 414), authorized the president or vice president in council to cause to be laid out and surveyed a town, in lots and outlots, upon a tract of 3,000 acres, reserved to the use of the state in and by the act of March 12, 1783, and described in those acts as "an oblong of not less than one mile in depth from the Allegheny and Ohio Rivers and extending up and down said rivers from opposite Fort Pitt so far as may be necessary to include the same"; and the act of September 11, 1787, declared that "the streets, lanes and alleys of the said town and outlots shall be common highways forever." Accordingly, a plan of a town of lots and outlots was laid out upon said reserved tract along and upon the Allegheny and Ohio rivers, and was named "Allegheny," and the plan was duly placed upon record in the Surveyor General's office of the commonwealth. Subsequently the commonwealth sold these lots and outlots in accordance with this plan.

The master's report in the present case contains the following finding of fact, which the evidence fully sustains:

"(3) That along the banks of the Ohio and Allegheny rivers a highway was laid out, as shown upon said plan, for the lots named by the said council as river lots, and for the lots in said plan and for public use, and for public access to the said rivers, and this highway extended in width from the abutting lots to the rivers at low-water mark, and was named by said council 'Bank Lane.' And the establishment of the said Bank lane was to give, and did give, the rights of access and river privilege and wharfage to the said river lots, and to the said town and to the public."

No defined width was given to Bank lane by said plan. As shown by the plan, the south line of the river lots is the north line of Bank lane, and the latter widens and extends laterally to the rivers.

By the act of April 14, 1828 (P. L. 368), it was enacted "that Allegheny town, in the county of Allegheny, shall be, and the same is hereby, erected into a borough, which shall be called Allegheny, and shall be comprised within the following boundaries": and then follow the courses and distances of the boundary lines, which on the river side of the described survey run up the middle of the Ohio river and the middle of the Allegheny river. These borough boundaries, including those to the middle of the rivers Ohio and Allegheny, were again declared and confirmed by the act of April 14, 1838 (P. L. 458).

By the act of April 13, 1840 (P. L. 310), the borough of Allegheny became the city of Allegheny, the twentieth section enacting "that all property and estate whatever, real and personal, of the borough of Allegheny, are hereby vested in the corporation or body politic of the city of Allegheny, and their successors in and by this act established by the name, style and title aforesaid, to and for the use and benefit of said citizens, forever."

It appears from the evidence in this case that when the town of Allegheny was laid out, and thereafter until about the year 1840, there was an island known as Killbuck or Smoky Island in the Ohio river, with its upper end extending to or into the mouth of the Allegheny river. As shown by the original plan of the town, this island was surrounded by the waters of the Allegheny and Ohio rivers, and was separated from Bank lane by a channel in which part of the river ran, although the main channel of the rivers was on the other or southern side of said island. The site of this island is within the statutory boundaries of the borough of Allegheny and city of Allegheny.

On the 28th of April, 1873 (P. L. 860), the Legislature passed "an act to perfect the title to Killbuck Island," and "authorizing and directing the Surveyor General to issue a patent therefor." Accordingly, a patent was issued to the persons named in the act. These patentees, and others claiming under them, brought an action of ejectment against the city of Allegheny for the land embraced in this act and patent issued under it. There was a verdict for the plaintiffs in that action, and judgment in their favor was given on the verdict, but the recovery was limited to the natural low-water line of the island on its north side (that is, on the side next to the mainland) as the island was in 1806. *Allegheny City v. Moorehead et al.*, 80 Pa. 118.

The decision in *Allegheny City v. Moorehead et al.*, *supra*, related exclusively to the title to Killbuck Island as it was defined by the verdict of the jury, and did not determine the question of title to the soil lying between the natural low-water line of the island on its north side as it was in 1806 and the mainland. In delivering the opinion of the Supreme Court, Chief Justice Agnew, in stating the issue involved in the action, said, "The title to Killbuck or Smoky Island was therefore the only question." 80 Pa. 137. And again he said, "There was no question of public easement or right of navigation involved in the trial below." 80 Pa. 140. In referring to that adjudication, the master in this case, we think, was quite right in saying, "No express decision, however, is made as to the effect of

the act of Assembly of Pennsylvania approved April 13, 1840, on the title to or right of the city in the soil under the old channel."

It appears from the master's report, and otherwise, that at the particular locality with which we are here concerned the city of Allegheny by municipal action gave to Bank lane the new name of "South Avenue," and laid out and opened it at the width of 60 feet, measuring from the south line of the river lots. Now, as we have seen, the city proposes to quitclaim "all that land commonly known as the 'old inner channel' between the south line of Bank Lane or South Avenue and the north side of Smoky or Killbuck island." This description, it seems to us, was intended to embrace, and does embrace, all the land between the south line of South avenue as located and fixed by the city and the north side of Killbuck Island. The words "commonly known as the 'old inner channel'" do not limit the scope of the grant. In our judgment, the proposed quitclaim would be clearly hostile to and in derogation of the rights of access to the rivers across Bank lane, and to the riparian easements recited by the master in his third finding, which were secured to lot owners and to the public by the establishment of Bank lane in and by the original plan of the town of Allegheny. The obvious purpose of the threatened quitclaim is to extinguish those rights and easements at the locus in quo.

We do not deem it necessary to discuss or to express an opinion upon the question whether the legal title to the soil of the old inner channel is still in the state, or became vested in the municipal corporation for public uses. The city assumes to have title thereto, and proposes to execute a quitclaim deed conveying the same, with the extraordinary covenant "that it will not at any time hereafter, in any way, or by any means, question or dispute the title of the parties of the first part thereto" (its grantees). Any suggestion that the proposed quitclaim deed will not or may not operate to convey a good legal title to the soil of the old inner channel is quite immaterial here.

As respects the proposed quitclaim, this case, we think, falls within the well-settled rule of law that a municipal corporation has no implied power or authority to convey away for private purposes property dedicated to or held by it for the public use. *Commonwealth v. Rush*, 14 Pa. 186, 196; *Dillon on Mun. Corps.* § 512 (2d Ed.), and § 650 (4th Ed.); *Roberts v. City of Louisville*, 92 Ky. 95, 17 S. W. 216, 13 L. R. A. 844. The city of Allegheny has no express legislative authority to make the conveyance in question. What is here proposed, it will be perceived, is an out and out conveyance in fee by the city to the railway company. Such an absolute conveyance of the land described in the recited ordinance and draft of the proposed article of agreement would be an abuse of municipal discretion and a breach of trust duty which a court of equity will restrain by injunction.

We think it clear under the authorities that the appellant complainant, as the owner of a lot of ground in the city of Allegheny, has the right to invoke the interposition of a court of equity to prevent the threatened illegal conveyance of the property in question. *Pitts-*

burgh's Appeal, 79 Pa. 317, 324; Crampton v. Zabriskie, 101 U. S. 601, 609, 25 L. Ed. 1070.

The proposed grant by the city to the railway company of the right to lay an additional railroad track upon and along the Allegheny Wharf from Darrah street to Herr's Island Bridge presents an entirely different question from the one we have considered above. In respect to this matter, the complainant appellant has not shown any ground for relief. The proposed use of the railway company of the wharf for transportation purposes is a public use, and the grant of such right of way is within the authority conferred on the councils of the city of Allegheny.

The decree of the Circuit Court dismissing the bill of complaint is reversed, and the cause is remanded to that court with direction to enter a decree in favor of the complainant restraining and enjoining the defendant, the city of Allegheny, from conveying or releasing to the said railway company, by deed or other instrument in writing, the title of the said city to the property described in the recited ordinance and in the bill, with costs to the complainant.

KERR v. SHINE, United States Marshal.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1905.)

No. 1,104.

CRIMINAL LAW—VENUE—OFFENSES COMMITTED ON THE HIGH SEAS—APPREHENSION.

Under Rev. St. § 730 [U. S. Comp. St. 1901, p. 585], providing that the trial of all offenses committed upon the high seas shall be in the district where the offender is found or into which he is first brought, an offender is to be tried in the district where he is apprehended, unless he is taken into custody while at sea, in which case he is to be tried in the district into which he is first brought. But to be "brought" into a district, within the meaning of the statute, one must be first apprehended, and it is not enough that he merely "arrive" in the district. Thus, where an offense was committed on the high seas, and the offender was not taken into custody until he was found and apprehended in one of the districts of California, he must be tried in that district, although the vessel on which the offense was committed had previously touched at Hawaii, and a complaint was filed and a warrant of arrest—which was returned unexecuted because of the offender's departure from the District of Hawaii before its attempted service—was issued there.

Appeal from the Circuit Court of the United States for the Northern District of California.

On June 5, 1904, a complaint was filed by F. Ramos before a United States commissioner for the District of Hawaii, charging John Kerr, the appellant herein, with having assaulted and beaten the complainant on May 19, 1904, on board the United States army transport Buford, on the high seas, within the admiralty and maritime jurisdiction of the United States, to wit, on the Pacific Ocean, and alleging that said appellant was an officer on said army transport, and a member of the crew thereof, and that said "District of Hawaii is the first district and jurisdiction into which said vessel has come since said 19th day of May, 1904." Thereupon said commissioner issued a warrant of arrest directing the United States marshal for the District of Hawaii to arrest the appellant. The marshal returned the warrant unexecuted, stating in his return that he could not find the appellant, who, he

alleged on information, had departed from the District of Hawaii on June 4, 1904, the day before the filing of the complaint. On June 29, 1904, Benjamin L. McKinley, Assistant United States Attorney for the Northern District of California, filed a complaint before a United States commissioner for that district, alleging the assault as stated in the complaint of said Ramos, and stating further that said District of Hawaii was the first district and jurisdiction into which said vessel had come since said assault; that a complaint had been filed in said District of Hawaii as above stated, but that the appellant had fled from the District of Hawaii, and was now at large in the Northern District of California. A warrant was thereupon issued by the commissioner, and the appellant was arrested thereon, and upon a hearing had before said commissioner on June 29, 1904, he was held to answer on said charge before the United States District Court for the District of Hawaii. On July 1, 1904, said Assistant United States Attorney moved the District Judge for the Northern District of California for a warrant of removal of the appellant to the District of Hawaii on said charge. The motion was opposed by the appellant. The District Judge ordered the issuance of the warrant of removal directed to the United States marshal, the appellee herein. Thereafter, on July 2, 1904, the appellant presented to the Circuit Court of the United States for the Northern District of California his petition for a writ of habeas corpus, directed to the appellee, also a petition for a writ of certiorari. In his petitions he stated the facts which have been above set forth, and further alleged that the order of removal was not warranted by law, because the District Court of Hawaii had no jurisdiction to try said charge, that the proper trial court was the District Court for the Northern District of California. The writs were issued, and upon the hearing the Circuit Court made its order discharging both writs, holding that the appellant was not illegally restrained of his liberty. From that judgment the present appeal is taken.

William P. Humphreys, for appellant.

Benjamin L. McKinley, C. M. Fickert, and Marshall B. Woodworth, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The question presented on the appeal is whether the District Court of Hawaii acquired jurisdiction over the person of the appellant to try him for the alleged offense. The alleged offense was committed on an American vessel on the high seas. The appellant was not placed in custody on the vessel, nor was he brought into the District of Hawaii in the custody of any person or officer. Section 730 of the Revised Statutes [U. S. Comp. St. 1901, p. 585] provides:

"The trial of all offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, shall be in the district where the offender is found, or into which he is first brought."

The first statute on this subject is in the crimes act of April 30, 1790 (1 Stat. 113, c. 9). The latter portion of section 8, c. 9, reads as follows:

"The trial of crimes committed on the high seas or in any place out of the jurisdiction of any particular state shall be in the district where the offender is apprehended or into which he may first be brought."

The act of May 15, 1820 (3 Stat. 600, c. 113, § 3), provides for the punishment of robbery on the high seas, and declares that a person

guilty of the acts defined "shall be adjudged a pirate and on conviction thereof before the Circuit Court of the United States for the district into which he shall be brought or in which he shall be found, shall suffer death." The act of March 3, 1825 (4 Stat. 118, c. 65, § 14), provides:

"And the trial of all offenses which shall be committed on the high seas, or elsewhere, out of the limits of any state or district, shall be in the district where the offender is apprehended, or into which he may be first brought."

The act of March 3, 1847 (9 Stat. 175, c. 51), provides for the conviction and punishment of persons guilty of piracy taken on the sea "before any Circuit Court of the United States for the district into which such person may be brought or shall be found." Undoubtedly the word "found" in section 730 of the Revised Statutes, and in the act of 1847 is used in the same sense with the word "apprehended," which is found in the crimes act of 1790, and in the act of 1825. The question, then, is, was the appellant "brought" into the District of Hawaii? The appellee contends that the appellant was carried into that district on the army transport, and was therefore brought there within the meaning of the statute. He cites and relies upon *United States v. Thompson*, 1 Sumn. 168, Fed. Cas. No. 16,492. In that case the defendant was charged with having committed an offense on the high seas against the crimes act of 1790. His ship arrived from her voyage first at Stonington, Conn., and thence sailed to New Bedford. The defendant was arrested at the latter place, and committed for trial. It was contended that the indictment ought to have been found in Connecticut, where the ship first arrived. Judge Story, without discussing the meaning of the word "brought," held that the provision of the crimes act is in the alternative, and that, therefore, the crime was cognizable in either district; and he observed that:

"There is wisdom in the provision, for otherwise, if a ship should by stress of weather be driven to take shelter temporarily in any port of the Union, however distant from her home port, the master and all the crew, as well as the ship, might be detained, and the trial be had far from the port to which she belonged, or to which she was destined. And if the offender should escape into another district, or voluntarily depart from that into which he was first brought, he would, upon an arrest, be necessarily required to be sent back for trial to the latter. Now, there is no peculiar propriety as to crimes committed on the high seas, in assigning one district rather than another for the place of trial, except what arises from general convenience; and the present alternative provision is well adapted to this purpose."

That case was decided in 1832. But in *The United States v. Bird*, 1 Spr. 299, Fed. Cas. No. 14,597, Judge Sprague in a similar case, said:

"By being brought within a district is not meant merely being conveyed thither by the ship in which the offender may first arrive, but the statute contemplates two classes of cases—one in which the offender shall have been apprehended without the limits of the United States, and brought in custody into some judicial district; the other, in which he shall not have been so apprehended and brought, but shall have been first taken into legal custody after his arrival within some district of the United States—and provides in what district each of these classes shall be tried. It does not contemplate that the government shall have the election in which of two districts to proceed to trial. It is true that in *United States v. Thompson*, 1 Sumn. 168, Fed. Cas. No. 16,492, Judge Story seems to think that a prisoner might be tried either in the district where he is apprehended or in the district into which he was first brought. But the objection in that case did not call for

any careful consideration of the meaning of the word 'brought,' as used in the statute; nor does he discuss the question whether the accused, having come in his own ship, satisfies that requisition. In that case the party had not been apprehended abroad, and the decision was clearly right, as the first arrest was in the District of Massachusetts."

In *United States v. Baker*, 5 Blatchf. 6, Fed. Cas. No. 14,501, a case which was tried before Mr. Justice Nelson and Judge Shipman, the defendants had been captured by an armed vessel of the United States off Charleston, S. C., for an offense committed on the high seas. The ship on which they were placed after their capture was destined for Hampton Roads. The prisoners were carried to that port, and after some two days' delay were transferred to another vessel, and taken to the port of New York, where they were arrested by the civil authorities. It was insisted on behalf of the prisoners that, inasmuch as they were first taken into Hampton Roads, the jurisdiction attached to the Eastern District of Virginia. Mr. Justice Nelson, in charging the jury, said:

"The court is inclined to think that the circumstances under which the Minnesota was taken to Hampton Roads, in connection with the original order by the commander that the prisoners should be sent to this district for trial, do not make out a bringing into that district within the meaning of the statute. But we are not disposed to place the decision on this ground. The court is of opinion that the clause conferring jurisdiction is in the alternative, and that jurisdiction may be exercised either in the district into which the prisoners were first brought, or in that in which they were apprehended under lawful authority for trial for the offense."

In that case, as in *United States v. Thompson*, there was no discussion of the meaning of the word "brought." The case of the *United States v. Arwo*, 19 Wall. 486, 22 L. Ed. 67, cited on behalf of both the appellant and the appellee, affords little, if any, light upon the question involved. Arwo was indicted in the Southern District of New York. He pleaded to the jurisdiction, alleging that immediately upon the commission of the offense he had been placed in irons on board the ship for custody, and was so kept until the vessel reached her anchorage in the Eastern District of New York. He was thence taken by harbor police officers to the city of New York, where he was delivered over to the United States marshal for the Southern District upon a warrant for his arrest issued to that officer. The question of the jurisdiction of the Circuit Court for the Southern District of New York, together with other questions, was certified to the Supreme Court. The Supreme Court, without discussing the propositions involved, or answering the other questions, expressed the opinion that the Circuit Court for the Southern District of New York had jurisdiction. The decision of the court in so ruling seems to have been controlled by the provisions of the act of February 25, 1865 (13 Stat. 438, c. 54), establishing the Eastern District of New York, giving it jurisdiction over the waters of the counties of Queens, Kings, and Suffolk, and providing that its jurisdiction as to "all matters made or done on such waters" should be concurrent with that of the court of the Southern District.

In *Ex parte Bollman*, 4 Cranch, 75, 136, 2 L. Ed. 554, Chief Justice Marshall expressed his understanding of the purport of the act of 1790 by saying that the statute "is understood to apply only to offenses com-

mitted on the high seas, or in any river, haven, basin, or bay not within the jurisdiction of any particular state. In those cases there is no court which has particular cognizance of the crime, and therefore the place in which the criminal shall be apprehended, or, if he be apprehended where no court has exclusive jurisdiction, that to which he shall be first brought, is substituted for the place in which the offense was committed." It may be urged against the force of this utterance of the court that the case did not call for an interpretation of the act, the offense having been committed not on the high seas, but in a territory of the United States; but, if the remarks of the learned chief justice are obiter, they furnish nevertheless an instructive exposition of the act as it was understood by the court at that early date, and they embody what we conceive to be its true meaning. In brief, the offender is to be tried in the district where he is apprehended; but, if he be taken into custody where no court has jurisdiction, he shall be tried in the district into which he is first brought. An offender on the high seas may be taken into custody while he is still at sea. Thus, for example, the act of March 3, 1819 (3 Stat. 532, c. 101; Rev. St. § 5560 [U. S. Comp. St. 1901, p. 3735]), gives authority to the commander of armed vessels of the United States to cause to be apprehended and taken in custody on the high seas all persons on board of vessels engaged in the slave trade. It could properly be said of a person so apprehended and brought to the United States that he was "brought" into a district within the meaning of the statute. It is not reasonable to suppose that Congress would have used the word "brought" in the various statutes above mentioned if its intention had been to grant jurisdiction of such offenses to the court of the first district into which, after the commission of the offense, the offender might arrive. He might arrive otherwise than upon the ship upon which he was at the time of the commission of the offense. He might arrive by other conveyance—as, for instance, in a rowboat propelled by himself, or in a sailboat sailed by himself. In such a case it could not be said that he was "brought." The appellant was an assistant engineer and an officer of the army transport, and as such came with his vessel into the District of Hawaii. It is more accurate to say that he brought the ship than that the ship brought him.

Again, if it be true, as suggested by Mr. Justice Nelson in the Baker Case and by Mr. Justice Story in the Thompson Case, that the clause conferring jurisdiction is in the alternative, and that jurisdiction may be exercised either in the district into which the offender is first brought or in that in which he is found, it would seem clear that the court acquiring jurisdiction of the offender by legal process would be the court possessed of jurisdiction to try him. The appellant was not in the District of Hawaii when the first complaint was filed there before the commissioner. He was not found in that district. He was apprehended in the Northern District of California. In that district jurisdiction over his person was first acquired, and there, it is our opinion, is the district in which he must be tried.

The judgment of the Circuit Court is reversed, and the appellant will be relegated for further proceedings to the commissioner's court in which the complaint was filed in the Northern District of California.

SANTA FE PAC. R. CO. v. HOLMES.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1905.)

No. 1,084.

1. MASTER AND SERVANT—INJURIES TO SERVANT—RAILROADS—TRAIN DISPATCHERS—NEGLIGENCE.

In an action for injuries to a railroad engineer in a collision between two trains approaching each other, evidence held to sustain a finding of negligence of the train dispatcher in failing for 10 or 12 minutes to issue orders to one of the trains with reference to the passing, after he became aware that one of them had passed a station 2 minutes ahead of the time on which it was running, in violation of the orders, the probable effect of which was the collision which occurred.

2. SAME—VICE PRINCIPAL.

A train dispatcher is a vice principal, and not a fellow servant, of an engineer of a train running under his orders.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 495.

Who are fellow servants, see notes to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Flippin v. Kimball, 31 C. C. A. 286.]

In Error to the Circuit Court of the United States for the Southern District of California.

The defendant in error brought an action to recover damages for personal injuries sustained while he was in the employment of the plaintiff in error as locomotive engineer in a head-on collision between a limited passenger train west bound, known as "Train No. 3," and a passenger train east bound, known as "Train No. 4," on which the defendant in error was on duty as an engineer. He claimed that the collision and his injuries were caused by the negligence of a train dispatcher of the plaintiff in error. The train dispatching office was at Needles, and its jurisdiction extended eastward from Needles to Seligman, Ariz., as well as over the division westward from Needles. The office was in charge of two chief dispatchers and six assistants, three of the latter being assigned to each division. Assistant dispatcher E. L. Moore was on duty and in charge of the work on the Arizona division, at and before the time of the collision. On November 20, 1901, at 4:22 o'clock in the morning, train No. 3, west bound, and about two hours late, was at Kingman, and train No. 4, east bound, and about twenty-two minutes late, was at Needles. Both trains were run on regular schedule or time cards when on time or but slightly delayed. On account of the unusual delay of train No. 3 on that morning, it became necessary to issue special orders for the operation of both trains over the Arizona division. At 4:12 a. m. Train Dispatcher Moore promulgated a special order No. 22 in words as follows: "No. 3 eng. 482 has right of track over No. 4 eng. 444 & 450 to Needles but will run 1 (one) hour & 50 mins. late Kingman to Needles." Copies of this order were sent to Kingman and Needles, and were delivered to train No. 4 before 4:22 a. m., and to train No. 3 upon her arrival at Kingman at 4:21 or 4:22. At 4:22 train No. 4 departed from Needles, and ran east to Mellen, a distance of 11.9 miles, arriving there some time between 4:42 and 4:45, and stopped there upon a signal that there were orders to be delivered to it. At 4:21, it being apparent that No. 3 was more delayed in arriving at Kingman than had been expected, Train Dispatcher Moore promulgated special order No. 23, as follows: "No. 3 eng. 482 will run two (2) hours late Kingman to Needles." Copies of this order were sent to Kingman and were delivered to No. 3 at the same time that order No. 22 was delivered to Train No. 4 on its arrival at Mellen. The effect of these orders, when taken with the general rules of the company, was that No. 3 was to be run in accordance with the time card, except that it was to run two hours behind the scheduled time, and was to have the right of track over the other train, and train No. 4 was

to look out for No. 3, and run with reference to its movement, as provided for by the special orders in connection with the time-table. These orders and the time-table would have made Franconia the probable place of passing of the trains. The crew of No. 4 left Mellen with the intention of running to Franconia, and there going upon the siding. Train No. 3 left Kingman at 4:31, six minutes late, according to its schedule as provided by the special order No. 23 and the time card. Yucca, which was 23.9 miles west of Kingman and 12.8 miles east of Franconia, was the only night telegraph office between those two points. Train No. 3, according to the special order No. 23 and the time card, should have passed Yucca at 4:57. It passed there at 4:55, or two minutes ahead of its schedule time. At 4:58 or 4:59 the local telegraph operator at Yucca reported to the train dispatcher Moore that No. 3 passed Yucca at 4:55. Train No. 4 left Mellen, which was the only night telegraph office between Needles and Franconia, between 4:45 and 4:47, and ran 6.8 miles to Powell, arriving there at 5 o'clock. A stop of three or four minutes was made there for the purpose of adjusting the flow of fuel oil in one of the locomotives, and the train then proceeded toward Franconia. In the meantime Train No. 3 arrived at Franconia six minutes ahead of the schedule time under the special order for leaving that station. The engineer, on approaching that station, whistled his signal to inquire if there were any orders there for his train, and received by semaphore signal from the operator the reply, "No orders from the train dispatcher." He went on his way without stopping at Franconia, and while going at a speed of from 60 to 70 miles an hour, at about $1\frac{1}{4}$ miles from Franconia, collided with train No. 4, which was running at a speed of from 40 to 50 miles an hour. Both trains were wrecked, a number of persons were killed, and several others, including the defendant in error, sustained serious injuries. The operator at Franconia had no orders that morning for either No. 3 or No. 4. The defendant in error, but for the collision, could have reached and placed train No. 4 on the siding at Franconia station two or three minutes before train No. 3 was due there. The plaintiff in error's rule No. 385 only requires the train not having the right of track to take a siding and be clear of the main track before the leaving time of the opposing train. The plaintiff in error answered the complaint, denying that it was negligent, and alleging that the injuries received by the defendant in error were the result of his own negligence and carelessness and that of his fellow servants and co-employés. The case, by the stipulation of the parties, was tried before the court without a jury, and the court found that the train dispatcher Moore was negligent in failing to use ordinary and reasonable care and precaution to prevent said engines and trains from colliding and in failing to give proper orders as to the movements of one of said engines and trains. Judgment was entered for the defendant in error in the sum of \$9,000, with costs.

T. J. Norton, E. E. Millikin, and J. Wade McDonald, for plaintiff in error.

Waters & Wylie, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is the contention of the plaintiff in error that the orders given by the train dispatcher, together with the regular time schedules and the rules and regulations of the company, known and understood by the crews of both trains, were sufficient, if observed, to have insured the safety of all concerned, and that the accident was the result of the failure of train No. 3 to observe said time schedule and rules and regulations in connection with the special orders, in that it passed Yucca two minutes ahead of time, and Franconia six minutes ahead of time; that there was no evidence to go to the jury tending to show

negligence on the part of the plaintiff in error; and that its motion for nonsuit should have been granted by the court. It is argued that, although the train dispatcher was advised that train No. 3 had passed Yucca two minutes ahead of its passing time for that station, the circumstances did not make it his duty to send additional orders to that train, he having previously promulgated orders sufficient to have insured the safe operation of both trains had such orders been obeyed, and that, having once given proper and sufficient orders in the premises, the duty of the master to the employé had been fulfilled; and, further, that the violation of the orders by the conductor and engineer of train No. 3 was an act, not of the plaintiff in error, but of the fellow servants of the defendant in error, for which the former is not liable. It is assigned as error that the trial court erred in holding that it was the imperative duty of the railroad company to have attempted to enforce obedience to order No. 23 by ordering train No. 3 to stop at Franconia. The finding of fact of the trial court must stand as the verdict of a jury if there was any evidence whatever to sustain them. We cannot say, on examining the evidence in the bill of exceptions, that there was no evidence of negligence on the part of the plaintiff in error. The trial court found that "train No. 3, which should have passed Yucca at 4:57, did so at 4:55, and that Train Dispatcher Moore was notified of that fact in time to have stopped said train at Franconia," and was of the opinion that in failing to so act he was negligent. Under the circumstances it would seem that ordinary prudence required of the train dispatcher that he fix a point of meeting of the trains; but, whatever may have been his duty in that regard, we think there was evidence of his negligence in the fact that, after he was advised that train No. 3 passed Yucca two minutes ahead of its time, and was running in violation of his orders, he failed to send orders to have that train stopped at Franconia. He had 12 or 13 minutes within which to make that order. He knew that No. 3 was running in advance of its schedule time, whether because of willful violation of the rules and orders or because on the downgrade track by these stations it had become uncontrollable, or because the engineer's watch was running slow; and he must have known that, if such violation of orders continued, there would probably be a collision. The engineer of train No. 3 testified that according to his watch he left both Yucca and Franconia on schedule time, and according to the orders. It may be that the error of the train dispatcher in not sending special orders to Franconia was induced by his own negligent entries on his train sheet, a record which he kept of the progress by hour and minute of both of the trains. On that train sheet it appears that he had marked "5:45" and "5:47" as the time of the arrival and departure of train No. 4 at Mellen, instead of the figures "4:45" and "4:47," which were the actual times at which that train arrived and left that station. The circumstances called for the exercise of the greatest care and diligence on the part of the plaintiff in error. It could not absolve itself from its duty by giving orders which, if strictly complied with, would have insured the safety of its employes. The duty was a continuing one, and called for the issuance of further orders as soon as it became ap-

parent that a known failure to comply with orders already made was likely to or might result in disaster.

There was no error in holding the plaintiff in error accountable for the negligence of the train dispatcher. *Northern Pacific Ry. Co. v. Dixon*, 194 U. S. 338, 24 Sup. Ct. 683, 48 L. Ed. 1006; *Oregon Short Line v. Frost*, 74 Fed. 965, 21 C. C. A. 186. In *Northern Pacific Ry. Co. v. Mix*, 121 Fed. 476, 57 C. C. A. 592, this court approved the instruction given by the trial court to the jury in such a case as follows:

"It is the duty of the defendant company to all operatives upon its road to take all reasonable care and precaution to prevent opposing trains on its line of railway from colliding, and to exercise ordinary and reasonable care to notify, or cause to be notified, the operatives upon one train of the approach of a train in the opposite direction, and to give such orders as will insure the safe passage of the one by the other. With regard to the movement of trains, the train dispatcher stands in the place of the defendant."

The plaintiff in error challenges the jurisdiction of the Circuit Court, and contends that the allegation of the complaint as to the organization and existence of the plaintiff in error is not sufficient to show that it was a corporation of the United States. That allegation is as follows:

"That the defendant is now, and at all times mentioned herein was, a corporation organized and existing under the laws of the United States, having its principal place of business at and being a resident of Los Angeles, in the state of California."

It is said that, in order to show jurisdiction in the Circuit Court, the complaint should have contained the allegation that the plaintiff in error was created by and existed under a law of the United States, and that it derives all its corporate powers and authority from such law, and that in the maintenance and operation of the railroad in question it was exercising or claiming to exercise such powers and authority. We think that all this is necessarily implied in the undenied allegation of the complaint. If the plaintiff in error was organized and existed under the laws of the United States, it could not have been organized or had its existence under other authority. It must have been a corporation of the United States, and as such entitled to maintain the action in the Circuit Court. *Pacific Railroad Removal Cases*, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319.

The judgment of the Circuit Court is affirmed.

GRIFFIN v. AMERICAN GOLD MIN. CO.

(Circuit Court of Appeals, Ninth Circuit. February 27, 1905.)

No. 1,111.

ATTACHMENT—RETURN—SUFFICIENCY.

Where a marshal's return on an attachment merely recited that, "in obedience to the annexed writ of attachment, I have attached the following described property, to wit," etc., and did not specify the acts or steps taken in levying the writ, it would be presumed, in support of the levy, that as to the real property the marshal attached the same by leaving a copy with the occupant thereof, or, if there was no occupant, by leaving in a conspicuous place thereon, and with respect to the personal property, that such as was not capable of manual delivery was attached by leaving

a copy of the writ with the person in possession of the same, as required by Code Civ. Proc. Or. §§ 149, 151, in force in Alaska at the time of the levy.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attachment, §§ 1166, 1167.]

In Error to the District Court of the United States for the First Division of the District of Alaska.

R. F. Lewis, E. S. Pillsbury, and Pillsbury, Madison & Sutro, for plaintiff in error.

Malony & Cobb, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This action was commenced by the plaintiff in error in the District Court of the United States for the District of Alaska on November 20, 1893, to recover from the defendant in error the sum of \$25,000, with interest, on a contract for the conveyance of a mining claim. On February 18, 1901, judgment was rendered against the plaintiff in error. On writ of error to this court the judgment was reversed (*Griffin v. American Gold Mining Co.*, 123 Fed. 283, 59 C. C. A. 301), and the cause was remanded for further proceedings not inconsistent with the opinion of the court. In pursuance of the mandate the District Court proceeded with the cause. Findings of fact and conclusions of law were made and filed, and judgment for the plaintiff in error was entered on March 31, 1904.

It appears from the record that on the 20th day of November, 1893, at the time of the issuance of a summons in the action, a writ of attachment was issued, and on the 24th day of November, 1893, there was recorded by the recorder for the District of Alaska, in the records of the Juneau recording district, the return of the marshal showing that certain property had been attached. It is provided by section 309 of the Code of Civil Procedure of Oregon (*Bellinger & C. Comp.*) that, "if judgment be recovered by the plaintiff, and it shall appear that the property has been attached in the action and has not been sold as perishable property, or discharged from the attachment as provided by law, the court shall order and adjudge the property to be sold to satisfy the plaintiff's demands." At the time this action was commenced the laws of Oregon were in force in Alaska, under the provisions of section 7 of the act of Congress of May 17, 1884, c. 53 (23 Stat. 24), and the same provision has been continued under section 147 of the Code of Civil Procedure of Alaska (31 Stat. 356). The judgment entered in the District Court contained no provision for the sale of the attached property, as required by the statute. To correct this omission, the plaintiff in error, on June 13, 1904, gave notice to the defendant in error of a motion to amend the judgment by adding thereto a clause that the property attached be sold to satisfy plaintiff's demands. This motion the court denied upon the ground that the marshal's return to the writ of attachment failed to set out the particular acts performed by him in levying the attachment, the court holding that the attachment was void by reason of such omission. The Code of Civil Procedure of

Oregon in force at that time in Alaska had the following provision relating to attachments:

"Sec. 149. The sheriff to whom the writ is directed and delivered shall execute the same without delay, as follows: (1) Real property shall be attached, by leaving with the occupant thereof, or if there be no occupant, in a conspicuous place thereon, a copy of the writ certified by the sheriff; (2) personal property capable of manual delivery to the sheriff, and not in the possession of a third person, shall be attached by taking it into his custody; (3) other personal property shall be attached, by leaving a certified copy of the writ, and a notice specifying the property attached, with the person having the possession of the same, or if it be a debt, then with the debtor, or if it be rights or shares in the stock of an association or corporation, or interest or profits thereon, then with such person or officer of such association or corporation as this code authorizes a summons to be served upon."

"Sec. 151. If real property be attached, the sheriff shall make a certificate containing the title of the cause, the names of the parties, a description of such real property, and a statement that the same has been attached at the suit of the plaintiff, and the date thereof. Within ten days from the date of the attachment, the sheriff shall deliver such certificate to the county clerk of the county in which such real property is situated, who shall file the same in his office, and record it in a book to be kept for that purpose. When such certificate is so filed for record, the lien in favor of the plaintiff shall attach to the real property described in the certificate from the date of the attachment, but if filed afterwards, it shall only attach, as against third persons, from the date of such subsequent filing. Whenever such lien shall be discharged, it shall be the duty of the county clerk, when requested, to record the transcript of any order, entry of satisfaction of judgment, or other proceeding of record, whereby it appears that such lien has been discharged, in the book mentioned in this section. The clerk shall also enter on the margin of the page on which the certificate is recorded a minute of the discharge, and the page and book where recorded."

The return of the marshal to the writ of attachment was as follows: "In obedience to the annexed writ of attachment, I have attached the following described property, to wit." It was objected to this return that, with respect to the real property sought to be attached, it did not show that the marshal had attached the same by leaving with the occupant thereof, or, if there was no occupant, by leaving in a conspicuous place thereon, a copy of the writ certified to by the marshal, and, with respect to the personal property, that the return did not show that such of it as was capable of manual delivery, and not in the possession of a third person, had been taken into custody, and that the other property had been attached by leaving a certified copy of the writ and a notice specifying the property attached with the person having the possession of the same. It is contended by the plaintiff in error that the presumption of law is that the marshal performed his official duty, and that his official acts were regular, and that this presumption is sufficient to support the validity of the attachment, in the absence of anything in the writ itself or in the return tending to overcome this presumption, or anything in the record tending to show that the proceedings were irregular. The court below, in holding the attachment void, relied upon the case of *Hall v. Stevenson*, 19 Or. 153, 23 Pac. 887, 20 Am. St. Rep. 803. In that case there were two tracts of land involved in a suit for the foreclosure of a mortgage. The same land was involved in an attachment suit, and the question was, which had the prior lien, the mortgage or the attachment? The writ of attachment was deliv-

ered by the sheriff to the defendant on October 4, 1886, at 8:30 a. m. The mortgage was executed between 2 and 3 o'clock of the same day. The court, in its opinion, on page 155, recites the facts relating to the service of the attachment, as follows:

"He [the defendant Stevenson] received these papers from the sheriff in the lane in the southern part of the town of Roseburg. The mortgaged premises were situated about thirteen miles from this point. The individual land of Stevenson joins the 1,500-acre tract owned in common with Gabbert, and the distance between the 640-acre tract and the 1,500-acre tract is about one-fourth of a mile."

The sheriff, by his return on the writ of attachment, certified as follows:

"And I further certify that I did, on the said 4th day of October, 1886, by virtue of said annexed writ of attachment above described, attach the following described real property of George Stevenson, one of the defendants named in said annexed writ of attachment, subject to the former attachment of Koshland Bros., hereinbefore mentioned. I did, in pursuance of said annexed writ of attachment, on the said 4th day of October, 1886, at 8:30 a. m. of said day, attach the following described real property by delivering to said George Stevenson in person a copy of the annexed writ of attachment, duly certified to by me as sheriff aforesaid, and thereafter, to wit, at 1:30 o'clock p. m. of said 4th day of October, 1886, I duly posted a copy of said annexed writ of attachment, duly certified to by me as sheriff, upon the front of the dwelling house of said George Stevenson, within said county and state, as no person could be found at the place of residence of said defendant George Stevenson of suitable age and discretion with whom to leave said copy of said writ of attachment, as aforesaid."

No other facts appeared in the return showing the manner of the service of the attachment. But enough appeared to overcome the presumption that the statute had been complied with in such service. The two tracts of land claimed to be subject to the attachment lien were distant from each other about one-quarter of a mile. The court, referring to this fact, says:

"Several separate and distinct parcels of land could not be attached by posting up a copy of the writ on one only of them."

With respect to the defective return, the court says:

"The return of the sheriff fails to show that George H. Stevenson was an occupant of the premises sought to be attached, and it does not appear that the copy of the writ was posted in a conspicuous place on said premises. The sheriff returns that it was posted 'upon the front of the dwelling house of said Geo. H. Stevenson within said county and state,' but it does not appear that said dwelling house was the property sought to be attached, or that the front of said dwelling house was 'a conspicuous place.'"

The court then refers to the case of *Mickey v. Stratton*, 5 Sawy. 475, Fed. Cas. No. 9,530, as an authority for the insufficiency of such return. In this last case the attachment also referred to two pieces of property, and the returns show what the sheriff did in the execution of the writ, which was that with respect to one piece of property a copy of the writ was posted on the building, and with respect to the other a copy was posted on the block. In the opinion of the court "the return is radically defective because it does not appear therefrom that the premises were unoccupied at the time of this alleged service by leaving a copy of the writ upon the premises, and, unless they were, the sheriff

had no authority to make such service." The court had previously said, "Neither does it appear from the return that the copy left upon the premises was posted in a conspicuous place." The facts stated in the return in this case were also sufficient to overcome the presumption that the officer had performed his duty in the service of the writ, and that his official acts were regular; and the court well says:

"The presumption that he did his duty applies as well to the making of the return as to the service of the writ, and therefore there is no room to presume that he did his duty in making the service more fully or otherwise than he has stated in his return."

The cases of *Sharp v. Baird*, 43 Cal. 579, *Watt v. Wright*, 66 Cal. 206, 5 Pac. 91, and *Brusie v. Gates*, 80 Cal. 462, 22 Pac. 284, involved the question of a sufficient return based upon a similar statute of the state of California; but in those cases there was enough stated in the return to overcome the presumption that the service had been made in accordance with the statute, and the service was held to be insufficient. These cases are based upon the rule that, where the record states what steps were taken in the performance of an official act, it will not be presumed that others were taken, when to do so would tend to contradict the record. In other words, it is a general principle to presume that public officers act correctly, in accordance with the law and their instructions, until the contrary appears. *Ross v. Reed*, 1 Wheat. 482, 484, 4 L. Ed. 141; *Gonzales v. Ross*, 120 U. S. 605, 622, 7 Sup. Ct. 705, 30 L. Ed. 801. In the present case there is nothing stated in the return, nor is there any fact before the court, tending to show that the marshal failed in any particular to do his duty in serving the attachment, or that his official acts were in any respect irregular. The presumption therefore arises that the writ of attachment was served in accordance with the requirements of the statute, and that the writ was valid.

In *Dodge v. Butler*, 42 N. J. Law, 370, the court said:

"The return made to the writ by the constable to whom it was delivered for service shows a substantial execution of it. It does not therein affirmatively appear that in its execution all the requirements of the statute were observed by him, but this will, upon the return made to this writ, in the absence of other proof, be presumed, in virtue of the common legal intendment in favor of the due execution of process. * * * It is not shown that any essential act was omitted by the officer, and, presumptively, there was none."

In *Anderson v. Sutton*, 2 Duv. (Ky.) 480, the court said:

"The next objection urged against the judgment by appellant worthy of notice is that the sheriff who executed the orders for the attachment failed to state in his returns that he executed them on the real estate by leaving with the occupant thereof a copy of said orders, or that there was no occupant, and he posted up copies of them in a conspicuous place on said real property. He stated in his return that he had levied the attachments on the property of the appellant, and gave a particular description of the property so levied upon. Nothing appearing to the contrary, the law presumes he performed his duty and complied with the requirements of the law, and his return must therefore be regarded as sufficient in the absence of counter-vailing evidence."

There is no claim made that the attachment proceedings were in fact irregular. For more than 10 years since the return of the writ the de-

fendant has made no objection to the attachment proceedings. It has been open to it during all this time to move to quash the writ on the ground that the marshal had not made a valid service, but it has taken no such action. Under the circumstances it would be manifestly unjust to deny to the return of the marshal the presumption of regularity accorded to official acts.

The order of the District Court denying plaintiff's motion to amend the judgment is reversed, with instructions to allow the amendment adding thereto a clause ordering that the property attached in the action be sold to satisfy the plaintiff's demands.

BROSNAN v. WHITE.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1905.)

No. 1,081.

1. EJECTMENT—COMPLAINT—ENTRY OF ESTATE.

Under Carter's Alaska Civ. Code, § 303, providing that, in an action to recover possession of real property, plaintiff, in his complaint, shall set forth the nature of his estate in the property, whether it be in fee, for life, or for a term of years, etc., and that he is entitled to possession thereof, and that defendant wrongfully withholds the same from him, to his damage in such sum as may be therein claimed, plaintiff is not required in such action to further state the nature of her estate in the property.

2. SAME—COMMON SOURCE.

Where both parties to an action of ejectment claimed from a common source, it was unnecessary for either to deraign title from another source, or to pursue the chain of title further back than their common grantor.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, §§ 59-62.]

3. SAME—DEPARTURE.

Plaintiff in ejectment alleged that she and S. went on the premises in March, 1898, which were then unoccupied, and erected a building thereon. Defendant alleged that on March 6, 1898, the premises were unoccupied and unclaimed, and were entered and appropriated by G., who thereafter conveyed to C., who conveyed to R., who conveyed to defendant; that defendant had no notice of plaintiff's claim, and that he had made valuable improvements upon the property. Plaintiff replied, admitting defendant's allegations as to entry on the unappropriated land by G. and his conveyance to R., and that defendant had erected the improvements as alleged, but denied that it was done without notice of plaintiff's interest, and denied that S. conveyed to R. or that R. conveyed to defendant, and then alleged that S. conveyed an undivided half interest to plaintiff, who was then in possession as a tenant in common, and from that time plaintiff continued to occupy the premises until ousted by defendant as alleged in the complaint. *Held* that, in the absence of a motion or demurrer, the departure in the reply, with reference to the appropriation of the land, from the allegation in the complaint, was not such as to justify the trial court in rendering judgment for defendant on the pleadings.

In Error to the District Court of the United States for the Third Division of the District of Alaska.

The plaintiff in error and the defendant in error having been respectively the plaintiff and the defendant in the court below, they will be so designated here.

The plaintiff brought an action of ejectment against the defendant, alleging in her complaint, in substance, as follows: That the plaintiff is the owner

of an undivided one-half interest in, and is entitled to the possession of, lot 4, in block 8, in the town of Valdez; that the nature of the estate of plaintiff in and to said described premises is that of prior possession; that in the month of March, 1898, said premises were a portion of the unsurveyed, unclaimed, and unoccupied public lands of the United States, subject to settlement thereon for the purposes of business, trade, and residence; that the plaintiff and one William Spencer, while the same was unoccupied and unclaimed public land of the United States, went upon the same and erected thereon a substantial building, and occupied and used the same for a hotel as tenants in common; that the plaintiff continued to occupy the same until the month of November, 1900, when the defendant, without right or title, entered into possession of said premises, and ousted and ejected the plaintiff therefrom, and now wrongfully and unlawfully withholds the same and the possession thereof from the plaintiff.

The answer denied the allegations of the complaint, and set up a further and separate defense, the substance of which is in the following paragraphs:

First. That on March 6, 1898, the premises described in the complaint were unoccupied, unclaimed, and unsurveyed public lands of the United States, and that, while they were so unoccupied, one S. W. Gray went upon said premises, and claimed and appropriated the same by posting a notice thereon, and by filing a notice of record with the town recorder, which notice was recorded at page 3 of Book of Town Lot Records of the town of Valdez.

Second. That thereafter, during the month of March, 1898, said Gray erected on said premises a house, and occupied the same as a residence and hotel.

Third. That on July 7, 1898, said Gray, for a valuable consideration, sold and conveyed said premises to one William Spencer by a deed which was recorded at pages 23 and 24 of the Town Lot Records of the town of Valdez, and said William Spencer thereupon went into possession of said premises.

Fourth. That on November 24, 1900, the said Spencer, for a valuable consideration, sold and conveyed said premises to J. P. Roberts by a deed recorded at pages 189 and 190 of Smith's Record of Deeds for Valdez precinct.

Fifth. That on November 30, 1900, said Roberts, for a valuable consideration, sold and conveyed said premises to the defendant, and that ever since that date the defendant has been, and now is, the owner in fee simple of and in the possession thereof.

Sixth. That the defendant had no notice or knowledge of the plaintiff's right, title, or interest in or to said premises; that the plaintiff's pretended interest did not appear of record; and that the defendant purchased said premises in good faith, and for a valuable consideration, and without notice or knowledge of plaintiff's pretended title or interest.

Seventh. That since the defendant purchased said premises he has made valuable improvements thereon by erecting a large saloon and lodging house, the reasonable value of which is \$6,000; and that said improvements were made in good faith, and without any knowledge or notice of plaintiff's pretended interest.

To this answer the plaintiff replied, admitting the truth of the first, second, and third paragraphs of said affirmative matter of the answer. As to the fourth and fifth paragraphs, she denied any knowledge or information sufficient to form belief, "and therefore denies the said paragraphs and the whole thereof." She denied the whole of the sixth paragraph. She admitted that the defendant had made valuable improvements as alleged in paragraph 7, and that they were of the value of \$6,000, but she denied that the improvements were made in good faith, or without notice or knowledge of her interest. She alleged further in the reply that on July 17, 1898, while the plaintiff and said William Spencer were in possession of said premises, and claiming the same under the town site laws of the United States as tenants in common, and while using the same premises for purposes of business, trade, and residence, said Spencer did, by a good and sufficient deed, for a valuable and adequate consideration, to wit, the sum of \$175, sell and convey an undivided one-half interest in and to said premises, together with the buildings thereon, to the plaintiff; and that thereafter the plaintiff continued to occupy said premises for the purposes of trade and business until the month of November, 1900, when the defendant entered upon said premises, took possession thereof,

removed plaintiff's buildings, and built thereon the said saloon and lodging house, and that he continues to hold all of said premises adversely to the plaintiff and in hostility to her right of possession. On these pleadings the plaintiff moved for a judgment, and the motion was overruled by the court.

The case came on for trial before a jury. After the jury had been impaneled and sworn, the plaintiff's attorney opened her case to the jury, and stated "that the property in question had been located by four persons, namely, William Spencer, W. S. Gray, the plaintiff, and one Mrs. S. Smith." After the defendant's case had been stated to the jury, the plaintiff called a witness and had him sworn. Thereupon the attorneys for the defendant interposed an objection to the introduction of any testimony by the plaintiff, and moved for a judgment on the pleadings. The court sustained the motion, and judgment was entered dismissing the action and adjudging that the defendant recover from the plaintiff his costs and disbursements. Judgment was entered on November 9, 1903. On November 17, 1903, the plaintiff moved the court for an order amending the judgment so as to make it a judgment of nonsuit, having the effect to dismiss the plaintiff's action, but to be no bar to a new action for the same cause. On November 21, 1903, the court denied the motion.

Volney T. Hoggatt, James E. Fenton, and W. T. Hume, for plaintiff in error.

John A. Carson, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The question here presented is whether the District Court erred in entering judgment for the defendant on the pleadings. The complaint states a good cause of action in ejectment. It alleges that the plaintiff owns and is entitled to the possession of an undivided one-half of the premises in controversy. The plaintiff was not required to further state the nature of her estate. Carter's Civ. Code Alaska, § 303. She proceeded, however, to allege that the nature of her estate was prior possession, and that in March, 1898, she and William Spencer went upon the premises, which were then unoccupied, and erected a building thereon. The defendant answered, denying all the allegations of the complaint, and then, instead of complying with section 304 of Carter's Civil Code of Alaska by setting forth the nature of his estate, he proceeded to set forth the facts on which his claim of estate was based. He alleged: First, that on March 6, 1898, the premises were unoccupied and unclaimed, and were on that date entered and appropriated by S. W. Gray; second, that in March, 1898, Gray erected a house on the premises, and occupied the same; third, that on July 7, 1898, Gray conveyed the lot to William Spencer, and that the latter went into possession; fourth, that on November 24, 1900, Spencer conveyed to Roberts; fifth, that on November 30, 1900, Roberts conveyed to the defendant; sixth, that the defendant had no notice of the plaintiff's claim; and, seventh, that the defendant has made the improvements, amounting to \$6,000. The reply admits the first, second, and third of these paragraphs of the answer. It denies the fourth, fifth, and sixth. It admits that \$6,000 were expended in improvements, but denies that it was done without notice of the plaintiff's interest. It then proceeds to allege affirmatively that on July 17, 1898, William Spencer conveyed an undivided one-

half interest in the premises to the plaintiff, who was then in possession with him as tenant in common, and that from that time the plaintiff continued to occupy said premises until ousted by the defendant as alleged in the complaint. But for the allegation of the plaintiff's complaint as to the nature of her estate in the premises, there could be no question but that the pleadings otherwise present issues for trial and determination. The complaint, answer, and reply show that both the plaintiff and the defendant claim title through William Spencer. Claiming as they do from a common source, it was unnecessary for either party to deraign title from another source, or to pursue the chain of title further back than to their common grantor. All this would be without question, were it not for the unnecessary averment of the complaint that the nature of the plaintiff's estate is that of prior possession, and that she and Spencer entered upon the premises in March, 1898. The question here is not what evidence the plaintiff might have been permitted to introduce, or might have been precluded from introducing, in proof of her title in view of the pleadings, but whether or not an issue was presented for trial before the court and jury. If material issues were presented by the pleadings, although they may have been improperly pleaded, the court was not authorized to render a judgment upon the merits, and adjudicate the title to be in one or the other of the parties. The admission in the reply that Gray went upon the premises and appropriated the same in March, 1898, and that he sold the same to Spencer in July, 1898, may not, we think, be necessarily inconsistent with the statement that the plaintiff and Spencer were joint entrymen with Gray and another, as made by the plaintiff's counsel in opening the case before the jury. But whatever may be the force or effect of the apparent departure from the plaintiff's case, as stated in her complaint, by the admissions of her reply, a departure which may have rendered the pleadings obnoxious to a motion or demurrer from the opposing party, we do not think it justified the action of the trial court in rendering a judgment on the merits, adjudging the title to be in the defendant, and barring the further right of action by the plaintiff. But it is said that the court was justified in regarding the plaintiff's denials of paragraphs 4 and 5 of the answer, made, as they were in the reply, upon information and belief, as trivial, and as raising no issue upon those averments. It must be admitted that the pleadings are faulty. They are defective on the part of both the plaintiff and the defendant. The provisions of the Alaska Code in regard to pleadings in ejectment are adopted from the Oregon laws. Under those laws it has been held that the particularity required in setting forth the nature of the estate or right of the defendant is complied with if he allege that he is the sole or part owner in fee simple, or upon condition, or for life, or for years, as the case may be (*Witherell v. Wiberg*, 4 Sawy. 232, Fed. Cas. No. 17,917), and a detailed statement of facts which might be evidence in support of title in the defendant is not a proper plea of such title, and will, on motion, be struck out as redundant (*Hall v. Austin*, 1 Deady, 104, Fed. Cas. No. 5,925; *Fitch v. Cornell*, 1 Sawy. 156, Fed. Cas. No. 4,834; *Moore v. Frazer*, 15 Or. 635, 638, 16 Pac. 869). It may be doubted whether

the plaintiff was required to file a reply to the answer. Generally speaking, the legal effect of the affirmative allegations of an answer alleging title in the defendant is mere denial of the averments of the complaint, and they are not to be considered as new matter, to be taken as true unless denied by a reply. But the plaintiff replied, denying on information and belief that the defendant is the owner in fee simple and in the possession of said premises. While such a denial in a pleading might be subject to objection as to its form, it certainly is not to be disregarded when the defendant accepts it as sufficient and goes to trial upon the issues so raised. The complaint distinctly alleged that the plaintiff was the owner and entitled to the immediate possession of the premises. The defendant denied this, and set up title in himself. The reply did not admit this to be true, nor did it admit that the plaintiff was not the owner and entitled to possession as alleged in the complaint. The pleadings would have sustained a judgment for the plaintiff if the jury had returned a verdict in her favor, and it was error to enter judgment on them without a trial.

The judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

In re HAFF.

(Circuit Court of Appeals, Second Circuit. January 18, 1905.)

No. 89.

1. **BANKRUPTCY—ORIGINAL PETITION—AMENDMENT.**

An original bankruptcy petition cannot be amended by setting out acts of bankruptcy not originally referred to, and occurring more than four months before the application for an order allowing the amendment.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, §§ 126-129.]

2. **SAME—INVOLUNTARY PETITION—NUMBER OF CREDITORS—AMENDMENT.**

Bankr. Act July 1, 1898, c. 541, § 59f, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], provides that creditors other than original petitioners may at any time enter their appearance and join in the petition. Section 59d (30 Stat. 561 [U. S. Comp. St. 1901, p. 3445]) provides that if the petition avers that the creditors are less than 12, and less than 3 have joined as petitioners, and the answer avers the existence of the larger number, there shall be filed with the answer a list, under oath, of all the creditors; and general order 11 (89 Fed. vii) authorizes the court to allow amendments to the petition on application of the petitioner. *Held*, that failure of an involuntary petition filed by a single creditor to allege that the creditors were less than 12 in number did not deprive the court of jurisdiction, where 3 creditors having provable claims had united in earlier proceedings, and the bankrupt did not deny the claims of such creditors, nor file a list of all of his creditors, with their addresses, under oath.

3. **SAME—CONSTRUCTION OF PETITION.**

Where an involuntary bankruptcy petition was in fact an original petition, it was not deprived of its status as such by the fact that it contained a prayer of the petitioner to intervene in earlier proceedings as a cautionary measure, in order that the petitioner might be represented in the proceedings on the earlier petition for the administration and preservation of the estate.

Petition to Review Order of the District Court of the United States for the Southern District of New York.

Franklin Pierce, for petitioner.

Leo Levy, for respondent.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. February 2, 1904, Thomas Lenane filed a petition that Charles E. Haff be adjudged a bankrupt; alleging that he was a creditor of said Haff, and that the creditors were less than 12 in number, and setting forth a single act of bankruptcy, alleged to have been committed on December 3, 1903. February 13th Haff filed his answer, denying insolvency, and alleging that his creditors were 12 and more in number. February 25th two other creditors intervened in the proceedings under said original petition. March 24th Edward Ridgely, as receiver of the Equitable National Bank, filed a petition that Haff be adjudged a bankrupt, and therein prayed to be permitted to intervene in the earlier involuntary proceedings. This petition was addressed to the judges of the court; stated the representative character of the petitioner; the principal place of business of the debtor for the greater portion of the preceding six months; that he owed debts to the amount of \$1,000; was insolvent; was neither a wage earner, nor chiefly engaged in farming, etc.; the amount of petitioner's claim, etc. The petition further alleged not only said act of bankruptcy set forth in the original petition, but other acts of bankruptcy alleged to have been committed "on or about the 3d day of December, 1903, and on or about the 3d day of February, 1904," and concluded with a prayer that service thereof, with subpoena, might be made on the alleged bankrupt, and that he might be adjudged a bankrupt. On said date the court ordered that said Ridgely be permitted to intervene as a petitioning creditor, and that the alleged bankrupt file an answer to said petition. April 7th, pursuant to said order, Haff filed his answer denying the alleged acts of bankruptcy, and again asserted that the number of his creditors was more than 12; having first filed a reservation of his rights to object to the sufficiency and propriety of said Ridgely petition, and of the order of the court thereon. April 12th Haff filed a petition that the allegations of new acts of bankruptcy not included in the earlier petition be stricken therefrom on the ground that they were not authorized by the bankrupt act, and that Ridgely's only relief was by joinder in the earlier petition. April 18th the attorney for Ridgely filed an affidavit stating "that, as far as appears by the record in this court, the creditors of said Haff are not in excess of twelve in number," and that the Ridgely petition, "in addition to being an intervening petition, was a petition de novo, and deponent knows of no statute nor any provision which prevents a creditor from alleging new acts of bankruptcy prior to the filing of the original petition February 2, 1904, and that the aforesaid Edward Ridgely has expressly asked that the alleged bankrupt be adjudicated a bankrupt upon the petition filed in his behalf." The affiant asked, "in behalf of said Edward Ridgely, petitioning creditor, that an order be made herein consolidating the two peti-

tions filed herein against said Charles E. Haff, and that the petition filed on February 2, 1904, be made to conform, by proper amendment and additions pursuant to general order 7 (89 Fed. v), to the petition filed in behalf of Edward Ridgely, in that there be inserted therein the acts of bankruptcy referred to in the petition of Charles E. Haff, to which this affidavit is an answer."

April 25th the court indorsed on Haff's petition the following memorandum:

"If an intervening creditor wishes to rely on additional acts of bankruptcy, I think he has a right to do so. The better practice is, perhaps, to enter an order to intervene, and then apply to amend, but I see no objection to alleging the additional acts in the petition to intervene. If a formal order to amend is preferred in this case, it will be granted, and may be deemed granted. I think, however, that the additional acts of bankruptcy must have occurred as early or before the act alleged in the original petition. The acts alleged, therefore, in paragraphs 'c' and 'e' of the intervening petition, should be disallowed."

April 30th the following order was entered:

"Ordered, that the petition filed herein on the 2d day of February, 1904, by Thomas Lenane, Theodore F. Hoffman, and Oscar J. Dennis to have Charles E. Haff adjudicated an involuntary bankrupt, be, and the same hereby is, amended so that the same shall in all things conform, nunc pro tunc, with the petition filed herein on March 25, 1904, by said Edward Ridgely, as receiver, as hereinafter modified."

The order further provided that the allegations of acts of bankruptcy in February, 1904, in the Ridgely petition, be stricken therefrom.

This petition seeks to review said order on the ground that:

"Said District Court erred in permitting an application to be made on the 18th day of April, 1904, to amend the original petition, filed as aforesaid on the 2d day of February, 1904, by inserting therein allegations of additional acts of bankruptcy occurring more than four months prior to the date of said motion to amend."

The date of the additional acts of bankruptcy inserted by amendment in the original petition was December 3d. More than four months had elapsed, therefore, before the application of April 18th for the amendment.

The general rule seems to be that an original petition cannot be amended by setting out therein acts of bankruptcy not referred to in the original petition, and occurring more than four months before the application for an order allowing the amendment. In re Crowley & Hoblitzell, 1 N. B. R. 516; In re Craft, 2 N. B. R. 111, 6 Blatchf. 177, Fed. Cas. No. 3,317; In re Leonard, 4 N. B. R. 562, Fed. Cas. No. 8,255; White v. Bradley Timber Co. (D. C.) 116 Fed. 768; Stern v. Schonfield, 22 Fed. Cas. 1310; In re Alfred Stevenson, 2 Am. Bankr. Rep. 66, 94 Fed. 110. See, also, In re Maund, 1 Law Reps. Queen's Bench Div. p. 194 (1895).

Counsel for respondent does not deny that the law is as thus stated, but he asserts that the Ridgely petition also was an original petition, and that the application to intervene was merely for the protection of his client's rights by a participation in the proceedings under the earlier petition, in so far as such proceedings might apply to the administration

and preservation of the estate. The Ridgely petition appears to have been framed as an original petition, and, as such, as already shown, it contains the general allegations of an original petition, and a prayer for subpœna. It is conceded that such an original petition might have been subsequently filed, setting up additional acts of bankruptcy within four months from its date. General order No. 11 (89 Fed. vii); *White v. Bradley Timber Co.*, *supra*. General order No. 7 (89 Fed. v) contemplates independent proceedings, and provides for their disposition. *In re Mammoth Pine Lumber Co.* (D. C.) 109 Fed. 308.

There is, however, one defect in the Ridgely petition, considered as an original petition. It fails to allege that the creditors are less than 12 in number. Section 59b of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3445], provides as follows:

"Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such persons are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt."

Under this section, *Collier on Bankruptcy*, at page 405, and *Loveland on Bankruptcy*, at page 199, state—citing *In re Brown* (C. C.) 111 Fed. 979—that, if only one creditor petitions, he must aver that the alleged bankrupt has less than twelve creditors in all. The case, however, does not state that such averment must be made, but that, where the claims are more than twelve, there must be three petitioning creditors.

Is said averment necessary in order to enable the court to entertain jurisdiction, or is the defect one which may be cured by amendment or subsequent proceedings? "The general rule is that, while the pleader is not bound to negative a proviso, he is bound to aver that the defendant is not within any of the exceptions contained in the enacting clause of the statute." *Ledbetter v. United States*, 170 U. S. 606, 611, 18 Sup. Ct. 774, 776, 42 L. Ed. 1162. It is held in *Re Bellah* (D. C.) 116 Fed. 69, that such a defect may be cured by amendment. General order 11 (89 Fed. vii) provides that "the court may allow amendments to the petition * * * on application of the petitioner." Section 59f, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], provides that creditors, other than original petitioners, may at any time enter their appearance and join in the petition. Section 59d, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3443], provides as follows:

"If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed."

We concur in the conclusion reached by Judge Bradford in *Re Mackey* (D. C.) 110 Fed. 355, that this clause clearly shows the intent

of Congress that insufficiency in the allegation as to the number of creditors should not be regarded as an incurable jurisdictional defect. Otherwise there would be nothing before the court in which creditors other than original petitioners could join. The provisions of section 59 ("f" and "g") authorize creditors other than the original petitioner to avail themselves of the original petition. In *re Stein*, 105 Fed. 749, 45 C. C. A. 29; In *re Bellah*, *supra*; In *re Bedingfield* (D. C.) 96 Fed. 190.

In the case at bar, however, the record itself shows that the failure to aver in the Ridgely petition that the creditors were less than twelve in number may be disregarded. Section 59d of the act, as we have seen, provides that if the petition avers that the creditors are less than twelve, and less than three have joined as petitioners, and the answer avers the existence of the larger number, there shall be filed with the answer a list, under oath, of all the creditors, etc. Here, although the bankrupt averred the existence of a larger number of creditors in his answer to the earlier petition, he annexed only a partial list, and not a list, under oath, of all his creditors, with their addresses, as provided for in said section.

The record at the date of the filing of the Ridgely petition showed that three creditors having provable claims had united in the earlier proceedings, thus making up the number necessary for a petition where the creditors were twelve or more in number, and that Haff, while denying all the other allegations of the earlier petition, did not deny that said three persons were creditors having provable claims against him. And although in the Ridgely affidavit of April 18th it was alleged "that, as far as appears by the record in this court, the creditors of said Haff are not in excess of twelve," Haff did not meet said allegation by filing a list of all his creditors, and did not raise any question of jurisdiction founded on the insufficiency of averment as to the number, or actual deficiency in number, of the petitioning creditors therein. In his prayer for relief in the petition to strike out the allegations of new acts of bankruptcy set forth in the Ridgely petition, he asserts "that the only relief which the statute points out upon such new petition is to join in the original petition and prosecute said original petition," etc. Therefore, even, if a question of jurisdiction might have been originally raised herein, or might be raised under other conditions, by reason of a failure to allege in the original petition that the creditors were less than twelve in number, it appears from the record herein that there were in fact three or more creditors having provable claims against the estate; that the allegation that the creditors were less than twelve in number had not been met by the filing of a list under oath, as required by statute; and that no objection to the jurisdiction had been stated, based on any insufficiency in the number of petitioning creditors.

The fact that the Ridgely petition contained a prayer to intervene in the earlier petition, and that the Ridgely petition was thereafter treated by the court and counsel as an intervening petition, should not be permitted to deprive it of its character and status as an original petition. The prayer for intervention appears to have been inserted merely out of abundant caution on the part of Ridge-

ly's counsel, in order that he might be represented in the proceedings on the earlier petition for the administration and preservation of the estate.

The order of the District Court amending the petition of February 2, 1904, so as to conform with the petition filed on March 29, 1904, and striking therefrom subdivisions "c" and "e" of paragraph 5 thereof, is reversed, without costs, and each of said petitions should be left to stand as original petitions. The case is remanded to the court below, with instructions to enter an order in conformity with this opinion.

COLUMBIA, N. & L. R. CO. v. MEANS.

(Circuit Court of Appeals, Fourth Circuit. February 21, 1905.)

No. 543.

1. ERROR—MATTERS REVIEWABLE—WAIVER.

A defendant waives the right to assign as error the overruling of a motion to direct a verdict in his favor made at the conclusion of plaintiff's evidence, where he afterward introduces testimony, and the motion is not renewed.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 983.]

2. CARRIERS—ACTION FOR INJURY TO PASSENGER—INSTRUCTIONS.

Instructions given by the court in an action by a passenger against a railroad company to recover for a personal injury considered, and *held* to have fully and fairly stated the law applicable to the case as made by the evidence.

In Error to the Circuit Court of the United States for the District of South Carolina.

D. W. Robinson, for plaintiff in error.

J. E. McDonald (P. H. Nelson, on the brief), for defendant in error.

Before GOFF, Circuit Judge, and BRAWLEY and McDOWELL, District Judges.

McDOWELL, District Judge. This was an action at law for damages brought by the defendant in error—to be hereinafter spoken of as the plaintiff—against the plaintiff in error, which resulted in a verdict and judgment for \$1,500 in favor of the plaintiff. The errors assigned relate only to refusals by the trial court to give sundry instructions asked for by the defendant company.

One assignment is that the trial court overruled a motion by the defendant that the jury be instructed to find for the defendant. This motion was made at the close of the plaintiff's testimony. After the ruling in question was made, the defendant company introduced evidence, and did not renew the motion after the close of the testimony. Under such circumstances, the action of the trial court cannot be assigned as error. *Grand Trunk Railway v. Cummings*, 106 U. S. 700, 27 L. Ed. 266; *N. P. R. Co. v. Mares*, 123 U. S. 710, 713, 8 Sup. Ct. 321, 31 L. Ed. 296; *Robertson v. Perkins*, 129 U. S. 233, 236, 237,

9 Sup. Ct. 279, 32 L. Ed. 686; *Wilson v. Haley Co.*, 153 U. S. 39, 43, 14 Sup. Ct. 768, 38 L. Ed. 627.

The remaining assignments of error, with the exception of the last two, to be considered hereafter, really raise no question for consideration here, except to ascertain if the charge, as given, fairly and fully instructed the jury as to the law of the case.

The plaintiff in October, 1898, intended to go from Columbia to Schleys on the defendant's train. The train was a mixed one, made up of freight cars and one passenger coach. The time of departure of the train seems to have been somewhat irregular, dependent on the arrival of a passenger train from Laurens. The train from Laurens was scheduled to arrive at 3:55 p. m., but actually arrived on the day in question at 4:17. The time of the arrival of the plaintiff at the depot is not accurately shown, but the testimony tends to show that he reached there not very long before the probable starting time. At least three and perhaps five other passengers were in the coach at the time he entered it, which was before the coach had been coupled to the freight cars. The plaintiff did not purchase a ticket. He says he asked the ticket agent for a ticket, and was told that he need not get one, but could pay his fare to the conductor. The ticket agent, not pretending to remember the occurrence—the trial was in January, 1904—testified that it was his custom to sell tickets to all who applied. The place where the coach was at the time the plaintiff entered it, and at the time he was injured, is in some doubt. In his testimony in chief, the plaintiff said the coach was north of Gervais street. If so, it was probably 200 feet from the place where passengers usually entered it. On rebuttal the plaintiff and Mr. Ryan stated positively that the car started on its journey from the very place where it stood when the plaintiff entered it. Dr. Ensor, who entered the car before the plaintiff, testified in chief that the car was at the Union Depot when he entered it. And Moffett, the car porter, testified that this coach, which came to Columbia in the forenoon, was always left opposite the Union Depot. The entire testimony goes to show that this coach, prior to being coupled to the freight train, usually stood near the point from which it started, but that there was no fixed position in which it was invariably placed. It seems probable that the car was at or very near the place where it was usually boarded by passengers when the plaintiff entered it. The car appears never to have been locked—in fact, there was no key—and the reason given for this custom is that the car, while left standing in the interval between its arrival in the forenoon and its departure in the afternoon, was under the observation of the car inspector. It seems that it was the custom to pull or back the train to which this car was coupled so as to bring the passenger car, if not already in place, in front of the waiting rooms, and the conductor would then go to the waiting rooms and announce that the train was about ready to leave. The plaintiff knew that the passenger car had not been coupled when he entered it. After being in the car for some minutes, he decided to change his seat; and, in doing so, he was standing up in the aisle at the moment when the freight train was backed against the coach. The shock was extremely violent—unusually and inexcusably so, if the train crew knew or should have known that passengers were in

the coach. The shock threw the plaintiff down, and injured him considerably, and for this he brought this action.

The charge given the jury by the trial court is as follows:

"This, as you have seen, is an action for damages against the defendant for injuries received by plaintiff, claiming to have been a passenger on the train of defendant. There are three points on which you must be satisfied from the evidence:

"(1) Railroad companies engaged in the transportation of passengers for hire are common carriers, and, in the course of their employment, are required to exercise as to passengers the utmost human care and foresight. In the protection of their passengers they are bound to exercise more than ordinary care; they must exercise extraordinary care and employ all reasonable skill and diligence—remembering always that the responsibility of a carrier of passengers is not, like that of a carrier of goods, a responsibility at all events, except for the acts of God and the public enemy, but a responsibility modified by this fact: that passengers are reasonable beings, exercising their own will, so that the carrier, though bound to take the highest care of the passenger, is not bound by any act of imprudence on the part of the passenger either violating proper regulations, or exposing himself imprudently to danger. Was the plaintiff a passenger on the train? As common carriers of passengers, railroad companies are required to carry, subject to reasonable regulations, all who offer. The purchase of a ticket is not necessary to constitute one as a passenger. The relation of passenger to the carrier ordinarily arises when a person intending to take passage presents himself at a proper time (a reasonable time before the train is scheduled to start), in a proper place (the usual place for passengers to enter), and then and there enters the train, with no notice to the contrary. That is the law. Now, you apply the facts of this case. Recall these as testified before you, and say: Where was the passenger coach lying on the day of the accident when the plaintiff entered it? Was it at the usual place for the passengers to enter it? Was it open, so as to permit passengers to enter it? Did passengers so enter it with no warning from any quarter to the contrary? If you answer these questions in the affirmative—if the facts be these—then a person entering the passenger car under these circumstances stands to the railroad company in the relation of a passenger, and is entitled to protection against negligence of the railroad company and of its servants.

"(2) If you find that the plaintiff was a passenger, in the sense I have stated, you next inquire, was he injured by the negligence of the railroad company? You have heard the testimony on this point. Did that part of the train made up of freight cars come down on the passenger coach at unnecessary speed or with unnecessary violence? Did this speed or violence cause the fall of the plaintiff? Was that the proximate cause—the thing that caused the injury? And in this connection you must say whether the imprudence of plaintiff himself—his carelessness in being on his feet when the shock came—also caused the injury. If you find that the imprudence or carelessness of the plaintiff was one of the immediate causes of the accident, he cannot recover.

"(3) If you find that it was negligence on the railroad company for coming with unnecessary speed or unnecessary violence on the passenger coach, and that this caused the accident, with no imprudence or carelessness of the plaintiff contributing to it, your next inquiry is, what damages you will give him. There is no place here for punitive or exemplary damages. All that you can do is to compensate him for his loss of time, and for the pain he suffered, and for such diminution of his capacity to work coming directly from this accident, and for such private consequences, if any, he may suffer; estimating in money what you think he ought to have."

It would involve unnecessary and fruitless labor to discuss the requests for instructions offered by the defendant and refused. It is clear that the charge fully and fairly instructed the jury as to the law on every debatable question in the case.

The ninth and tenth requests were as follows:

"If the jury believe from the evidence that at the time the plaintiff was injured the train was under the charge and control of the Atlantic Coast Line Railroad, that the defendant herein would not be liable for such injury to the plaintiff, and it would be the duty of the jury to find for the defendant.

"The only evidence on this point is that of the witness Childs, and, if the jury believe the testimony of that witness, they should find for the defendant."

These assignments of error are without merit. The record puts beyond any question the fact that the freight train had been "made up" and put in charge of the defendant's servants before the injury. The engineer, Weatherby, and conductor, McManus, who backed the freight train against the passenger car, were, as was testified by numerous witnesses for the defendant, the employes of the defendant. The following from the testimony of W. D. Graham, a witness introduced by the defendant, must have been overlooked by counsel for the defendant:

"Q. Are you familiar with the custom in making up those freight trains in 1898—those mixed freight and passenger trains? A. Yes, sir; I was on it a good deal. Q. Tell us what your custom was in making it up? A. We did not have anything to do with the making up of the trains. The box cars was made up in the Coast Line yard, and were put on a certain track, and we pulled it on our main line and backed in on the coach on the outside of the shed."

Also the following from the testimony of W. S. Fowler, another witness for the defendant, who was a conductor of the defendant's at the time of the injury:

"Q. How was the train made up in the afternoon? A. It was made up down in the freight yard, and then the C., N. & L. [Columbia, Newberry & Laurens] engine coupled it and took it in on the road before leaving. Q. How long before leaving did you ordinarily do that? A. Sometimes might be delayed in the yard. If we was on time, might be 25 or 30 minutes before leaving. Q. What did you do with the train after you had coupled it to this coach? A. We took it over Gervais street to clear the crossing until leaving time."

We find no error, and the judgment below must be affirmed.

NERESHEIMER & CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. December 12, 1904.)

No. 51.

1. CUSTOMS DUTIES—FINDING OF BOARD OF GENERAL APPRAISERS—REVIEW.

Findings of fact by a Board of General Appraisers were reviewed by the court on appeal, where it appeared that the decision was made by general appraisers who did not hear the testimony, which was all taken before another general appraiser, who did not himself sign the decision.

2. SAME—CLASSIFICATION—DRILLED PEARLS—PEARLS IN THEIR NATURAL STATE—SIMILITUDE.

Certain drilled pearls of exceptionally large size and fine quality were imported together, arranged in collections according to size, the largest in the center. It appeared that these collections had not been selected for a special piece of jewelry, but that the pearls were to be

sold separately on their individual merits, and that they had not been advanced to a special value beyond the aggregate amount of their individual values by an assortment and selection that fitted them for immediate transformation into a necklace or string of pearls. *Held* that, under the similitude clause in section 7, Tariff Act July 24, 1897, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], they bear a closer resemblance to "pearls in their natural state not strung or set" than to "pearls set or strung," which are enumerated in paragraphs 436 and 434, respectively, of said act, chapter 11, § 1, Schedule N, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676].

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the Circuit Court, Southern District of New York (131 Fed. 977), affirming a decision of the Board of General Appraisers, G. A. 5,146, T. D. 23,748, which sustained the collector of the port of New York in the assessment for customs duties of certain drilled pearls.

W. Wickham Smith, for appellant.

Henry A. Wise, for appellees.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The pearls were imported under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676]. The relevant paragraphs are:

"Par. 434. Articles commonly known as jewelry, and parts thereof, finished or unfinished, not specially provided for in this act, including precious stones set, pearls set or strung, and cameos in frames, sixty per centum ad valorem."

"Par. 436. Pearls in their natural state not strung or set, ten per centum ad valorem."

There were two importations by appellants, in March and November respectively, 1901. One of these consisted of 45 drilled pearls, the other of 39 drilled pearls, the total value exceeding \$123,000. The importations were experiments. The foreign representative of the house secured the pearls for resale here, and they were entered in bond until a purchaser could be secured; had a satisfactory offer not been received, they were to be sent back. At that time the customs authorities were assessing such articles for duty at 20 per cent., as "manufactured articles not otherwise provided for." It is not disputed that they are not within the enumeration of either paragraph above quoted. A resale was effected to Black, Starr & Frost, large dealers in jewelry in this city, at a price including the cost and duty at that rate—20 per cent.—besides (presumably) the importers' profit. Entries were duly made, and duty assessed at 20 per cent., amounting to \$24,761. This sum was paid, and the articles withdrawn shortly after importation.

At the date of these transactions the Board of General Appraisers and the Circuit Court, Southern District of New York, had affirmed the collector's imposition of duty at 20 per cent. on drilled pearls, but an appeal in a test case was pending in this court. Decision on such appeal was handed down December 6, 1901—*Tiffany v. U. S.*, 112 Fed. 672, 50 C. C. A. 419. In that decision we held that the goods

then before us were not jewelry, but were "loose pearls of various sizes, qualities, colors and shapes, not set or strung, and not adapted for such purpose in their then condition, but to be put into the general stock of pearls of the importer for such general use of pearls as the demands of the importer's trade should thereafter require"; and that, being perforated, they were not pearls in their natural state. Therefore they were not within the provisions of either paragraph. We further held, however, that, before they could be included in the general clause of manufactured articles not otherwise provided for, it must first be found that they do not fall within the similitude section (chapter 11, § 7, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]), which imposes the same duty as is laid on an enumerated article upon an article similar to it in material, quality, texture, or the uses to which it may be applied.

Of the Tiffany importation we held that it would be error to take "as the standard of comparison for those pearls which are not matched or selected, and are therefore to be considered individually, those aggregations of individual pearls which have been strung into an article of jewelry. The evidence shows that there has to be a careful process of assortment and selection as to size, quality, luster, shape, etc., which takes time and skilled labor, so that the string of pearls thus produced is worth more than the aggregate values of the individual pearls composing it. * * * The cost of perforation is a mere trifle compared with the value of the pearl. * * * There is no difference between a single drilled pearl and a single strung pearl, but between a drilled pearl, or any number of unmatched drilled pearls, and the strung pearls of paragraph 434, which are commonly known as 'jewelry,' we think there is a greater difference than between the drilled pearl and the pearl in its natural state."

Subsequent to the decision in the Tiffany Case, and in March, 1902, more than three months after liquidation of the duties on the later importation, and nearly a year after the earlier importation, the collector reliquidated both entries, assessing the articles as pearls strung, 60 per cent., and imposing an additional duty of \$49,522. Timely and sufficient protests and appeals have preserved the importers' right to a review of this decision, and it is not disputed that the collector had authority to reliquidate each entry within a year from the time of entry.

Each lot of pearls was imported in a morocco case, with silk lining, forming a groove running lengthwise, in which the pearls were placed and by which they were held, instead of being folded loosely in squares of paper, being arranged in a graduated order, the center being the largest, and gradually decreasing in size to the last pearl at each end. The pearls were all drilled. The Board of General Appraisers held that they were so matched and assorted as to quality, size, color, and shape that each lot possessed a value greatly in excess of the aggregate value of the individual pearls composing such collection.

Findings of fact made by the board upon conflicting testimony are, as a rule, not reviewed in this court. The case at bar, however, is peculiar. The opinion of the board is signed by three members, no

one of whom, as the record shows, either saw or heard a single one of the witnesses. Testimony was all taken before another general appraiser, who did not himself sign the opinion. The circumstance that the pearls were exceptionally large and fine apparently had great weight with the board. Undoubtedly it must have been by a process of selection and assortment that large fine pearls were sent instead of smaller and cheaper ones. They were of different sizes, and not all of the same color. They were so numerous that in each lot there were pearls which closely matched each other in size. But the test suggested in the Tiffany Case is not such an assortment and selection as brings together a lot of pearls, each of which is so well chosen for luster, size, and color that it will command a high price. The assortment and selection must be such as to produce a collocation of pearls similar to the collocation found in the articles of jewelry known as necklaces or strung pearls, where time and skilled labor have been applied to produce not merely a collection, but an aggregation such that "the string of pearls thus produced is worth more than the aggregate values of the individual pearls composing it." The evidence does not, in our opinion, warrant a finding that the pearls of these importations had been assorted so as to acquire that increased value. The government appraiser, who examined them upon arrival to see if they were "jewelry or parts thereof finished or unfinished," and reported that they were not, testified, in support of the later reliquidation, that "it seemed to [him]—it is a matter of opinion merely—that in the condition in which they were imported they were intended to be strung to constitute an article of jewelry; they simply needed the stringing." On cross-examination he admitted that, inasmuch as his examination was directed solely to determining whether they were articles of jewelry, it was not sufficient to enable him to deny the testimony of others that they were not drilled perfectly and were not in a condition for immediate stringing. The weight of testimony is clearly to the effect that they had to be rebored, and that some, at least, of them had to be repolished. The importers, interested witnesses of course, testified that they were imported merely as series of pearls, not selected for a special piece of jewelry, but offered for sale and sold on their individual merits. These witnesses are corroborated by the jewelers who bought the pearls; they were not bought as collections which could be strung, each into one article of jewelry; after being rebored and polished, they went into the general stock of pearls used for making up different articles of jewelry. If they had been advanced to a special value beyond the aggregate of their individual values by an assortment and selection which fitted them for immediate transformation, each lot into a necklace or string of pearls, it is difficult to believe that this added value would have been thrown away. We are not satisfied from the proof that these importations come within the exception indicated in the Tiffany Case.

The decision appealed from is reversed, and the cause remitted with instructions to classify them at 10 per cent. by similitude to paragraph 436.

HOLDER v. WESTERN GERMAN BANK.

(Circuit Court of Appeals, Sixth Circuit. February 15, 1905.)

No. 1,343.

1. BANKS—COLLECTIONS—REMITTANCE—CUSTOM—INSTRUCTIONS.

The instruction of a bank, in sending to one bank for collection a check on another bank, "Remit New York exchange," authorizes the remittance only in accordance with custom, be that the sending of a draft drawn on a New York bank by the bank to which the check was sent, or a draft drawn by another.

2. SAME—TRUST RELATION.

Plaintiff deposited a check with defendant bank for collection as plaintiff's agent. Defendant forwarded it to the F. bank for collection, with the instruction, "Remit New York exchange." The F. bank remitted the proceeds of the collection by its own draft on a New York bank, which the New York bank, at direction of the receiver of the F. bank, who in the meantime had been appointed, refused to pay. *Held*, that the F. bank was liable as trustee for the money collected, there being no authorization by defendant that its relation should be changed to that of debtor, so that defendant was not liable.

[Ed Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, § 575.]

In Error to the Circuit Court of the United States for the Southern District of Ohio.

For opinion below, see 132 Fed. 187.

Albert Bettinger, for plaintiff in error.

H. D. Peck, Frank H. Shaffer, and J. W. Peck, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This was an action prosecuted by the plaintiff in error to recover from the Western German Bank the sum of \$4,000, being the amount of a check deposited with it for collection, and interest from March 13, 1903. The case was tried before the court without a jury. The following statement of the material facts as found by the court, and, as we think, fairly exhibited in the brief for plaintiff in error, is sufficient for the purposes of our decision:

"On the 10th day of March, 1903, the plaintiff, being the holder of a check for \$4,000, drawn upon the Commercial Bank of Jacksonville, in the state of Florida, indorsed the same, 'For deposit,' and caused said check to be deposited for collection in the Western German Bank of Cincinnati, Ohio, where he was a regular depositor. Said check was received and credited subject to the conditions printed on the deposit ticket, delivered to defendant with the deposit, and in plaintiff's book in which the deposit was entered, to the effect that the Western German Bank received said check for collection only as the agent of the plaintiff, and that credit for the same would be given subject to its payment; that the bank would observe due diligence in the selection of banks or agents for the collection of the check, but should not be responsible for the failure or negligence of said banks or agents; and, further, that said check was received, credited, and forwarded at depositor's risk only until satisfactory returns should be received for the same.

"On the same day that the check was deposited, viz., March 10, 1903, the officers of the Western German Bank duly forwarded said check to the First National Bank of Florida, at Jacksonville, in said state, for collection, ac-

accompanied by a letter wherein said bank was instructed to collect and return the proceeds of said check, with the further request to said First National Bank of Florida, 'Please remit New York exchange.' The First National Bank at Jacksonville, on the 13th day of March, 1903, received payment of the same, and on the same day forwarded to the Western German Bank of Cincinnati, by mail, a draft of said National Bank of Florida upon the Chemical National Bank of New York for \$3,995, the amount of said check less \$5 exchange or collection charges. This draft was received by the Western German Bank at the opening of business on Monday, March 16, 1903, and on the same day the First National Bank of Florida, before it could open its doors for business, was taken possession of by a receiver acting under orders of the Comptroller of the Currency, and was and is insolvent, and is now being wound up by the receiver so appointed.

"On the same day the draft was so received from the First National Bank of Florida, and before the close of business hours, defendant was first informed of the insolvency of the First National Bank of Florida, and of the fact of its having been taken possession of by a receiver. The Western German Bank forthwith forwarded the draft to New York for collection, but the Chemical National Bank, upon which the draft was drawn, acting under orders from the receiver of the First National Bank of Florida, refused payment of the draft, and, although defendant afterwards demanded payment from the receiver, and made all reasonable efforts to collect said draft, the same remains wholly unpaid.

"The court further finds that it is, and was at the time of the receipt of this check by defendant for collection, a general and uniform custom among banks and bankers of the United States to remit, in the absence of instructions to the contrary, the proceeds of checks, drafts, notes, and other instruments sent to them for collection by means of drafts or bills of exchange drawn upon banks located in the larger cities of the country, and that a great majority, probably three-fourths, of all remittances, are made by means of drafts upon banks located in the city of New York."

The court's conclusion of law upon these facts was:

"That the Western German Bank, in requesting said First National Bank to remit in New York exchange, did not exceed its powers as agent, or act outside the terms of its agency for the plaintiff, and did not thereby change its relation to the plaintiff or to the First National Bank of Florida, and is therefore not liable to plaintiff upon the cause of action set forth in the petition, and is entitled to recover from plaintiff its costs."

The plaintiff contends that the defendant, in giving the direction to the First National Bank of Florida, "Please remit New York exchange," authorized the collecting bank to remit the collection in its own draft on a New York bank, and thereby change its relation to the defendant from that of a trustee to that of a debtor, whereby the claim for the collection made by the Florida bank lost its priority in the distribution of the assets of the latter on its going into liquidation. By the conditions of the plaintiff's deposit of the check with the defendant for collection, the defendant became his agent for the purpose of sending it forward to some other bank or collecting medium, which, in proceeding with the collection, would become, as between the plaintiff and the defendant, the agent of the plaintiff. The defendant contends that there is a custom among bankers whereby the collecting bank remits its collections in New York exchange, and the finding of the court is that this custom is uniform, in the absence of instructions to the contrary. But the finding does not state whether this custom is that the collecting bank remits exchange by means of drafts of other banks on New York banks, or whether the custom permits the remittance to be

made in the collecting bank's own drafts also. But we do not think it material. The direction of the defendant to the Florida bank should be read in the light of the custom, and meant no more than that which the custom sanctioned.

But other considerations lead more directly to the determination of the controversy. The Florida bank was an agent in making the collection. When it had made the collection, it held it in trust. If it mingled it with its own funds, the trust attached pro tanto to the funds. *National Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693, where the principle vindicated in *Knatchbull v. Hallett*, 13 Ch. Div. 696, by Sir George Jessel, M. R., is fully confirmed. When it sent its own draft as the remittance, it did not operate as a satisfaction of its obligation, unless the draft should be paid, there being no agreement to receive the draft as payment. This would be so in the case of a common debt. And certainly the reasons for the same rule are not less where an agent transmits to his principal his own note or draft to provide means for the satisfaction of a trust obligation on account of funds received for his principal. The facts show that the draft of the Florida bank was uncollectible, that the payment of it was forbidden by the receiver, the party upon whom the right of the bank had been devolved. The trust relation between the plaintiff and the Florida bank was not discharged by such a remittance, and the collection went into the hands of the receiver subject to the trust. If the remittance of the draft were to be regarded as provisional payment, the result would be that, in case the draft should not be paid, the parties would be remitted to their former position. In such a case there would be no sound reason, as we think, for holding that the debt had lost its privileged character by a proceeding of the party owing it, unless the party to whom the debt is owing expressly assents to the change of relation between himself and his agent. The bank could not rid itself of that relation and become the mere debtor of the plaintiff by its own act. The trust was part of the plaintiff's security. Neither the plaintiff nor the Western German Bank, in his behalf, ever consented that the Florida bank should cast off the trust and become the plaintiff's debtor. It would be a most absurd consequence if a man in the possession, as an agent, of a fund belonging to another, could convert the fund into his own property by sending his check to the owner, and then, upon some change in his own circumstances, direct his bank not to pay it, and so transform himself into a debtor. Of course, if the owner consents to such a change of relationship between himself and his agent, or where the circumstances indicate that a credit in account is expected, which is the same thing, the result is different, because the destination of the fund is altered by agreement. But here there was no such agreement. The check was sent for collection and remittance. Satisfactory proof should be required that the owner assented to such change, in view of the consequences which would ensue. A man might be quite willing to trust another with the collection of his money when he would be very unwilling to loan it to him. It would seriously impair the facilities for collecting commercial paper if it should be exposed to the hazards of conversion by the agent into whose hands the proceeds might come.

By agreement of the plaintiff and defendant, the Florida bank became the plaintiff's agent, and the defendant is not responsible to the plaintiff for the failure of its agent to fulfill the obligations of his trust, and we think the plaintiff's remedies have not been impaired by any fault of the defendant.

If the remittance were by drafts of other parties, it may be that the presence of other considerations would require a different conclusion. But the custom referred to, if it gave the collecting bank the power to thus change the character of its obligations to its principal, would be palpably inconsistent with settled rules of law. But when interpreted in harmony with such rules, probably it would be unobjectionable.

We have stated the relations of the collecting bank, and its obligation, upon the assumption that the relations were with, and its obligation to, the owner of the check. But if upon the form of a general indorsement, without more, the Western German Bank appeared to be the owner, and the relations of the Florida bank were therefore, in technical law, with the former, the result would not be different, for all that has been said of the nature of the Florida bank's obligations would be equally applicable, and all the advantages of the right of the Western German Bank would inure to the plaintiff.

The prime reason which supports the judgment of the Circuit Court is that the injury suffered by the plaintiff consists in the failure of his agent, the Florida bank, to discharge its duty to transmit the trust fund to the Western German Bank, for which failure the latter is not responsible.

The direction to remit in New York exchange did not authorize the remittance of the collecting bank's own draft, which, being valueless, would not effect the purpose of a remittance.

The judgment is affirmed, with costs.

FARWELL et al. v. HOME INS. CO. OF CITY OF NEW YORK.

(Circuit Court of Appeals, Fifth Circuit. March 28, 1905.)

No. 1,379.

1. REFORMATION OF INSTRUMENTS—INSURANCE POLICIES—FAILURE TO READ—NEGLIGENCE.

Complainant employed brokers to obtain \$60,000 of insurance on plantation buildings, which it was found necessary to distribute among 20 different insurers. In order to have the policies read exactly alike, riders were printed containing a description of the property, and a provision for concurrent insurance to the extent of \$60,000, which were used on all but one of the policies, on which a printed rider previously used by complainant's grantor, providing only for \$45,000 concurrent insurance, was used by mistake. The policies were similar in form, each containing about 4,000 words. *Held*, that the complainant was not guilty of negligence in failing to read the policy before loss and discovering the mistake, precluding a reformation.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 265-272.]

2. SAME—EVIDENCE.

In a suit to reform an insurance policy, the evidence was held to require a finding that a rider only authorizing \$45,000 concurrent insurance had been attached to the policy, by mistake of both parties, in place of a rider provided, authorizing concurrent insurance to the extent of \$60,000.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

S. Wolff, J. D. Rouse, and William Grant, for appellants.

John Clegg and Lamar C. Quintero, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. The appellants, Charles A. Farwell and two others, citizens of Louisiana, brought this suit in equity against the appellee, the Home Insurance Company of the city of New York, a corporation organized under the laws of New York, to reform a fire insurance policy for \$2,500 issued to the complainants by the defendant company. The policy, as issued, allowed concurrent insurance for only \$45,000, and became void if insurance was had for a larger sum. The assured obtained insurance, including the \$2,500—the amount of the policy in question—for \$60,000. The policy, as issued, was thereby made void. The bill seeks to have the policy reformed so as to permit, by its terms, concurrent insurance to the amount of \$60,000. The case was tried on its merits. The Circuit Court dismissed the bill, and the complainants appealed to this court.

The bill, answer, and evidence show many facts about which there is no controversy, and yet it is necessary to make a condensed statement of them, for they greatly aid, we think, in pointing to a correct and just answer to the one controverted question of fact, to wit, whether or not \$45,000, instead of \$60,000, was by mutual mistake fixed as the amount of concurrent insurance allowed by the terms of the policy.

The policy sought to be reformed is dated September 27, 1902, and was issued by the defendant company from the office of Peter F. Pescud, insurance agent. It covers the buildings and fixed and movable machinery of all kinds situated on the Ashton Plantation, in the parish of St. Charles, La., and, as issued, contains the words "\$45,000 total insurance permitted concurrent herewith." The premium was duly paid by the complainants. The property insured was totally destroyed by fire, and proof thereof was duly made.

The Ashton Plantation formerly belonged to Emile Legendre, who sold it to the complainants in September, 1902. While Mr. Legendre owned the property, he obtained insurance upon it to the amount of \$45,000, \$5,000 of which was issued through Peter F. Pescud, insurance agent. Mr. Legendre obtained the \$45,000 insurance from several different companies. In order to have all the policies alike, he had printed a number of forms to be used as riders, which contained a description of the property and a statement of the amount of concurrent insurance permitted. One of these riders or forms was to be attached to each of the policies. For convenience of reference, they will be called hereafter the "old form." They were furnished the agents of the several insurance companies to whom Mr. Legendre made application for insurance. Such forms were furnished Peter F. Pescud, insurance agent. After the complainants became owners of the property, they employed Brand & Bush, insurance brokers, to obtain insurance for them upon the property for \$60,000. Brand & Bush prepared and had printed a large number—perhaps 250—forms or riders,

describing the property, and providing \$60,000 as the total insurance permitted. These forms (hereafter designated as the "new form"), in general appearance, were substantially like those which had been printed for Mr. Legendre. They were distributed by Brand & Bush among the agents of the several insurance companies of whom they sought the \$60,000 insurance. They obtained insurance for the complainants from 19 different companies for sums ranging from \$1,000 to \$7,000; the aggregate amount of the 19 policies being \$57,500. In each of these 19 policies the new form, allowing concurrent insurance to the amount of \$60,000, was used. The \$2,500 policy issued by the defendant company, which is in suit here, is required to complete the amount of \$60,000. There is no dispute or controversy as to the 19 policies. After the fire which destroyed the property insured, these 19 policies were paid. The defendant company refused to pay the policy in question, claiming it was void, because by its terms only \$45,000 of concurrent insurance was allowed, and the complainants, they claim, had made the policy void by obtaining insurance for a greater sum. The only material difference between the policy in question and the other 19 policies is as to the amount of concurrent insurance. The fact is that the agents of the defendant company, in issuing the policy, pasted thereon one of the old forms, instead of one of the new forms. Brand & Bush, who were intrusted with obtaining the \$60,000 insurance, did not, of course, intend to obtain the policy which permitted only \$45,000 of concurrent insurance. There is no controversy in the case, and no room for controversy, about the fact that, so far as Brand & Bush are concerned—and they were the agents of the complainants—there was a mistake in using the old form instead of the new one. The controverted question is as to whether or not the defendant company had knowledge of the fact that insurance was being obtained to the amount of \$60,000, and intended to issue a policy that would permit such insurance, and by mistake used the old form. The evidence which bears directly on that point must be briefly stated.

It is shown without conflict that Mr. Robert Gottschalk was in charge of Pescud's office, and had full authority to represent the defendant company. Mr. W. A. Brand, of the firm of Brand & Bush, testified that he did not authorize the use of the old form in the issuance of the policy, and that, at the time the policy was written, Mr. Gottschalk was familiar with the amount of insurance which was to be had on the property. This witness was asked, "What did you tell him [Gottschalk] was the gross amount of insurance you were trying to place?" And he replied: "\$60,000. Q. Did you tell him that before or after the policy was issued? A. Before." This witness says that he is quite certain that he furnished Mr. Gottschalk with the \$60,000 forms which he had printed. Duncan J. Arnoult, who was connected with the firm of Brand & Bush, testified that he showed Mr. Gottschalk one of the new forms. Arnoult testifies that, representing Brand & Bush, the complainant's agents, he went to Pescud's office, and saw and talked to Mr. Gottschalk; applying to him for part of the \$60,000 insurance. On this visit, and in connection with the application, he showed him the new form. Both Brand and Arnoult testify posi-

tively to conversations in which they informed Gottschalk of the purpose to insure the property for \$60,000, and this occurred before the issuance of the policy. The fact that these conversations occurred in relation to the insurance, Gottschalk does not deny, except to the extent of saying that the amount of insurance sought—\$60,000—was not mentioned. Is it reasonable that, in obtaining 20 policies as a part of one plan to insure the property for \$60,000 Brand & Bush would have made the amount known in 19 instances, and failed in the twentieth, when the same opportunities were had for conveying the information?

The following excerpt from Brand's deposition points to the way in which the mistake probably occurred:

"Q. And you are quite sure you sent a copy over to Mr. Pescud? A. I am. [Witness is speaking of the \$60,000 form.] When I went there after it was discovered that this was the wrong form, I asked Mr. Gottschalk how he came to make such a mistake; and he turned to a young man and asked him where he got the form, and he said he used some of those he had in the office, which had been left there for Emile Legendre's sugar house. Q. The conversation you had respecting what you term a mistake in the policy occurred between you and Mr. Gottschalk after the fire? A. Yes, sir. Q. Did Mr. Gottschalk say that that was a mistake then? A. Well, he turned to the boy and asked where he had gotten the form. Seems he knew it was a mistake, because I tried to get more from him on the \$60,000 form, but he declined to take it. We did a large business together, and I always offered it to him when I could."

-- On this point Gottschalk testified:

"Q. When your attention was called by him [Brand] to the fact of the printed form attached to the policy, which specified the amount of the risk—the total risk—upon that property was \$45,000, didn't you turn to a young man in your office, and ask him where he got it? A. I might have. Q. Did he not say, 'I took one of the forms of the Legendre policy found in the office'? A. I don't recollect that at all. Q. What was that young man's name? A. Bulber. Q. Is he in your employ now? A. Yes, sir. Q. What is his first name? A. Eugene."

Eugene Bulber was not examined as a witness, and the record does not show why he was not made a witness.

The record shows that there was some correspondence between Mr. Gottschalk and the defendant company in reference to the insurance in question. This correspondence was asked for by the complainants on the taking of the proof, but it does not appear in the record. It is not improbable that it would show whether the insurance was to be on a basis of \$45,000 or \$60,000. Mr. Farwell, one of the complainants, testifies that, when Pescud sent to collect his bill for the premium on the policy, he referred him to Brand & Bush, saying that he (Farwell) would settle with them. Gottschalk confirms this, saying that Brand came to the office "some time between the date of the policy and the issuance of the policy—the issuance having been delayed on account of correspondence—and asked me, inasmuch as he had the balance of the insurance, if he would permit this transaction to go through his office; and I felt he referred particularly to the commission on the premium, and I instructed our bookkeeper to let that policy go to Mr. Brand's account, and it was charged to his account." This is significant as showing that Gottschalk admits in every instance his coming in contact

with Brand and Arnoult, and the conversations about the policy, but in no instance does he remember that the amount of the concurrent insurance was mentioned. Are we not justified in believing confidently that Mr. Gottschalk is mistaken? Brand's firm had been employed for the express purpose of securing \$60,000 of insurance. It had to be secured in small sums from a large number of companies—from 20, as the result showed. He had 200 or 250 forms printed. These forms were distributed among the various insurance agents in New Orleans. They were furnished to be used on the policies making up the \$60,000. Nineteen of the forms certainly reached the several offices, for they were used on 19 policies. Brand says that he sent the forms, and Arnoult says that he carried them to Pescud's office, where Gottschalk was in charge. Brand and Arnoult say that on several occasions they told him that the insurance sought was \$60,000. Can we believe it to be true that, with all these opportunities, the complainants' agents failed to let Gottschalk know they were seeking \$60,000, and not \$45,000, insurance on the property? We are convinced by the evidence that he was informed as to Brand's purpose to secure for the complainants \$60,000 of insurance. We do not think that, with knowledge of that fact, Gottschalk would have intentionally used the old form, limiting the insurance to \$45,000, and no such charge is made; nor do we think that he would have collected the premium on the policy, knowing it to be void. We believe his memory is in fault. We find the evidence clear and convincing that the old form was attached to the policy by the mistake of the defendant company's agent. Considering all the witnesses as equally credible, we are constrained to reach this conclusion from the weight of the evidence on the question in dispute, and by many facts and circumstances about which there is no dispute.

It remains to apply the law to the foregoing facts and conclusions.

It is unquestionably the rule that, to entitle the complainants to relief, the evidence must be clear, unequivocal, and convincing. *United States v. Budd*, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. Ed. 384. We find the evidence fills the measure of this rule, for it leaves in our minds no substantial doubt that a mutual mistake has occurred.

It is urged that the negligence of the complainants in failing to read the contract of insurance is such that they should be deprived of the right to relief. And in that connection our attention is called to the indorsement on the back of the policy: "It is important that the written portions of all policies covering the same property read exactly alike. If they do not they should be made uniform at once." This language would not necessarily call attention to the printed rider or form attached to the policy. The policy was written by an agent having authority from the defendant company to write it. The complainants' agents had informed the defendant's agent that insurance to the amount of \$60,000 was desired and applied for, and printed forms to that effect were furnished him. The complainants' agents would naturally expect the defendant's agent to use the form furnished, and not to use an old and discarded form, that would, under the circumstances, make the policy void. While not directly in point, the ob-

servations of Mr. Justice Miller in *Williams v. North German Ins. Co.* (C. C.) 24 Fed. 625, 626, are pertinent:

"Where an instrument fails to represent what both parties intended to have it represent, and one party had drawn up the instrument, and the other party merely accepted it, and the fault was on the party drawing up the instrument, it can be reformed. It would be a harsh rule if a person applying to an insurance agent, who is supposed to know the legal value of the language used in such policies, which he is drawing up every day, and who is supposed to know exactly what is desired—if that agent fails to do that which was intended, it would be harsh to say that the instrument shall not be reformed, and that chancery shall not give relief."

Moreover, there are facts peculiar to this case tending to answer the contention that the complainants were negligent in failing to discover the mistake before the fire. To obtain the amount of insurance they sought, they received 20 different policies in 20 different companies. If ordinary care required them to read one, it required them to read all. They were all on standard forms. Each of them had pasted on it a printed form headed, "Ashton Sugar House," containing a description of the property insured, a statement of the amount of concurrent insurance allowed, and other matters. The entire policy contained, in all, about 4,000 words; and the twenty policies, about 80,000 words. Would it not be too stringent to hold that the complainants were guilty of culpable negligence in failing to read these policies? The ordinarily careful business man would probably have only looked at them to see that all were properly signed, and that the forms descriptive of the property were attached. The evidence shows that some such examination was made, but the difference in appearance between the old and new forms being slight, the fact that an old form had been pasted on 1 out of the 20 policies was not discovered. It has been held, even where the case was not complicated by the submission of a number of policies, that "a plaintiff is not, by neglecting to read his policy, guilty of such laches as to bar him from seeking to have the policy reformed to agree with the contract he made." 2 May on Insurance (4th Ed.) § 566, p. 1334. *Fitchner v. Fidelity Mutual Fire Association*, 103 Iowa, 276, 72 N. W. 530; *Barnes v. Hekla Fire Ins. Co.*, 75 Iowa, 11, 39 N. W. 122, 9 Am. St. Rep. 450; *Palmer v. Hartford Ins. Co.*, 54 Conn. 488, 9 Atl. 248. The highest possible care is not demanded. The complainants were not guilty of such negligence, in our opinion, as deprives them of the right to have the contract reformed. See 2 Pomeroy, Eq. Jur. (2d Ed.) § 856.

There are other facts and circumstances in the case which we have considered, but it is impracticable to comment on all of them without making the opinion longer than the transcript.

No universal rule has been formulated in text-book or opinion to show in all cases when contracts may or may not be reformed. We examine and decide this case only in the light of its own inherent facts. We have been caused to hesitate only by the fact that the able and careful trial judge reached a different conclusion. The evidence, however, is so convincing that we are constrained to dissent from his view.

The decree of the Circuit Court must be reversed, and the cause remanded, with instructions to enter a decree for the complainants.

EMPIRE STATE-IDAHO MINING & DEVELOPING CO. et al. v. HANLEY.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1905.)

No. 1,083.

1. PRIOR APPEAL—LAW OF THE CASE—MANDATE.

Where, on a prior appeal, it was held that defendant had excluded plaintiff from a mining property at least until 1901, such holding constituted the law of the case on a subsequent hearing with reference to damages sustained, though it was not contained in the mandate issued to the trial court.

2. SAME—FINDINGS—EVIDENCE.

On a hearing to determine damages for defendants wrongfully keeping plaintiff from possession of a mine, evidence held to justify a finding that such dispossession extended to January 1, 1902.

3. SAME—SUPERSEDEAS BOND—SUMMARY JUDGMENT AGAINST SURETIES.

Where, after affirmance on appeal, appellee filed in the trial court a motion to proceed containing a notice to the sureties on appellant's supersedeas bond that he would apply for a summary decree on the bond, service of which motion was admitted by the surety, such surety was a quasi party to the proceeding, and the court was authorized to render summary judgment against it, both under the state law (Ann. Code Idaho 1901, § 3576), providing that judgment may be entered on motion against the sureties by the court from which the appeal is taken, pursuant to the stipulations, and independent thereof.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Idaho.

Geo. Turner, F. T. Post, and W. B. Heyburn, for appellants.

M. A. Folsom, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. On November 9, 1903, this court rendered a decree in the above-entitled cause, remanding the same to the court below with directions to modify its final decree in certain respects specified, and directing it to take, if necessary, further proof as to the time when the defendants to the suit, the appellants herein, ceased to exclude the appellee from the mine in question, "and gave or offered to him or his representatives free access thereto and free inspection thereof." In accordance with that decree, the cause was remanded to the Circuit Court. That court appointed a special examiner to take such testimony upon the question so suggested, and return the same to the court together with his opinion thereon, his opinion to be advisory only. Testimony was accordingly taken. Thereupon a motion and petition were served and filed by the appellee for judgment against the Empire State-Idaho Mining & Developing Company and the surety upon its supersedeas bond, the American Bonding Company. The surety entered a special appearance, and objected to the rendition of a judgment against it upon the ground that it had never been served with any process or rule or order of the court, and had not had its day in court, and that the court was without jurisdiction to render a judgment against it. The Circuit Court found from the evidence that the appellee was excluded from the mine up to January 1, 1902, and that thereafter he was not excluded, and it accordingly entered a decree

against the mining company for \$260,672.43 and a decree against the American Bonding Company for \$170,343.60, the amount of the decree from which the former appeal was taken.

The assignments of error present some questions which have already been adjudicated by this court, and which will therefore not be here reconsidered. The questions that are new are, first, did the trial court err in holding that the appellee was excluded from the mining property up to January 1, 1902? and, second, was that court without jurisdiction to render a judgment against the American Bonding Company? As to the exclusion of the appellee from the mining property, the appellants contend that he was not in fact excluded therefrom at any time, but that, if there were at any time theoretical exclusion, it ceased on May 6, 1901. The date so mentioned is the date of the decree of this court in the case of *Hanley v. Sweeny*, 109 Fed. 712, 48 C. C. A. 612, in which it was held that the appellee herein was the owner of an undivided one-eighth of the Skookum Mine, and that his conveyance of that interest had been fraudulently obtained by the opposing parties in that suit. The present suit was brought by the appellee herein to obtain an injunction against the further operation of the mine by the appellant the Empire State-Idaho Mining & Developing Company and to obtain an accounting of the antecedent working of the ground by said appellant. Upon the appeal from the decree of the Circuit Court this court, in *Sweeney v. Hanley*, 126 Fed. 102, 61 C. C. A. 153, said: "The case shows that from the beginning of the mining of the ore in controversy to at least the time of the decision of this court on May 6, 1901, in the case of *Hanley v. Sweeny et al.*, 109 Fed. 712, 48 C. C. A. 612, the defendants to the suit claimed Hanley's interest in the mine in question by virtue of the deed here adjudged never to have been delivered, but to have been fraudulently gotten possession of by Sweeny and Clark, during all of which period they unlawfully and fraudulently excluded Hanley from the mine;" and this court in its opinion further said that the decree of the Circuit Court "must be so modified as to award the complainant, Hanley, judgment for one-eighth of the gross value at the mine of all ore extracted by the Empire State-Idaho Mining & Developing Company therefrom up to the time the defendants to the suit ceased to exclude him from the mine, and to give him or his representatives free access thereto and inspection thereof, and thereafter for one-eighth of the net value of all ore so mined by the defendant company from the mine or mining claim in question, together with legal interest," etc. It thus appears that it is settled by the adjudication of this court that the exclusion of the appellee from the mine continued at least until May 6, 1901. The fact that the views of the court so expressed in the opinion are not contained in the mandate which issued to the lower court renders them no less conclusive as the law of the case. *Thompson v. Maxwell*, 168 U. S. 451, 18 Sup. Ct. 121, 42 L. Ed. 539.

The trial court found that the exclusion of the appellee continued until January 1, 1902. That date was fixed as the date of the termination of the exclusion for the reason that it was shown that at that time a limited permission, through an order of the court, was given to the ap-

pellee's engineers and his watchman to enter the mining ground. The evidence that the exclusion continued until that date consists in the following facts: The decree of this court of May 6, 1901, was not complied with by the appellees in that suit. They filed in this court a petition for rehearing, in which they reasserted their denial of Hanley's right to the property or to relief in equity. After the denial of that petition they made an application to the Supreme Court for a writ of certiorari to review the judgment of this court. That application was pending until January 13, 1902. In December, 1901, the appellee herein presented an application to the Circuit Court for an injunction and an order of reference, supported by his affidavit, in which he deposed that the defendant company had constantly refused to permit him to enter the underground workings of said property for the purpose of working said property or inspecting the same, and that it had excluded him from entering said property for any purpose whatever. The Empire State-Idaho Mining & Developing Company, in opposition to the motion and application, replied to that affidavit, but did not deny the alleged fact of the exclusion of the appellee. Upon the hearing on that motion and application counsel for said mining company, in the presence of the general manager and other officers thereof, vigorously objected to an order of the court permitting the appellee to enter the mine, upon the ground that he had no right therein. Later, when the appellee presented to the Circuit Court his petition in said case for the appointment of a receiver and an injunction, together with his affidavit in support thereof, the resident manager of the mining company on February 6, 1902, presented his counter affidavit in opposition thereto, in which he admitted that said mining company "and its officers and agents have refused to permit the said Hanley to enter its underground workings; that it has no underground workings in which the said Hanley has any interest, or into which he is entitled to enter; deny that the said Hanley, for the purpose of working the said Skookum mine, or inspecting the same, or for any purpose, has any right to enter therein through any workings of the respondent corporation; admit that the respondent corporation has claimed exclusive title and right of possession to its said workings, and has excluded plaintiff from entering therein for any purpose whatever; deny that the said plaintiff has any right to enter into or within the workings of the corporation defendant, except by virtue of such orders as the court may make authorizing him to enter such workings for the purpose specified in said order; denies that any order has been made by said court authorizing said Hanley to enter within the workings for any purpose; and admit that on the 23d day of January, 1901, the corporation defendant did forbid the said Hanley entering into the said workings." Against the force of these admissions of the affidavit, counsel for the appellants contend that the mining company was not seeking to obtain any relief based upon that paper. They admit that the appellee had in his affidavit alleged his exclusion from the mine as one of the reasons why he was entitled to an injunction and the appointment of a receiver, and that the counter affidavit is possibly an admission of that statement in a qualified way for the purpose of that hearing; but they argue that,

so far as the hearing was concerned, it was immaterial whether the appellee were excluded from the mine or not. But whatever may have been the purpose of the affidavit, and however immaterial the question of the exclusion of the appellee from the mine may have been to the questions involved on the hearing of that application, the affidavit nevertheless shows clearly and distinctly the hostile attitude of the mining company toward the question of the admission of the appellee to the mining property—an attitude that, so far as the evidence shows, had been continuous and uninterrupted upon the part of the mining company and its predecessors in interest from the beginning of the litigation. It is true that the evidence in this case contains the admission of the appellee that he did not at any time between May 6, 1901, and January 1, 1902, ask the privilege of entering the mine, but it is also true that the mining company never offered him that privilege. Counsel for the appellants argue that, if there were exclusion in February, 1902, that fact would not tend to prove exclusion during the period between May 6, 1901, and January 1st following, and that presumptions do not work backwards. But we think the fair presumption is that an exclusion shown to have existed in and long prior to May, 1901, and to have existed in December and February following, was continuous between those periods, and that to show that it was so continuous the appellee was not required to prove a specific act of exclusion on either or any of the intervening days. The admission of the appellee's agents to the mine on January 1, 1902, was not the voluntary act of the mining company. It was obtained only upon the order of the Circuit Court, and against the opposition of the mining company. We find no error, therefore, in the finding of the Circuit Court that the exclusion continued at least until that date.

It remains to be considered whether the Circuit Court erred in entering a decree against the American Bonding Company of Baltimore. In November, 1902, the decree of the Circuit Court was entered in favor of the appellee for \$175,867.02 and costs. Of that amount the appellee collected \$5,523.42. Both parties appealed from the decree. Upon hearing the appeals this court directed a modification of the decree in favor of the appellee herein. A supersedeas bond in the sum of \$200,000, with the American Bonding Company as surety, had been given by the mining company upon its appeal. That appeal not having been sustained by this court, both the principal and the surety became liable for the amount of the decree appealed from. After the mandate of this court was filed in the court below, the appellee herein filed a motion to proceed, and gave notice to the appellants that he would apply for a summary decree upon the bond. Prior to the filing of the examiner's report, the appellee filed his petition and motion for summary judgment upon the bond, and gave due notice of his intention to present the motion. Service was made upon the mining company and upon the vice president of the American Bonding Company. Service upon the latter was admitted in the following words: "Service of the foregoing motion, petition, and notice is hereby admitted this 29th day of April, 1904." On the day fixed for the hearing the appellants appeared. The bonding company made objection to the entry of a sum-

mary judgment on the ground that no order to show cause had been served upon it, and it contended that the court had no jurisdiction to enter a judgment against it except upon process issued out of the court and under its seal. The statutes of Idaho, as do those of many other states, provide that judgment may be entered on motion against the sureties by the court from which the appeal is taken, pursuant to the stipulations. Idaho Ann. Code 1901, § 3576. It is held that such a provision is not only not unconstitutional (*Beall v. New Mexico*, 16 Wall. 535, 21 L. Ed. 292), but that similar provisions of state laws may properly be followed by the federal courts (*Smith et al. v. Gaines*, 93 U. S. 341, 23 L. Ed. 901). In *Moore v. Huntington*, 17 Wall. 417, 21 L. Ed. 642, Mr. Justice Miller said:

"It is a very common and useful thing to provide by statute that sureties in appeal and writ of error bonds shall be liable to such judgment in the appellate court as may be rendered against their principals. This is founded on the proposition that such sureties, by the act of signing the bond, become voluntary parties to the suit, and subject themselves thereby to the decree of the court."

Independently of such statutory provisions, it has been held that federal courts, upon a mandate determining that the conditions of the bond have been broken, will enter a summary judgment against the sureties on a supersedeas bond. In *Third National Bank v. Gordon* (C. C.) 53 Fed. 471, it was held that, where a judgment of the Circuit Court has been affirmed by the Supreme Court, and the condition of the supersedeas bond given under rule 29 of the Supreme Court has been thereby broken, judgment may be had thereon by motion against the sureties as well as the principal. The court said:

"The nature and character of a supersedeas bond seem to imply a more summary remedy upon it than a suit to enforce it. The plaintiff's judgment is superseded, and he is for the time deprived of his remedy by execution to obtain the fruits of his judgment. The supersedeas bond is given and approved by the judge of the court in which the cause was heard and the judgment obtained; and the giving and acceptance of such bond are, to some extent, like a confession of judgment, if the appellant fails to maintain his contention in the appellate court."

That decision was affirmed by the Circuit Court of Appeals for the Fifth Circuit in *Gordon v. Third National Bank*, 56 Fed. 790, 6 C. C. A. 125, in which, in a carefully considered opinion, it was said:

"In this connection it may be well to notice that the motion for judgment in this case has all the necessary elements of a scire facias; and, proper notice thereof having been served on all of the obligors in the bond, and they having all appeared, and the sureties having interposed demurrers, not well taken, considering it as a scire facias, and having failed to plead or answer, the court could well proceed to enter judgment on the record alone without other proof."

The court, having found in these considerations ground to sustain the judgment of the court below, proceeded to consider the case as the parties and the court below had treated it, namely, as a proceeding authorized by the state laws of Alabama, and the practice of the United States Circuit Court for that state and of the United States courts in general, and found upon that ground also that it was a proceeding in accordance with the law and practice of the federal courts. In *Blossom*

v. Railroad Company, 1 Wall. 655, 17 L. Ed. 673, Mr. Justice Miller, speaking for the court, referred to the fact that after a decree adjudicating rights between the parties to a suit, other persons having no previous interest in the litigation may become connected with the case in the course of subsequent proceedings in such a manner as to subject them to the jurisdiction of the court and render them liable to its orders, and said:

"Sureties signing appeal bonds, stay bonds, delivery bonds, and receiptors under writs of attachment, become quasi parties to the proceedings, and subject themselves to the jurisdiction of the court, so that summary judgments may be rendered on their bonds or recognizances."

In *Tyler Mining Company v. Last Chance Mining Company*, 90 Fed. 21, 32 C. C. A. 498, this court held that a summary decree for damages upon an injunction bond could properly be entered against the sureties. *Lea v. Deakin* (D. C.) 13 Fed. 514; *Russell v. Farley*, 105 U. S. 433, 26 L. Ed. 1060. The trial court did not err, therefore, in rendering judgment against the surety on the appeal bond.

The decree of that court is affirmed.

LOS ANGELES TRACTION CO. v. CONNEALLY et al.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1905.)

No. 1,086.

1. STREET RAILROADS—INJURIES AT CROSSING—CONTRIBUTORY NEGLIGENCE—PRESUMPTIONS.

In an action for death caused by a collision with a street car at a crossing, there was evidence that the horse deceased was driving approached the crossing at a gallop, whereupon the motorman immediately applied the brakes and did everything in his power to stop the car, and so far succeeded that deceased almost got across the track before the car was struck. Immediately after the collision the horse appeared to be "sweaty," but stood quietly with two of his feet on the curbing of the sidewalk. The cart, when struck, was in a position indicating that deceased saw the car and took a diagonal course to cross ahead of it. *Held*, that such facts justified a finding that deceased was guilty of contributory negligence, so that it was error to charge that, in the absence of all evidence tending to show whether deceased stopped, looked, and listened before attempting to cross, it would be presumed that he did.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 210-215.]

2. SAME—DUTY TO STOP, LOOK, AND LISTEN.

A person about to cross a street railroad track in an incorporated city is not bound, as a matter of law, to stop, look, and listen.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 210-215, 256, 257.]

In Error to the Circuit Court of the United States for the Southern District of California.

Harris & Harris and Byron L. Oliver, for plaintiff in error.

Isidore B. Dockweiler and Joseph Scott, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This action was brought for the recovery of damages for injuries resulting in the death of one Luke Conneally, father of the plaintiffs to the action, defendants in error here, and resulted in a verdict and judgment in their favor. The injuries were received in a collision of Conneally's cart with one of the electric cars of the plaintiff in error, at the intersection of Jefferson street and Vermont avenue, in the city of Los Angeles. In its answer the defendant to the action put in issue the averments of negligence on its part, and also pleaded contributory negligence on the part of the deceased. The questions presented on the present appeal grew out of the latter defense.

The case is fairly stated by counsel, and is, in substance, as follows: Early in the evening of the accident, Conneally, who was a dairyman, and a strong, healthy man about 37 years of age, came into the city of Los Angeles to attend a meeting of the Milkmen's Association, and on his way to the meeting stopped at a saloon and took one drink of whisky; without apparent effect, however, for the evidence is undisputed that he was entirely sober at the meeting. After the meeting, and between 10:30 and 11 o'clock, he drank at least two glasses of beer; about 11:15 or 11:30 of the same evening he took within a few minutes of each other two drinks of whisky, and a few minutes later he drank at another saloon two small glasses of beer. During most of this time Conneally was accompanied by two other milkmen, named respectively E. Paggi and George W. Hood, both of whom were witnesses for the plaintiffs at the trial in the court below. These three persons lived near each other, and, after the drinking of the last two glasses of beer by Conneally, they started for their homes, Paggi and Hood in one conveyance, and Conneally in a heavy two-wheeled cart, drawn by one small, gentle horse. As they proceeded, Conneally was sometimes ahead, and at others Paggi and Hood were ahead, driving at the rate of about six miles an hour. There was no moon, and the night was dark and foggy, but it appears from the uncontradicted testimony that there was no difficulty in seeing from 30 to 40 yards. As the crossing of Jefferson street and Vermont avenue was approached, at which there was no street light, Paggi and Hood were in advance, and Conneally was following in his cart some 30 or 35 yards in the rear, which cart, according to the evidence, made a rattling noise. On Vermont avenue the defendant company had two tracks. The car that struck Conneally's cart and inflicted the injury which resulted in his death was going south on Vermont avenue, and was therefore on the west track. That street is straight for half a mile north from its crossing with Jefferson street, and its view unobstructed to one at the crossing. Of the men in the vehicle ahead of Conneally's, one testified that he saw no light on the car or from the car until after the accident; that he looked for a light, and saw none. The other said that "shortly after approaching Vermont, probably 30 or 40 feet from the line of the car track," he "glanced right and left, and saw no car." The motorman and conductor of the car that did the damage, and the motorman on a car approaching from the south, testified that the car was lighted; and the conductor further testified that at the time of the accident he was

engaged in making up his trip sheet; and several witnesses testified that from the arrangement of the electric current, and from the fact that other cars on that circuit were lighted, the car in question must have had its lights burning. Paggi and Hood testified that they heard no gong or other warning from the car, while the motorman's testimony was to the effect that he sounded the gong all the way down Vermont avenue. The car seems to have been going, at the time of the accident, at the rate of about 10 miles an hour, whereas the speed prescribed by an ordinance of the city was not to exceed 8 miles an hour.

It appears from the diagram introduced in evidence that Jefferson street is 60 feet, and Vermont avenue 80 feet, in width. So far as appears, there was but one eyewitness of the accident, who was the motorman of the car that inflicted the injury. He testified, among other things, as follows:

"As we approached the place of the accident, the front end of the car was somewhere between the lines of Jefferson street. I think it was near the north line, and a single rig came out of the darkness and started across the tracks in front of me. The horse was on a gallop, and just the moment I saw him I applied the brakes and reversed my car, and did everything in my power to stop, but I so slowed the car that he almost got across the track. If he had moved eighteen inches farther he would have cleared the track, but he didn't move that distance, so I struck the cart. To stop the car, I first applied the brake and threw my reverse. That is all that could be done to stop it. I made an extraordinary good stop. From the time I saw the cart, I should judge I stopped within a car length and a half—in the neighborhood of that. I believe a car is 39 feet in length. The moment I saw the cart I put on the brakes and tried to stop the car. After the accident occurred I got off the car and went back to the body. He [Conneally] was lying on his face, was turned over, and I examined him and felt his pulse, and he was still alive. I asked the conductor to go to Dr. Kissler's and call him. He lived only about half a block from where the accident happened. The conductor was at the body when I reached it; no one else. Mr. Hood and Mr. Paggi came afterwards. I am positive they did not come up until after. One of the first things I noticed was that Mr. Conneally had been drinking. I smelled liquor; it was real strong. The horse was standing with his front feet on the curbing, opposite the car. He was standing real still. He was tied afterwards."

The motorman's description of the position and condition of the horse was corroborated by the testimony of other witnesses, both for the plaintiffs and for the defendant, one of whom added that the horse was "sweaty."

After telling the jury that the burden of proof rested upon the plaintiffs as to all of the issues except that of contributory negligence, and that as to that the burden of proof rested upon the defendant, the court below instructed the jury as follows:

"Contributory negligence is such an act or omission on the part of the person injured, amounting to a want of ordinary care, as, concurring or co-operating with the negligent act or acts of the defendant, was the proximate cause of the injury complained of by the plaintiffs, and whether or not said deceased exercised due care and caution before or in crossing or attempting to cross defendant's railway track is one of the issues submitted for your determination. The court, however, instructs you in this connection that it is the duty of an individual, before crossing or attempting to cross a railroad track, to exercise reasonable care in the use of his senses of sight and hearing, to ascertain whether or not a car or train is approaching, and, if he fails to exercise such reasonable care, he is guilty of negligence.

"The court further instructs you on this branch of the case that, in the ab-

sence of all evidence tending to show whether the deceased, Luke Conneally, stopped, looked, and listened before attempting to cross the west track, the presumption would be that he did. But that presumption may be rebutted by circumstantial evidence, and it is a question for the jury whether the facts and circumstances proved in this case rebut that presumption, and, if they find that they do, they should find that he did not stop and look and listen; but if the facts and circumstances fail to rebut such presumption, then the jury should find that he did so stop and look and listen. In order to justify them in finding that he did not, all evidence tending to show that should be weightier in the minds of the jury than that tending to show the contrary."

The court also gave the jury these instructions:

"The jury are the sole judges of the facts and the credibility of the witnesses, and in civil cases, such as the present one, should base their findings on a preponderance of evidence, uninfluenced by sympathy or prejudice for or against either party.

"The jury are not bound, however, to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number, or against a legal presumption or other evidence, satisfying their minds.

"If you believe from the evidence that said deceased was guilty of contributory negligence, your verdict will be for the defendant, even though there may have been negligence on the part of the defendant."

The instructions of the court concerning contributory negligence were duly excepted to by the plaintiff in error, and are here assigned as error. The portion most strenuously objected to is that relating to the presumption to be indulged by the jury that the deceased stopped, looked, and listened before attempting to cross the railroad track. That instruction is a copy of one approved by the Supreme Court in the case of *Baltimore & Potomac Railroad Company v. Landrigan*, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. Ed. 262, and was evidently taken from it. But that case presented a very different state of facts from the present one. In the first place, the instruction itself is to the effect that the presumption mentioned arises only "in the absence of all evidence tending to show" whether the deceased stopped, looked, and listened before attempting to cross the railroad track. Such instruction was applicable to the facts of the *Landrigan* Case, for, so far as appears from the report of the case, there was no evidence there tending to show whether the plaintiff's intestate stopped, looked, and listened before attempting to cross the track. The present case is wholly different in that respect, for not only did the motorman (the only eyewitness to the accident, so far as appears) testify that the horse that the deceased was driving came out of the darkness on a gallop, upon the discovery of which he immediately applied the brakes, and did everything in his power to stop the car, and that he so slowed the car that the deceased almost got across the track before the cart in which he was riding was struck, but that testimony was somewhat, at least, corroborated by other uncontradicted testimony to the effect that the horse was "sweaty," indicating that he had been driven rapidly; that he was naturally so gentle as to stand, after such a crash, quietly with two of his feet on the curbing of the sidewalk; and that the cart when struck was from 30 to 50 feet south of the south line of the crossing, which would tend to show that the deceased saw the car and took a diagonal course to cross ahead of it. The jury might have found some corroboration

of all this, too, in the uncontradicted testimony to the effect that, during the evening of the accident resulting in the death of the deceased, he took three drinks of whisky, and at least four glasses of beer, all of which beer, and two glasses of the whisky, were taken by him within about an hour and a half of the time of the accident.

The facts and circumstances here presented wholly differentiate the case, in our opinion, from that of *Baltimore & Potomac Railroad Company v. Landrigan*, supra, for it is very clear that in the present case there was evidence tending to show that the deceased, Conneally, did not stop before attempting to cross the track upon which he was injured. Where there is evidence upon the question of alleged contributory negligence, the case should be determined upon the evidence, and not upon a presumption that arises only in the absence of all evidence. *Philadelphia, etc., Railway Co. v. Stebbing*, 62 Md. 504; *Salvers v. Monroe*, 104 Iowa, 74, 73 N. W. 606; *Bell v. Clarion*, 113 Iowa, 126, 84 N. W. 962; *Smith v. Railway Co. (N. D.)* 53 N. W. 173; *Olmstead v. Railway Co. (Utah)* 76 Pac. 557; *Volkman v. Railway Co. (Dak.)* 37 N. W. 731; *Huber v. Railway Co. (Dak.)* 43 N. W. 819; *Seaboard, etc., Co. v. Walthour (Ga.)* 43 S. E. 720. But for the instruction of the court to the effect that the deceased was presumed to have stopped, looked, and listened before crossing the track, the jury might, as said by counsel for the plaintiff in error, have found from the evidence that the car was lighted; that he put his horse into a gallop, and undertook to cross the track ahead of the car, thereby taking the risk of doing so.

There is also another marked distinction between the present case and that of *Baltimore & Potomac Railway Company v. Landrigan*. The latter was a case of a steam railroad, in which the duty usually devolves upon one crossing its tracks to stop, look, and listen before undertaking to do so. There could, of course, be no legal presumption that such an act was performed, unless the duty to perform it existed. We know of no decision, and have been cited to none, in which it has been held that it is always the duty of a person to stop before crossing a street railroad track in an incorporated city. Certainly, in the populous portion of a city or town such a rule would be unreasonable and highly inconvenient; but it may be that in the more sparsely settled portions a like rule to that applicable to steam roads should apply to street railroads.

In the case of *Tacoma Railway & Power Company v. Hayes*, 110 Fed. 496, 49 C. C. A. 115, this court, in the course of its opinion, said:

"The defendant maintains that the rule usually applied to the conduct of persons crossing the tracks of steam railroads is applicable to street railroads as well, and that the omission of the plaintiff to 'stop, look, and listen' before crossing the track was negligence as a matter of law. This rule, even in the case of steam railroads, is not inflexible, but is dependent upon the surrounding circumstances to a greater or less degree, and is only applicable to street railways where the attending conditions are such that reasonable care and prudence would dictate such precautions. The duties of persons with respect to steam railways and street railways are not so analogous as to be governed at all times by the same rule. *Railway Co. v. Whitcomb*, 14 C. C. A. 183, 66 Fed. 915, 919. The rights of the person are greater, and the dangers less, in connection with the latter; the rights of street cars, no matter by what

power impelled, not being superior to those of other vehicles, save in the one instance where a vehicle is bound to get out of the way, and not to obstruct the passage of the car, owing to the inability of the car to travel in any other part of the street. The element of trespass is entirely absent in the case of a person crossing a street railway at any point, and the only care required of him is that which a reasonably prudent man would exercise, having due regard to the rights of others, and assuming that others (including the street car companies) will exercise the same care; in fact, knowing that such care is imposed by municipal regulation upon the persons operating the street cars. This assumption does not, of course, warrant such a reliance upon it as to neglect means of self-preservation, but is an element of consideration in arriving at the standard of care to govern the particular case."

For the error above pointed out, the judgment must be, and is, reversed, and the cause remanded to the court below for a new trial.

THE SVEALAND.

(Circuit Court of Appeals, Fourth Circuit. February 21, 1905.)

No. 575.

1. ADMIRALTY—REVIEW ON APPEAL—FINDINGS OF FACT.

A decree in admiralty, based on facts found by the court from conflicting testimony of witnesses, the most of whom were examined before the court, will not be disturbed on appeal unless clearly unsupported by the evidence.

2. SEAMEN—INJURY IN SERVICE—LIABILITY OF SHIP FOR FAILURE TO FURNISH PROPER TREATMENT.

The master of a steamship *held* not negligent for not deviating from his course during a voyage to a port to procure medical treatment for a seaman who had broken his ankle, where the end of the voyage near New York was reached within 48 hours after the injury; but the ship *held* liable for his failure to procure proper treatment and attention for the seaman after reaching port, it having been 10 days, and after starting on a new voyage, before he was taken off the vessel and placed in competent hands, the result being that the injury was greatly aggravated by the delay.

Appeal from the District Court of the United States for the Eastern District of Virginia, in Admiralty.

For opinion below, see 132 Fed. 932.

H. H. Little, for appellant.

W. B. Barton, for appellee.

Before GOFF and PRITCHARD, Circuit Judges.

GOFF, Circuit Judge. This appeal is prosecuted from a decree of the court below allowing damages to the appellee because of the neglect of the master of the steamship Svealand to furnish him proper medical aid and treatment after he had been injured on said vessel when in the discharge of his duties as a seaman thereon. The appellant insists that the court below erred in holding the vessel liable under the circumstances, existing at and immediately after the accident to appellee, set forth in the testimony taken at the hearing of this cause. The case is clearly stated in the opinion filed by the judge who heard it, and before whom most of the witnesses were orally examined.

There is no serious contention as to the law applicable to the facts existing at the time the appellee was injured. It is not claimed that the vessel is liable to the appellee for the injury he sustained, but the insistence is made that, because of the failure of the master to provide competent medical attention at the earliest possible time after the accident, the vessel is responsible for such neglect, and for the injury and suffering caused thereby. With the propositions of law announced by the court below, we are in full accord. The decree is based on the facts found by the court from the conflicting testimony as to the conduct of the master in providing medical attention, with hospital care and comforts. Clearly the evidence offered by the appellee sustains the conclusion reached by the court below. It is quite as clear that the court did not give full weight to the, at least, unsatisfactory testimony submitted by the master. Under such circumstances this court will not reverse a decree based on such findings, unless clearly against the evidence. *Whitney v. Olsen*, 108 Fed. 292, 47 C. C. A. 331, and cases there cited.

We include in this opinion, as part thereof, the views of the court below, as follows:

"The libellant, a seaman on board the Swedish steamship *Svealand*, en route from Tampico, Mexico, to New York, by way of Perth Amboy, N. J., on the return voyage to New York, from whence he had shipped to Tampico and return, on the 14th day of December, 1903, while on the high seas, in the vicinity of Cape Hatteras, in descending a ladder into the hold of the ship lost his footing, and fell a distance of some 20 feet, fracturing his ankle. The libel is filed to recover damages against the steamship because of its failure to put into the port of Norfolk, where the libellant could have received prompt medical and surgical treatment, but instead proceeded on its journey to New York; also for the failure to afford the libellant prompt and proper surgical treatment, and for the additional pain and permanent character of the injury caused by such delay.

"The duty of the master to furnish the libellant with proper and prompt medical treatment and surgical aid, on account of an injury sustained by him while in the service of the ship, may be conceded, but whether the ship should be held liable for the failure to divert its course and put into Norfolk depends upon the facts and circumstances of this particular case. The conclusion reached by the court is that the ship was not at fault, under the circumstances in which the master was placed, in this respect. The time to be saved by so doing, and the extent of the injury to the libellant, as the same then appeared, was not sufficient to justify the vessel making a deviation from its route. This particular subject has been so recently under review by the Circuit Court of Appeals for the Ninth Circuit, in the cases of *The Troop* (D. C.) 118 Fed. 769, and *The Iroquois*, 118 Fed. 1003, 55 C. C. A. 497 (the latter also by the Supreme Court of the United States, 194 U. S. 240, 24 Sup. Ct. 640, 48 L. Ed. 955, to which latter opinion by Mr. Justice Brown, with the authorities there cited, special reference is made, as containing a comprehensive and complete discussion thereof), as to render further elaboration unnecessary.

"The inability of the libellant to recover for the injury he sustained by reason of the fall is conceded by his counsel. Indeed, such claim is not asserted. And the freedom of the ship from liability to its seamen for injury received in the discharge of their duties, except in cases arising by reason of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship, is recognized. *The Osceola*, 189 U. S. 158, 175, 23 Sup. Ct. 483, 47 L. Ed. 760. But the libellant bases his claim upon his right to recover damages for the failure of the ship to afford prompt and efficient medical and surgical aid after he sustained his injury. That such last-named liability exists, if in point of fact there was neglect on the

part of the ship, seems equally well settled. In the *Iroquois Case*, supra, the Supreme Court of the United States affirmed a judgment of the lower court for \$6,000, awarded the libellant for the failure of the ship to deviate from its course and put into a nearer port, where the libellant could have received medical treatment more promptly. It would follow that if there was a failure to furnish medical treatment at the end of the voyage, in a case like the one under consideration, where the circumstances did not necessarily require a departure from the course, that likewise a recovery should be had for such neglect, as it is for precisely the same thing in a more aggravated form. The master would be more readily excused for a failure to deviate from his course, and go hundreds of miles out of his way, involving the loss of time and expenses necessarily incident to such a change. But the imposition upon the master to give proper and prompt attention to a crippled seaman on reaching the port of destination is a very different thing. The neglect in the latter case, having in view the humanities of the situation, seems almost inexcusable. Here the libellant sustained his injury, the horrible breaking of his ankle joint, which has crippled him for life, and on account of which he suffered greatly, and from which he was required to stay in a hospital from the 24th of December, 1903, certainly as late as the middle of June, 1904, without walking, except on crutches. He was injured at sea on the early morning of the 14th of December, and reached the port of Perth Amboy 48 hours afterwards. He remained at Perth Amboy two days, leaving there on the 18th, and reached Norfolk on the 20th. The master of the ship, it seems, visited him twice after his injury, and once at Perth Amboy, where he called in a doctor, who saw the libellant only once, and considered the injury to his ankle a sprain, and instead of the libellant, who was then at the end of his voyage, and entitled to be released and discharged, being sent to the hospital for medical treatment, all of which he insists he asked should be done, he was brought back to Norfolk on another voyage, where he arrived two days later, when another doctor was called in, who saw the libellant daily on the ship for three or four days, and who likewise practiced upon his limb for sprain, until the libellant insisted upon calling in another physician, who discovered his serious condition, and promptly sent him to the hospital, where, 10 days after the receipt of his injury, he was afforded proper medical treatment. During all of this time this seaman was confined to his bunk in the ship's forecabin, an unsuitable and uncomfortable place, the bunk being, it is claimed, too short, and in which he suffered greatly. Dr. Graves, the physician having charge of the libellant at the hospital, described his injury, and what had to be done for it, as follows:

"I examined his ankle and found it in a little disturbed condition—twisted; and I made a diagnosis of fracture of the larger bones, and considerable tearing of the ligament; that is, the tissues that bind the bones together, and especially on the outer side, which allowed the foot to tilt freely. I chloroformed him, and broke up the union which had taken place in the bone, and the bone was somewhat impacted—broke; that is, when broken in two, the shock had dovetailed it, and under the anæsthetic the bone was carried out again; that is, the break was renewed, and the ankle put straight, and put in place. After taking it out of plaster, the foot on the inner side was straight, but on the outer side it remained very prominent—the outer bone pushed forward and outward of the foot; had the appearance below the joint of still tilting in. A second examination showed something interposing between these bones, and that necessitated opening the joint, and the interposition there was a dislocation of one of the smaller bones, and caused the ankle to go in. After that was removed, the bone was carried straight, and the foot comes down level. But the ankle is permanently disabled; he will have a useful foot, and be able to carry on good work on that foot; but whether he will be able to climb ladders as he did before, and stand on that foot, where heavy weights are necessary, and pulling, I cannot say but that he may feel some giving away in the ankle."

"It will be seen from this statement that during the time that elapsed before proper medical treatment was afforded the libellant, which was readily at hand both in New York and Norfolk, a union had taken place in the bone, and that the first thing necessary to be done was to administer chloroform,

and break up the union thus formed; that is, to renew the break, and put the ankle straight; and so serious was the character of the injury, and the condition of the limb in which it was then found, that subsequently it had to be broken over again. This doctor further testified as to the painful character of the injury by reason of its location.

"Respondent seeks immunity from liability to the libellant because of calling in the doctors at Perth Amboy and Norfolk, and also to excuse itself for bringing libellant away from New York, instead of sending him to the hospital there, because, it claimed, the libellant did not ask to be either formally discharged or sent to the hospital. This will not do, even assuming the facts to be as contended for by the respondent, with which the court does not agree. No formal discharge of the libellant was necessary; his voyage had ended. Nor was it necessary for him to demand to be sent to a hospital. The duty imposed upon the ship was an affirmative one; that is, to care properly for a crippled seaman, and see that he was afforded prompt and proper medical and surgical treatment; and he should have been sent to the hospital in his then condition, and under no circumstances should the ship have put back to sea with a seaman, at the end of his voyage, in the crippled condition in which he was. Once countenance this conduct, and the custom would soon prevail for the substitution of the inexperienced officer of the ship, acting as doctor, in unsuitable quarters on shipboard, for the intelligent care and comfortable provision of crippled seamen at the hospitals of the country. In *The Iroquois*, 194 U. S. 240, 24 Sup. Ct. 640, 48 L. Ed. 955, supra, much the same contention was made as is here set up; that is to say, the defense was that the libellant made no complaint that the bones of his limb had not united, or of the failure of the master to turn about and put into a nearby port for medical treatment. But the court, speaking through Mr. Justice Brown, in discussing the first question said: 'Yet with a careful examination, such as the master was bound to make, we think he should have detected it;' and in reference to the latter: 'We lay no stress on the fact that the libellant did not ask to be taken into an intermediate port. He was a boy, largely ignorant of his rights and duties. The master was his legal guardian, in the sense that it is a part of his duty to look out for the safety and care of his seamen, whether they make a distinct request for it or not. If, on arriving at Valparaíso, the bones were found not to have knitted together, there was at least a chance of securing their union by proper treatment. If, upon the other hand, they had united, there was a certainty of securing ultimate recovery by careful nursing, and by the use of facilities which the hospital undoubtedly would have, and which the ship had not. To put it in a light most favorable to the master, he speculated upon the chance that a union of the bones had taken place, without seeking to inform himself of the fact.' And in this same case the Supreme Court criticised the action of the ship's master in allowing a crippled seaman to remain in the fore-castle of the ship, instead of placing him in the cabin, where he could have been more comfortably provided for. In that case, it is true, the injury was of a more serious character than here, though not more painful; and it may be said that there was not the same need for the transfer from the fore-castle to the cabin; but manifestly, if upon reaching New York no relief was afforded the libellant, and he was taken back to sea at the end of his voyage, he should at least have received better treatment than to have been kept in the ship's fore-castle.

"Thus far, the court has assumed that the libellant did not ask either to be discharged at New York or sent to the hospital. On these questions the evidence is conflicting. Libellant testifies one way, and the master the other. The court had not the benefit of hearing the master testify, as his evidence was taken by deposition; but it saw and observed the demeanor and conduct of the libellant on the stand, and was impressed with the truthfulness of his statement, and is therefore inclined to adopt his statement in this conflict, particularly as it is hardly possible that with an injury of this painful character he would either have wanted to be taken back to sea, or have failed to ask for all the relief and treatment which could be furnished him. The court is the more strengthened in this view from the fact that the ship's master seemed to have treated this injury as not serious; and according to libel-

ant's evidence, when at the end of 10 days he insisted on going to the hospital. the master replied that there was nothing the matter with the leg—"Get up and get to work." Whatever may have been the view of the master as to the character of the injury, and of the doctors who were called in, it should not operate to relieve from liability in this case, in the light of the relationship existing between the ship's master and its seaman, and the degree of care due to a seaman injured in the ship's service. The captain, in his evidence, says: 'Could not see anything on his foot; but it was swelling up a little, and it was bent a little;' and the two physicians called in each testified as to its greatly swollen condition, and of their efforts to reduce the same.

"If the master and these two doctors did not know that this was a serious condition, or the doctors did not know the difference between a sprained ankle and broken ankle, certainly the consequences of such lack of information on their part ought not to be visited upon the libellant, and he denied a reasonable recovery for the suffering and additional injury he sustained as a consequence. He had no voice in the selection of doctors; was himself subject to the orders of the ship's master, and was confined on shipboard in a crippled condition, where he could secure no relief save through the ship's master; and he was not responsible in any sense for what was done; and, whatever may have been the motives of those acting, the fact is they were wrong in all they did—manifestly and patently wrong. To deny the right of recovery to the libellant would be to enable the ship's master, with a seaman having a broken ankle, to speculate on the chances of a sprained ankle, and visit the consequences of miscalculation, in addition to the suffering and affliction that ensued, upon the innocent seaman.

"In conclusion, the court thinks that an award of \$500 should be made to the libellant for the additional suffering imposed upon him, and for the apparently aggravated character of the injury he sustained; the same to be paid in addition to all expenses incurred for medical treatment and cure of libellant, which in this case have been considerable, and on account of which the damages are fixed at so small an amount."

The decree complained of is without error, and is hereby affirmed.

ARCHER v. BEIHL.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1905.)

No. 1,087.

1. ADVERSE POSSESSION—COLOR OF TITLE—PLEADING.

Where, in ejectment, defendant alleged title under a quitclaim deed from S., specifically describing the property, and alleged that said parcel "is a part of the identical property which is the subject of controversy in this action," and that, since the original entry on the lot by F., he and his grantees, of whom S. was one, had been in quiet, uninterrupted, open, and notorious possession thereof, etc., the answer sufficiently alleged that defendant claimed the land under the deed as color of title.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 646-650.]

2. SAME.

Where a quitclaim deed was claimed to have conveyed the property in controversy to defendant, and possession of at least a portion of the land in controversy was taken under the deed, it was sufficient to give color of title, though there was nothing contained therein showing that the grantor claimed any interest in the property at the date of its execution.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 415-427.]

3. SAME—INSTRUCTIONS.

Where, in ejectment, defendant claimed under a quitclaim deed as color of title, and it was impossible under any construction of the deed

to make its description fit the premises involved in the action, it was error for the court to permit the jury to find for defendant for the whole of the property in controversy.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 463, 464.]

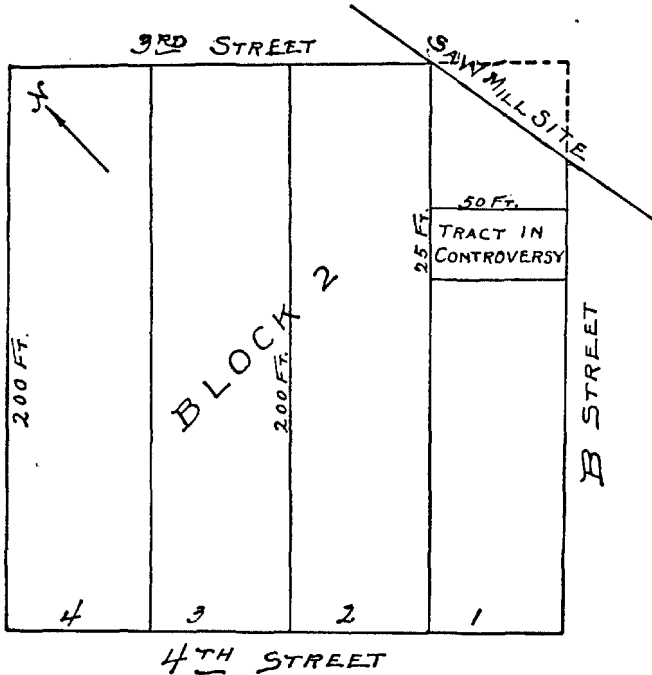
4. SAME—EVIDENCE.

Where, in ejectment, defendant claimed by adverse possession, under a quitclaim deed, as color of title, it was error for the court to charge that the jury might find, from the bare fact that defendant testified that at the time he received the deed the grantor put him in possession, that the grantor at that time "had some right title or interest in the land, such as actual possession," and that defendant "did obtain some sort of title thereto by his acts and the surrender of possession by the other parties."

In Error to the District Court of the United States for the First Division of the District of Alaska.

The plaintiff in error and the defendant in error were respectively the plaintiff and defendant in the court below, and they will be designated by the latter terms in this opinion. The plaintiff brought an action of ejectment against the defendant to recover the possession of a portion of lot 1 in block 2 in the town of Douglas City, on Douglas Island, Alaska, described as follows: Beginning at a point on the north boundary line of B street, 150 feet northeasterly from the corner of said block No. 2 at the intersection of B and Fourth streets; thence northwesterly at right angles to B street across said lot 1, block 2, 50 feet; thence along the north boundary line of said lot in a southwesterly course toward Fourth street, 25 feet; thence at right angles to the last course, 50 feet, to B street; thence along the south boundary line of said lot to the place of beginning. The defendant answered, denying that the plaintiff ever at any time owned, occupied, or possessed the said premises, and alleging that in May, 1886, one Joseph Farnsworth entered the ground so described as lot 1 in block 2, which was at that time unoccupied, unpossessed, and unappropriated public land of the United States; that he caused certain improvements to be made on said lot according to the local rules and regulations made by the citizens of Douglas City, and caused a notice of his location to be recorded in the office of the local recorder of said town; that on November 19, 1886, he sold and transferred said lot to Wm. Nelson; that on February 24, 1890, said Nelson conveyed the same to Peter Roblin; that on March 3, 1895, said Peter Roblin conveyed the same to Mary A. Sakaloff; that prior to said last-named date, to wit, on May 5, 1894, the said Mary A. Sakaloff and her husband quitclaimed to the defendant, by a proper instrument in writing, a certain portion of lot 1, block 2, "being 25 feet in length and fronting toward the beach on Gastineaux Channel, together with the one-story frame building situated thereon," and that said parcel "is a part of the identical property which is the subject of controversy in this action." The answer further alleged that, ever since the original entry of said lot by Joseph Farnsworth, he and his grantees have been in the quiet, uninterrupted, open, exclusive, and notorious possession thereof up to the time of the said conveyance to the defendant, and the defendant ever since said last-named date has been in the quiet, uninterrupted, open, notorious, and adverse possession of the said property, and has made valuable improvements thereon of the value of \$1,000, and that he is now the owner and in possession of all of said 25 by 50 feet of said lot 1 in block 2, together with the improvements thereon. The defendant in his answer expressly disclaimed any interest in or title to any part of the premises described in the complaint, "excepting the land conveyed to him by Mary A. Sakaloff and her husband." On the trial of the cause before a jury the plaintiff introduced in evidence a quitclaim deed from Wm. Nelson to Peter Roblin, of date February 24, 1890, quitclaiming all of lot No. 1 in block No. 2 in Douglas City, Alaska, according to the plat of said town made by Geo. W. Garside; a quitclaim deed from Peter Roblin to Mrs. Mary A. Sakaloff, of date March 3, 1895, quitclaiming the same property; a quitclaim deed

from Mary A. Sakaloff to Emery Valentine, dated April —, 1897, quitclaiming the south 150 feet of said lot No. 1 in block No. 2; and a quitclaim deed from Emery Valentine and wife to Sarah Archer, of date June 12, 1897, quitclaiming the premises described in the deed last above mentioned. The plaintiff introduced also the evidence of Geo. W. Garside, the original surveyor of the town of Douglas City, who testified that the lines of Fourth street and B street run, according to the true meridian, very nearly northeast and southwest; and in connection with his testimony the plaintiff introduced in evidence a plat of the said block 2, showing that lot 1 was fractional, and did not include a triangle used for a saw mill site, marked by a line drawn from the point of junction of lots 1 and 2 on Third street to a point on B street some 20 or 25 feet northeast from the point of beginning



of the description of the tract in controversy, as set forth in the complaint. The plaintiff introduced also the evidence of M. B. Archer, her husband, who testified that when the plaintiff purchased from Mrs. Sakaloff she was put in possession of a house on the south end of said lot; that the defendant's house stood on the north end of said lot, partly on the lot and partly on B street, and that about one-half of said house was in the street; that about January, 1900, the defendant constructed a kitchen at the rear of his house on a portion of the lot covered by the plaintiff's deed; that the witness notified the defendant that he was on the plaintiff's ground, but that the defendant then stated that his deed "also covered 50 feet southerly from the intersection of the line of the mill site." He further testified that there was only about 20 or 25 feet between the mill site and the north end of plaintiff's ground, and that, measured along the line of lot 2, there was 50 feet of ground in lot 1 north of plaintiff's ground.

The defendant introduced a quitclaim deed to himself from Mary A. Sakaloff and husband, dated May 5, 1894, quitclaiming "25 feet in width and fronting north toward the beach and 50 feet in depth and being the northeast corner of Lot No. 1 in Block No. 2 as per plat of survey of said town of Douglas surveyed by Geo. W. Garside together with the one story frame

building and annexes thereto situated upon the above described premises." The defendant testified that at the time when he received said deed he was put in possession by the grantor of the ground in controversy, and had held such possession ever since. To this testimony the plaintiff objected, for the reason that the defendant in his answer had relied on his deed from Mary A. Sakaloff, and had pleaded no title by prior possession. The court overruled the objection, to which ruling the defendant excepted. The defendant further testified that the house on the north end of the lot referred to in his deed is partly on the ground in controversy. The court, in charging the jury, gave instructions, some of which were excepted to, and refused to give certain instructions requested by the plaintiff, to which the plaintiff excepted. The jury returned a verdict for the defendant, and judgment was rendered thereon for the defendant for the whole of the property in controversy. Among other instructions the court gave the following: "If you find that the deed from the Sakaloffs to Beihl conveyed a strip of land 25 feet in width across said lot, by 50 feet along the length of said lot, running from the northerly end thereof in a southerly direction, and that the buildings of Beihl are within the exterior boundaries of such piece or parcel of land, and that his rights are older, both as to the conveyance and possession, then you should find for the defendant, so far as that matter is controlled by the conveyance. * * * If you find by the weight and preponderance of the evidence that the defendant had been in quiet, adverse, uninterrupted, and notorious possession of said strip of land 50x25 feet, a part of said lot in dispute in this case, under color and claim of title, for seven years or more prior to the bringing of this action, then his title thereto is conclusively clear against all persons except against the United States, and you should so find. * * * If you find from the evidence in this case that at the time of making said deed by the Sakaloffs to Beihl the Sakaloffs had some right, title, or interest in said land, such as actual possession, and they surrendered their possession and right of possession, and any buildings that might be thereon, to the said Beihl for a consideration, then the said Beihl did obtain some sort of title thereto by his acts and the surrender of possession by the other parties." To all of which instructions the plaintiff excepted, and he now assigns the same as error.

Malony & Cobb and Alfred Sutro, for plaintiff in error.

Z. R. Cheney and Lorenzo S. B. Sawyer, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

This record comes to us in a very unsatisfactory condition. The statement of the evidence in the bill of exceptions is terse in the extreme, and affords but meager information of the facts. There is no definite testimony as to the location of the house or lot, the possession of which was surrendered to the defendant by Mary A. Sakaloff. There is no testimony that that tract which in the deed to the defendant was described as a parcel 25 feet by 100 was ever pointed out to the defendant, or was inclosed or in any way marked on the ground, or that the defendant ever actually or visibly occupied any precise tract of ground by using the same or marking the same or exercising acts of ownership over it. The deed under which the plaintiff claims from Mary A. Sakaloff is the south 150 feet of lot 1. There is no difficulty in determining the location of the premises so conveyed. They include the land in controversy. The quitclaim deed under which the defendant claims was made a year before Mary A. Sakaloff had acquired any title or right of possession of record. It quitclaimed a parcel "25 feet in width front-

ing north toward the beach and 50 feet in depth and being the northeast corner of Lot 1." It is impossible from this description to determine where the ground so intended to be quitclaimed is located. Where is the northeast corner of lot 1? The surveyor who laid out the ground testified that according to the plat the northeast corner was the inside corner next to lot 2, but that according to the variation of the compass it would be the corner next to B street. The wording of the deed would seem to indicate that the ground was located in the corner next to lot 2, for it is described as a tract 25 feet in width "fronting north toward the beach." Again, if it was intended to be, as the defendant contends, in the corner fronting B street, in what shape did it lie? If it is in that corner, and effect is given to the words "25 feet in width fronting north toward the beach," it was either a tract 25 feet in width, beginning at the point of intersection of the mill site with the line of B street, and running 50 feet southwesterly along B street, or a tract 25 feet in width on B street, immediately south of the point where the mill site intersects the line thereof, and running 50 feet across lot 1. In the latter case the defendant's ground as described in the quitclaim deed would not encroach on the plaintiff's ground more than 5 feet, if at all. In the former case it would not encroach on more than half of the plaintiff's ground. If it be admitted that the house situated on the premises described in the deed to the defendant is to be deemed a monument to identify his land, we are met by the difficulty that the evidence did not show the location of the house further than that it was partly on lot 1 and partly in B street, and that now, after an addition has been made thereto, it is partly on the ground in controversy. For aught that appears to the contrary, the original house, so far as it was situated on lot 1, was on that portion thereof lying north of the land in controversy. This would seem to be borne out by the fact that it was not until the defendant began to build his addition that the plaintiff complained of encroachment, and the further fact that the disseisin complained of in the complaint was alleged to have occurred at about that time. But whatever may have been the true location of the land quitclaimed to the defendant, according to the intention of the parties, it is very clear that the defendant's deed does not describe the tract in controversy in the action, and could not by any construction cover more than a portion thereof. The defendant in his answer did not allege adverse possession of the property in controversy in any of his grantors. He alleged such adverse possession in himself only from May 5, 1894. While it is true that, under the law which was in force in Alaska prior to the Code, color of title was not necessary to render actual possession under claim of title adverse, section 1042 of the Code of Civil Procedure of Alaska declares that "the uninterrupted, adverse, notorious possession of real property under color and claim of title for seven years or more shall be conclusively presumed to give title thereto except as against the United States." The plaintiff objected to that portion of the charge which permitted the jury to find adverse possession in the defendant upon the ground that the answer had not pleaded that such pos-

session was had under color and claim of title. We think that, taking all the averments of the answer together, it sufficiently appears that the claim of adverse possession to at least a portion of the land in controversy was made under the deed of Mary A. Sakaloff to the defendant of May 5, 1894, and there is no doubt that that deed was sufficient to give color of title, notwithstanding the fact that at the date of its execution there is nothing to show that the grantor therein had or claimed any interest in the premises. But the question is, to what precise tract of land does that deed give color of title? A deed is color of title only as to the land actually described in it. "Any description which, unaided by extrinsic facts, satisfies the mind that the land adversely occupied is embraced within the description contained in the deed, will, of course, be sufficient. So a description, though indefinite, is sufficient if the court can, with the aid of extrinsic evidence which does not add to, enlarge, or in any way change the description, fit it to the property conveyed by the deed. It is necessary, however, that the description be such that it can be rendered certain by such evidence." 1 Cyc. 1090, and authorities there cited.

The instructions of the court permitted the jury to find for the defendant for the whole of the property in controversy. This was error, for it is impossible, under any construction of the defendant's quitclaim deed, to make its description fit the premises which are involved in the action, and this is true no matter where along the line of B street the defendant's house may have been located. It was error, also, to instruct the jury that they might find, from the bare fact that the defendant testified that at the time of receiving his quitclaim deed Mrs. Sakaloff put him in possession, that at that time the latter "had some right, title, or interest in said land such as actual possession," and that the said defendant "did obtain some sort of title thereto by his acts and the surrender of possession by the other parties."

It is not necessary to consider the other assignments of error, since for these erroneous instructions the judgment must be reversed and the cause remanded for a new trial.

GREAT NORTHERN RY. CO. v. FOWLER.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1905.)

No. 1,114.

RELEASE—VACATION—MUTUAL MISTAKE—EVIDENCE.

Plaintiff, a railroad brakeman, after being injured, was solicited by defendant's claim agent to make a settlement, and went with him to the office of defendant's physician, who, after an examination, either through mistake or to deceive complainant, minimized his injuries, and stated that he would be able to work in a week or two, whereupon plaintiff, without other advice, was induced to sign a release of all damages and demands on account of his injuries, in consideration of payment of doctor's and nurse's bills and his wages for such period of time. It developed, however, that plaintiff was seriously injured, requiring a subse-

quent hazardous and delicate surgical operation on the skull, and that he would probably never be able to resume his avocation. *Held*, that the release was executed by mutual mistake of the parties, and was subject to vacation.

[Ed. Note.—For cases in point, see vol 42, Cent. Dig. Release, § 31.]

Appeal from the Circuit Court of the United States for the Northern Division of the District of Washington.

The appellee was the complainant in a bill brought to set aside a settlement he had made with the appellant on March 20, 1902, for injuries which he received while in the employment of the appellant as a brakeman on its railroad. He alleged that on February 5, 1902, through the negligence and carelessness of the appellant in erecting telegraph poles with the cross-arms thereon so close to the track of its railway, he was violently knocked from a moving train, without fault on his part, and was hit on the side of the head by a cross-arm of one of said telegraph poles, and was rendered senseless, had his skull fractured, and received permanent injuries. He alleged further that a week after receiving said injuries, relying upon the inducements made by the claim agent of the appellant, he went with said claim agent into the office of the physician and surgeon of the appellant, where he was examined by said physician, and that after such examination, either through mistake, or for the purpose of deceiving the complainant, said physician diagnosed his case by saying that he was practically well, and would be ready and able to go to work in a week or two; that, in consequence thereof, he was induced to sign a release of all damages and demands on account of his injuries upon the payment of his doctor's and nurse's bills, and his wages for the said period of time during which he would be disabled from work, amounting in all to \$195; that from the time of said injury until May 18, 1902, pus oozed out of the fracture of the appellee's skull, and, on his bending or leaning forward, he would become dizzy and blind, and fall to the ground or floor; that some months afterward he was compelled to undergo a hazardous and delicate surgical operation, having a piece of the skull which was pressing upon the brain removed, and ever since has been unable to perform any kind of work or labor. And the appellee brought into court and tendered the repayment of \$195 which he had so received, with interest thereon. The evidence was that the settlement so made by the appellee with the appellant was made at the instance of M. J. Gordon, a claim adjuster of the latter, who went to the appellee's home for the purpose of negotiating such settlement. He testified that he asked the appellee what he thought the company ought to do for him in connection with his accident, and the latter said that he thought he ought to be allowed his time while he was laid up, and the witness replied that he would be willing to recommend that; and he directed him to come to Seattle, and told him he would have him examined by Dr. Eagleson, the appellant's surgeon in Seattle, and ascertain just how long he ought to be laid up before he went to work; that he would be allowed whatever time there was, and the doctor's and nurse's bills, if they were not excessive. The witness testified further that accordingly the appellee went to Seattle, and the witness took him up to Dr. Eagleson's office for examination, and had the doctor make an estimate as to how long he ought to be laid up before going to work, and that Dr. Eagleson gave an opinion that the appellee would be incapacitated for about two weeks. The witness added: "We calculated his time at the regular rate, and produced the doctor's bill, and the bill for nurse, and the amount of his time, and footed it up at \$195. I filled the release papers in at \$195; made a sight draft; attached the release papers. He executed the release and voucher. I went with him to the bank and paid him \$195." The doctor's report was made upon a blank provided by the railway company, containing questions to be answered by the examining surgeon; and it contained, among others, the following questions and answers:

"(7) A. Give description, stating the parts injured and supposed manner of infliction.—Contused wound of scalp a little to the left of crown, and contusion of left shoulder.

"B. Will any permanent injury or deformity result? If so, what?—I think not."

"(14) How long will patient be disabled?—Will probably be able to work in two weeks."

Dr. Eagleson at that examination described the injuries as follows: "Contused wound of scalp a little to left of crown, and contusion of left shoulder." The release which was executed by the appellee described the injuries thus: "Divers injuries to my person and property by reason of while climbing down side of box car was struck by cross-arm on telegraph pole which would not clear me, causing a severe lacerated wound of scalp over middle parietal region and other injuries." Dr. Eagleson testified that Mr. Gordon, when he brought the appellee to him, asked him to look him over and see "what I thought his present condition was, and how soon I thought he could be able to go to work," and that in response he said, "In probably two or three weeks." The appellee testified, and it is not disputed, that Dr. Eagleson made an examination of him, lasting about 10 minutes; looked at his head; asked him a few questions; told him his injuries did not amount to much, and that he would be all right in about a couple of weeks. There was evidence that the injuries received by the appellee were far more serious and permanent than Dr. Eagleson found them to be; that the appellee sustained an injury to his brain and nervous system, resulting in traumatic neurosis, symptoms of which are accelerated pulse, pains in the head, inability to concentrate thought, forgetfulness, sleeplessness, numbness, impaired digestion, etc., and that while before the accident he was known to be a strong, well man, and never was known to be sick, immediately after the accident he was confined to his bed for a week, and for four or five weeks was confined to the house, during which times he was better on some days, and on other days worse, was weak and dizzy much of the time, with constant pain in his head, and that later he submitted to an operation on his skull, performed at the hospital, and after the operation he was confined to the hospital for a week or so; that thereafter he was removed to his home, and was several days there in bed, and was confined to the house for three weeks. There was expert evidence to the effect that the appellee's skull was injured, if not fractured, by the blow upon his head; that the periosteum was removed from a portion of his skull, leaving the bone bare, and that some months later he submitted to an operation whereby a piece of necrosed bone was removed; that it would be years before he could recover; that his injuries might be permanent; and that he placed his life in peril every time he undertook the employment of a brakeman. The court found that at the time of the injury the appellee was 30 years of age, a robust, healthy man, and that his present ailments were caused by the injury; that he is afflicted with traumatic neurosis, and is subject to fainting spells, and that he will be incapacitated for work for an indefinite time; that the sum of \$195 so paid him was not reasonable or adequate compensation for a tortious injury of such magnitude; and that the evidence justified a decree annulling the settlement and release set forth in the bill.

L. C. Gilman, for appellant.

George H. Walker, Walker & Munn, and Robert Welch, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The evidence in the case convinced the trial court, as it convinces us, that the settlement was made under a mutual mistake of both parties thereto as to the nature and extent of the appellee's injuries. The appellee, in making the settlement, acted wholly upon the advice of the agent and surgeon of the appellant. The agent called on him for the purpose of procuring a settlement, and informed him that the com-

pany was willing to pay him, in full discharge of all demands for the injuries received, his nurse's and doctor's bills, together with his regular wages as brakeman for the time during which he would be incapacitated to work. The appellant's surgeon made an apparently cursory examination of the appellee's injuries, and found that they consisted of a wound of the scalp, a contusion of the shoulder, and nothing more, and expressed his opinion that the appellee would be ready to go to work again in two weeks. The appellee consulted no other physician as to the extent or probable duration of his injury. He was a sick man at the time when he made the settlement. He accepted the statement and opinion of the appellant's surgeon, and, on the basis of it, received \$195, and signed the discharge. We entertain no doubt that such a release, executed under a mutual mistake of fact so induced by the appellant, should be set aside. It is true that where there is no misrepresentation or fraud on the part of the releasee, a releasor cannot subsequently avoid his release on the ground that his injuries were more serious than he thought them to be, even though his opinion at the time of making the settlement may have been based upon that of a physician employed by the releasee to examine and report on the extent of his injuries. Such was the case of *Nelson v. Minneapolis Street Ry. Co.*, 61 Minn. 168, 63 N. W. 486, cited by the appellant herein. In that case the settlement was made on the opinion of the releasor induced by the opinion of the releasee's physicians that the injuries were not of a permanent character. The court said:

"The facts proved constituted no ground for a rescission of the contract of settlement and release. These physicians were not sent to settle plaintiff's claim or to advise her. The extent of their authority was to ascertain the nature of her injuries, and report the result to the defendant for its information. Any statements they may have made in response to plaintiff's inquiries as to the extent of her injuries were wholly outside of the scope of their agency."

But it is equally true that a mutual mistake of fact or an innocent misrepresentation of the facts of the releasor's injury, made by the releasee's physician, may be effective to avoid a release induced thereby.

A case directly in point is *Lumley v. Wabash R. Co.*, 76 Fed. 66, 22 C. C. A. 60, decided by the Circuit Court of Appeals for the Sixth Circuit. In that case the complainant signed a release reciting that he had received a severe contused and lacerated wound on his forehead, right side, fracture of right arm between wrist and elbow, and various injuries and contusions, both internal and external. The release was from all actions, suits, claims, etc., arising from injuries so received, and any, every, and all results thereafter flowing therefrom. The gravamen of the bill of complaint was that the complainant had received an injury to his shoulder by breaking or dislocating, which permanently disabled him, and that, at the time of the examination made by the chief surgeon of the railway company, he had called the latter's attention to the pain in his shoulder, but was informed by the surgeon that the pain was purely sympathetic and was attributable to his fractured arm. The evidence was that this unknown and unsuspected injury was the principal injury sustained. The court said:

"If this surgeon honestly supposed the shoulder pain to be sympathetic, either because his examination had been superficial, or because he had made

none, we would then have a case where a release is comprehensive enough to cover a matter or claim unknown to both parties, and was therefore not the subject of consideration. Equity relieves from mistakes as well as frauds. The case is not one where it was sought to compromise and settle a general claim for all the injuries resulting from a particular accident, known and unknown. If one agrees that he will receive a given amount in satisfaction and settlement of his damages sustained through a particular accident, it is not essential that every possible consequence of the tort shall be mentioned, considered, or enumerated. The subsequent discovery by one giving such a release that he was worse hurt than he had supposed would not, in and of itself, be ground for setting aside the settlement or limiting the release. We put our judgment upon the facts stated in this bill, to wit, that both parties supposed complainant had received certain injuries, the extent and character of which were considered and discussed with reference to the time which the injured party would probably lose in consequence thereof. In such a case, if a release is given, specifically mentioning the particular injuries known and considered as the basis of settlement, general language following will be held not to include a particular injury then unknown to both parties, of a character so serious as to clearly indicate that, if it had been known, the release would not have been signed. This jurisdiction is well known, and has frequently been applied in cases of release affecting property rights, both in courts of law and equity."

In *Houston & T. C. R. Co. v. Brown* (Tex. Civ. App.) 69 S. W. 651, a release of damages for a broken arm was made by a railroad employé in reliance upon the statement of a physician acting for the railroad company, made for the purpose of inducing the execution of the same. that the bones of the arm had knitted together, and that the arm would be as good as ever. It was held that the release was not binding upon the employé, even though the statement of the physician was made in good faith. The court said:

"We cannot agree with the contention of appellant that it may escape liability on the ground that the representations and statements made by Stewart was a mere expression of opinion. It was more than an opinion. It was the statement of a fact. * * * It is true, this statement may have been predicated upon his opinion as a medical expert, but the opinion is based upon facts of which he possessed knowledge. The fact that the statement made by Stewart was not intentionally false does not affect the right of the appellee to have the release set aside, if he was misled by the statement, and executed the release, believing the statement was true. In such a case, innocent misrepresentations may as well be the basis of relief as where such statements are intentionally false."

The appellant relies on *Chicago & N. W. Ry. Co. v. Wilcox*, 116 Fed. 913, 54 C. C. A. 147. The plaintiff in that case had suffered a fracture of the femur. Her physician was also the physician of the railway company. She was told that it was a bad break, and was advised by the physician of the railway company that she would be incapacitated for at least a year; that the injury would be slow to repair, if it did repair, and that there was no certainty of her ever entirely recovering; and that such an injury resulted generally in permanent disability. When she talked of making a settlement, he advised her that the better plan would be to wait until she saw the extent of her injury. Disregarding this advice, she made a settlement with the railway company; and subsequently, finding that her injury was greater than she had supposed, she brought suit to set aside the settlement. The court, in the course of its opinion, said:

"But compromises and releases are not voidable on this account, for the reason that the parties to them know the uncertainty of these future events,

and, by the very fact of settlement before they develop, agree to take the chances of their effects. Their mistakes relative to the future duration of the disabilities and the future effects of the personal injuries that form the subject of their contracts are mistakes of belief, not of fact, and form no basis for the avoidance of their contracts. Such was the mistake under which the complainant labored. It was a mistake in the opinion of the doctor and in the belief of his patient with reference to unknowable future events. It was not a mistake of a past or of a present fact, and it presents no ground for a rescission of this release."

The difference between that case and the present case is apparent and is vital. In the Wilcox Case there was no mistake as to the nature of the injury. Mrs. Wilcox was not assured by the railway company's physician that she would be well within a year, or that she would ever recover. On the contrary, she was advised to await future developments before making a settlement. Her belief that she would recover, and the opinion of her physician that she might recover within a year, were matters of mere conjecture and opinion. In the present case there was a clear mistake of fact as to the nature of the injury. The appellant's physician believed, and so informed the appellee, that the injury to his head was a scalp wound, whereas it was a far more serious injury—an injury to the skull, causing necrosis of the bone, necessitating a surgical operation, and producing traumatic neurosis, effects that could not have resulted from a mere wound of the scalp.

All the decisions cited by the appellant are believed to be in harmony with the views we have above expressed. It is unnecessary to consider them all in detail. In *Currier v. Bilger* (Pa.) 24 Atl. 168, the court said:

"There was no mutual mistake of the parties as to any material fact. The only fact in the case was that the plaintiff's horse had been gored by the defendant's bull. As to this there was no mistake. Each party was fully informed."

In *Kowalke v. Milwaukee Electric Railway & Lighting Co.* (Wis.) 79 N. W. 762, 74 Am. St. Rep. 877, the plaintiff was injured by jumping from a car. She had her own physician, and was also examined by the railway company's physician. There was no mistake as to the injuries she received. The mistake was as to her pregnancy at the time. She informed the physicians that she was not pregnant, and refused to submit to an examination. The court said:

"Where a party enters into a contract, ignorant of a fact, but meaning to waive all inquiry into it, or waives an investigation after his attention has been called to it, he is not in mistake, in the legal sense."

In *Seeley v. Citizens' Traction Co.* (Pa.) 36 Atl. 229, the plaintiff, on her own motion, made the settlement; being ignorant of the character and extent of her injuries, but not relying on any statement of the defendant or examination by the defendant's physician. In *Homuth v. Metropolitan St. Ry. Co.* (Mo. Sup.) 31 S. W. 903, the plaintiff's wife was injured on the defendant's railroad track. The defendant's physician called on her, and, in answer to her question, said he thought her foot would be well in 14 days. Her own doctor, who was present, expressed a similar opinion, and settlement was effected on that understanding. Here it is clear that there was no mistake of fact, but a mistake of opinion, and that presumably the plaintiff relied on the opin-

ion of her own physician. The case most nearly approaching in its facts the case at bar is *Houston & T. C. R. Co. v. McCarty* (Tex. Sup.) 60 S. W. 429, 53 L. R. A. 507, 86 Am. St. Rep. 854. In that case the appellee was hurt in a wreck upon a railroad. It was supposed that his only injury was a dislocation of the ankle. He made a settlement of his claim against the railway company in full of all injuries. No other injuries were considered by the parties to the settlement, and the appellee relied upon no examination or opinion of the appellant's physician. The court said:

"Neither the appellant's agents nor appellee knew or suspected injury to another part of appellee's person, and appellee exercised reasonable care to ascertain if he was otherwise injured."

It transpired that he had suffered severe internal injuries. The court sustained the release, and distinguished the case from *Lumley v. Wabash R. Co.*, supra. The facts that the appellee in the *McCarty* Case exercised reasonable care to ascertain if he was otherwise injured, and that he relied upon no statement or examination of the appellant's physician, are sufficient to distinguish it from the present case.

The decree of the Circuit Court is affirmed.

TYEE CONSOLIDATED MIN. CO. v. LANGSTEDT.

(Circuit Court of Appeals, Ninth Circuit. March 6, 1905.)

No. 1,098.

1. ALASKA CODES—LIMITATIONS—APPLICATION.

Carter's Alaska Codes, approved June 6, 1900, § 1042, provides that adverse possession under color of title for seven years shall be conclusively presumed to give title, except as against the United States; and page 146, § 4, limits actions to recover real property to a period of ten years before commencement of the action, but declares that in all cases where a cause of action has already accrued, and the period prescribed within which an action may be brought has expired or will expire within one year from the approval of the act, an action may be brought within one year from the date of the approval of the act. *Held*, that where an action to recover possession of a mining claim in Alaska was brought on December 24, 1900, section 1042 was not applicable thereto.

2. SAME—UNITED STATES LAND LAWS—RIGHTS OF GRANTEE—LIMITATIONS.

Limitations begin to run against a grantee under the general land laws of the United States only from the date when he acquires title.

3. SAME—ADVERSE POSSESSION—DISSEISIN.

Since there could be no adverse possession of public land on which a mining claim was located while the title was in the United States, there was no disseisin sufficient to start the statute of limitations in operation, as against the locator of such claim, prior to the issuance of a government patent to him therefor.

4. SAME.

Where a locator of a mining claim on public land had complied with all the conditions necessary to entitle him to a patent, his estate in the land was not perceptibly different from that acquired by entrymen of agricultural land.

In Error to the United States District Court for the First Division of the District of Alaska.

See 121 Fed. 709.

The plaintiff in error, the Tyee Consolidated Mining Company, brought an action in ejectment against Ernest Langstedt, the defendant in error, to recover the possession of a tract of land which was alleged to be a portion of the Bonanza King lode claim, located by a grantor of the plaintiff in error, and of which the plaintiff in error became the owner by mesne conveyances. The defendant in error answered, denying the allegations of the complaint, and alleging that the defendant in error and his grantors and predecessors in interest have been in the actual, open, notorious, visible, continuous, exclusive, and adverse possession of the property in controversy for a period of more than 10 years prior to the commencement of the action, and that during that entire period the defendant in error and his grantors have claimed to be the owners of said tract of land under color and claim of title, and that the plaintiff in error and its grantors and predecessors have not been seised or possessed of the premises for more than 10 years prior to the commencement of the action. Upon the issues so made, and the evidence and stipulation of the parties as to the facts of the case, a jury having been waived, the court below made the following findings of fact: That the Bonanza King lode claim was duly located as a mining claim on January 29, 1884, by one Walter Pierce; that on May 13, 1884, he conveyed the same to M. W. Murray; that a receiver's receipt issued to Murray on May 20, 1890, and that United States patent issued to him on December 26, 1890; that thereafter the said lode claim was conveyed to the plaintiff in error; that the defendant in error and his grantors and predecessors in interest have been in the actual, open, notorious, visible, continuous, exclusive, and adverse possession of the premises in controversy, under color and claim of title, for a period of more than 10 years prior to the commencement of the action, and that during that period and ever since they have claimed to be the owners of said land, and their possession has been adverse and hostile to the plaintiff in error; that the plaintiff in error, its predecessors in interest, and grantors, have not been seised or possessed of the premises within 10 years before the commencement of the action. Upon those findings the trial court caused judgment to be entered dismissing the action, and adjudging that the defendant in error recover his costs and disbursements.

R. F. Lewis, E. S. Pillsbury, and Pillsbury, Madison & Sutro, for plaintiff in error.

W. E. Crews and J. A. Hellenthal (Lorenzo S. B. Sawyer, of counsel), for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The writ of error presents the question whether, in the territory of Alaska, adverse possession of a mining claim, as against the locator thereof, or his successors in interest, can be initiated at any time before the issuance of a patent from the United States therefor.

Section 1042 of Carter's Codes of Alaska (page 354) provides as follows:

"The uninterrupted adverse notorious possession of real property under color and claim of title for seven years or more shall be conclusively presumed to give title thereto except as against the United States."

Section 4 of the same Codes, at page 146, provides that actions shall be commenced within 10 years—

"For the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it shall appear that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the premises in question within ten years before the commence-

ment of the action: provided, in all cases where a cause of action has already accrued, and the period prescribed in this section within which an action may be brought has expired or will expire within one year from the approval of this act, an action may be brought on such cause of action within one year from the date of the approval of the act."

The Codes in which these provisions are found were approved on June 6, 1900. The present action was begun on December 24, 1900. It is plain that the provision first above quoted has no application to the present case. This is made clear by the proviso of section 4, above quoted, which extends the right of action for a period of one year from the approval of the act, and by that portion of section 368, p. 432, of the Codes, which declares that "no person shall be deprived of any existing legal right or remedy by reason of the passage of this act." Prior to the adoption of the Codes, adverse possession, in order to give title, was required to be continuous for a period of 10 years. *Parker v. Metzger*, 12 Or. 407, 7 Pac. 518.

It is well settled that the statute of limitations begins to run against a grantee under the general land laws of the United States only from the date when he acquires the title, and that an occupancy by another prior to that time will not be deemed adverse to the title of such grantee. But there is diversity of opinion as to the precise time when the title passes from the government to an entryman upon the public lands. In the majority of cases it is held that no title passes until the patent issues. *Redfield v. Parks*, 132 U. S. 239, 10 Sup. Ct. 83, 33 L. Ed. 327; *Simmons v. Ogle*, 105 U. S. 271, 26 L. Ed. 1087; *Gibson v. Chouteau*, 13 Wall. 92, 20 L. Ed. 534; *Godkin v. Cohn*, 80 Fed. 458, 25 C. C. A. 557; *Mathews v. Ferrea*, 45 Cal. 51; *Smith v. McCorkle*, 105 Mo. 135, 16 S. W. 602; *Steele v. Boley*, 6 Utah, 308, 22 Pac. 311; *Treadway v. Wilder*, 12 Nev. 108; *Stephens v. Moore*, 116 Ala. 397, 22 South. 542; *Schuttler v. Piatt*, 12 Ill. 417; *Clark v. Southard*, 16 Ohio St. 408; *Churchill v. Sowards*, 78 Iowa, 472, 43 N. W. 271.

In some courts, however, it has been held that the title passes to such an entryman as soon as he has complied with all the conditions requisite to entitle him to a patent, and that at that point of time an adverse possession may have its inception. *Carroll v. Patrick*, 23 Neb. 847, 37 N. W. 671; *Dolen v. Black*, 48 Neb. 688, 67 N. W. 760; *Cady v. Eighmey*, 54 Iowa, 615, 7 N. W. 102; *Mills v. Traver*, 35 Neb. 292, 53 N. W. 67; *Cawley v. Johnson* (C. C.) 21 Fed. 492; *Nichols v. Council*, 51 Ark. 26, 9 S. W. 305, 14 Am. St. Rep. 20; *Gay v. Ellis*, 33 La. Ann. 249; *Doe v. Hearick*, 14 Ind. 242; *Goodlet v. Smithson* (Ala.) 30 Am. Dec. 561; *Udell v. Peak* (Tex. Sup.) 7 S. W. 786.

It is contended that a controlling consideration on which the decisions of the United States courts above cited are based is the fact that in those courts no action of ejectment can be instituted upon the equitable title evidenced by a certificate of purchase or final receiver's receipt, and that that rule is not applicable to the present case, for the reason that in the courts of Alaska ejectment may be maintained by one who has acquired such equitable title. By the act of Congress of May 17, 1884 (23 Stat. 24), the Code of Civil Procedure of the state of Oregon was declared to be the law of Alaska so far as the same was

applicable; and thereafter, when the Code of Civil Procedure for Alaska was adopted by the act of June 6, 1900, it was taken from the laws of Oregon, both as to the provisions regulating the action of ejectment, and prescribing the interest in real estate upon which the action may be brought, and the statute of limitations applicable to such actions. In *Keith v. Cheeny*, 1 Or. 285, it was held that the donee of a land claim, having received a donation certificate thereto, could maintain ejectment against one who showed naked possession, with no color of title; and in *Rader v. Allen*, 27 Or. 344 (decided in 1895) 41 Pac. 154, it was held that, after the performance of all the requirements of the laws and regulations for the acquirement of a patent to a mining claim, the locator, having thus acquired a vested right in the land and a legal estate therein, might maintain ejectment to recover its possession. Said the court of such a mining claim after the performance of those conditions, "It then ceases to become a part of the public domain." But the rule of the federal courts that the statute of limitations does not begin to run against a grantee of the United States until the issuance of the patent does not rest alone upon the ground that ejectment cannot be maintained in those courts by such an entryman before the patent issues. In *Redfield v. Parks*, 132 U. S. 239, 10 Sup. Ct. 83, 33 L. Ed. 327, it was said that until the title passes from the government there is no title adverse to the entryman. In *Gibson v. Chouteau*, 13 Wall. 92, 100, 20 L. Ed. 534, the court said:

"The same principle which forbids any state legislation interfering with the power of Congress to dispose of the public property of the United States, also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition. The consummation of the title is not a matter which the grantees can control, but one which rests entirely with the government. With the legal title, when transferred, goes the right to possess and enjoy the land, and it would amount to a denial of the power of disposal in Congress if these benefits, which should follow upon the acquisition of that title, could be forfeited because they were not asserted before that title was issued."

In *Bagnell v. Broderick*, 13 Pet. 450, 10 L. Ed. 235, the court recognized the power of the states to pass laws authorizing purchasers of lands from the United States to prosecute actions of ejectment upon certificates of purchase, but denied "that the states have any power to declare certificates of purchase of equal dignity with a patent. Congress alone can give them such effect." The court further said:

"Congress has the sole power to declare the dignity and effect of titles emanating from the United States, and the whole legislation of the government in reference to the public lands declares the patent to be the superior and conclusive evidence of legal title. Until it issues, the fee is in the government, which by the patent passes to the grantee, and he is entitled to recover the possession in ejectment."

In *Sparks v. Pierce*, 115 U. S. 408, 413, 6 Sup. Ct. 102, 105, 29 L. Ed. 428, the court said of the right of a mineral claimant:

"Mere occupancy of the public lands and improvements thereon give no vested right therein as against the United States, and consequently not against any purchaser from them."

Referring to the decisions of the Supreme Court of Oregon, we find that in that state it has been held that possession cannot be adverse

to an entryman under the general land laws so long as the legal title remains in the United States. In *Joy v. Stump*, 14 Or. 361, 12 Pac. 929, it was said that possession, in order to be adverse, must be exclusive. In *Altschul v. O'Neill*, 35 Or. 202, 58 Pac. 95—a case decided before the enactment of the Code of Alaska—upon a careful and well-considered review of the authorities, it was held that to constitute adverse possession there must be, among other requisites, an entry under claim of right hostile to the true owner and to the world, and that an occupant of land cannot hold adversely while he admits the title to be in the United States; thus adopting the doctrine of the United States courts in *Ward v. Cochran*, 150 U. S. 597, 14 Sup. Ct. 230, 37 L. Ed. 1195, *Henshaw v. Bissell*, 18 Wall. 255, 21 L. Ed. 835, *Bracken v. Union Pacific Ry. Co.*, 75 Fed. 347, 21 C. C. A. 387, and *Pillow v. Roberts*, 13 How. 472, 14 L. Ed. 228, in which it was said that possession, in order to be adverse, must be adverse to all the world. We are compelled to hold, therefore, that there was no possession of the disputed premises adverse to the plaintiff in error prior to the date of the issuance of the patent to its mining claim. If there was no adverse possession, there was no disseisin, and until disseisin the statute of limitations of Alaska could not begin to run. In *United States v. Arredondo*, 6 Pet. 743, 8 L. Ed. 547, the court said:

"The law deems every man to be in the legal seisin and possession of land to which he has a perfect and complete title. This seisin and possession is coextensive with his right, and continues till he is ousted thereof by an actual adverse possession."

The ruling of the court below in holding that the possession of the defendant in error was adverse prior to the time of the issuance of the patent was based upon the consideration that the laws regulating the disposal of mineral land are essentially different from those that control the disposal of agricultural lands, and confer upon the locator of a mineral claim an estate of such a nature as to render inapplicable thereto the doctrine that the statute of limitations begins to run only from the time of the issuance of the patent. It is true that the locator of a mineral claim has, prior to the issuance of the final receiver's receipt, a broader control over his claim, and a higher estate therein than an entryman of agricultural land. But after full compliance with all of the conditions upon which a patent is authorized to be issued, there is no perceptible difference in the two estates. In cases where the question has been presented for adjudication, the courts have uniformly held that the statute of limitations does not begin to run against the claimant of a mining claim before his patent issues. *Nessler v. Bigelow*, 60 Cal. 98; *South End Mining Co. v. Tinney et al.*, 22 Nev. 221, 38 Pac. 401; *King v. Thomas*, 6 Mont. 409, 12 Pac. 865; *Weibold v. Davis*, 7 Mont. 107, 14 Pac. 865; *Mayer v. Carothers*, 14 Mont. 274, 36 Pac. 182; *Clark v. Barnard*, 15 Mont. 176, 38 Pac. 834; *Miser v. O'Shea*, 37 Or. 231, 62 Pac. 491, 82 Am. St. Rep. 751.

It follows that the judgment of the court below must be reversed and the cause remanded, with instruction to enter a judgment for the plaintiff in error.

INTERNATIONAL TEXT-BOOK CO. v. HEARTT.

(Circuit Court of Appeals, Fourth Circuit. February 21, 1905.)

No. 558.

1. FEDERAL COURTS—REMOVAL OF CAUSE—APPEARANCE.

The filing of a petition for removal of a cause to the proper Circuit Court of the United States in a state court, where the action is pending, amounts to a special appearance by defendant in the state court only, and does not, therefore, prevent it, after removal, from moving in the federal court to dismiss the action for want of jurisdiction of defendant's person, either in the state or federal court.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appearance, §§ 50, 89; vol. 42, Cent. Dig. Removal of Causes, § 238.]

2. SAME—PROCESS—SERVICE.

Where two corporations originally joined as defendants were separately organized, had different officials, and their interests were dissimilar, service of process on an individual as agent of one of the corporations, which he did not represent in any manner, was insufficient to confer jurisdiction over such corporation or the other corporate defendant, which he did in fact represent.

3. SAME—CORPORATIONS—REPORTS OF AGENT—SLANDER—CORPORATE LIABILITY.

Where, in an action against a corporation for slanderous words spoken by its agent with reference to an alleged embezzlement by plaintiff, it appeared that the slander was uttered by the agent after he had left plaintiff's presence and gone to another locality, where he was not engaged in the performance of any duty under the terms of his employment, which was expressly limited by contract, and alleged in the complaint as only extending to the "checking up of accounts," the corporation was not liable therefor.

4. SAME—DIRECTION OF VERDICT.

It is the duty of the court to direct a verdict for either party where the evidence is undisputed, or the proof is of such conclusive character that the court, in the exercise of its judicial discretion, would be compelled to set aside a verdict if one should be returned in opposition to the one directed.

In Error to the Circuit Court of the United States for the Eastern District of North Carolina.

John W. Hinsdale and David C. Harrington, for plaintiff in error.

J. C. L. Harris (Armistead Jones and William B. Jones, on the briefs), for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and BRAWLEY, District Judge.

GOFF, Circuit Judge. The defendant in error instituted this suit at law in the superior court of Wake county, N. C., against the International Text-Book Company, proprietors of the International Correspondence Schools; the Colliery Engineer Company, proprietors of the International Correspondence Schools; the International Correspondence Schools; the International Text-Book Company; and the Colliery Engineer Company—to recover damages for slanderous words said to have been spoken by one J. Stearns, who was alleged to have been an agent of said defendants.

A special appearance was entered in the superior court of Wake county by counsel for the defendants for the sole purpose of removing the case from that court to the United States Circuit Court for the Eastern District of North Carolina, the question of the proper service of the summons being expressly reserved. After the filing of the record in the Circuit Court of the United States, a special appearance was entered by the defendants for the sole purpose of moving to dismiss the suit.

The Colliery Engineer Company was incorporated in 1890 as a printing and publishing company, a part of its business being to teach by correspondence through the mails of the United States. In September, 1901, the charter of that company was duly amended, and its name was changed to the International Text-Book Company, and during the same month the International Correspondence Schools was incorporated. These corporations were chartered and organized under the provisions of the laws of the state of Pennsylvania, the principal office of each being in the city of Scranton, in that state. The defendant in error, the plaintiff below, in his original complaint alleged that he was one of the agents of the defendants at Raleigh, N. C., having been appointed in the month of May, 1901, and relieved in August of that year. He also alleged that one J. Stearns was a duly appointed supervisor of the Washington district of said defendants, which embraced the state of North Carolina, and that as such official it was his duty, among other things, to check up the accounts of plaintiff, and that as such agent, and while in the discharge of his duty as such, intending to injure and defame the plaintiff, did, in the presence and hearing of various persons, falsely, maliciously, and slanderously utter and publish of and concerning said plaintiff certain false, slanderous, and defamatory words, to his great damage. The original and a copy of the summons were placed in the hands of an officer for service, and he made return that he served the same by "reading it and delivering a copy of it to W. R. Stark, agent of the International Correspondence Schools." The defendants appeared specially in the court below, and moved to dismiss the suit because the summons had not been served on Stark as an agent of the International Text-Book Company, but on him as the agent of the International Correspondence Schools, and, he not being the agent of said last-mentioned company, neither defendant was served. The motion was overruled, and such action of the court is one of the assignments of error presented for our consideration. The defendants then entered a general appearance, and filed a demurrer to the complaint, which the court overruled, at the same time entering an order directing that the complaint be amended. The plaintiff below then filed an amended complaint against the International Text-Book Company alone, and in due time the case came on for trial, and was submitted to a jury, which found in favor of the plaintiff, on which verdict judgment was rendered. The other assignments of error relate to the admission and exclusion of evidence and to instructions given and refused by the court during the progress of the trial.

The court below, in refusing to dismiss because of want of service of the process, seems to have reached that conclusion because of the fact that the defendants had appeared in the superior court of Wake county for the purpose of filing the petition for removal. This, we think, was a mistake. Whatever confusion there may have been concerning this point heretofore, it is now well understood that the filing by a defendant, in an action brought in a state court, of a petition for removal to the proper Circuit Court of the United States, does not prevent such defendant, after the case has been removed, from moving in the federal court to dismiss it for want of jurisdiction of the person of such defendant in either the state or federal court. In other words, the filing of a petition for removal does not amount to a general appearance, but to a special appearance only. *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; *Wabash Western Railway v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431. The record discloses the fact that the only process issued in this action was served by reading the same and delivering a copy thereof to W. R. Stark, agent of the International Correspondence Schools. The record shows that the amended complaint was filed against the International Text-Book Company, owners of the Colliery Engineer Company. It was stated in an affidavit of the plaintiff below that he had been appointed solicitor collector of the International Correspondence Schools, which corporation it was quite evident is entirely distinct from the Colliery Engineer Company, which, in 1901, changed its name to the International Text-Book Company. It may be true that there was some contractual relationship existing between the International Text-Book Company and the International Correspondence Schools, but that did not dispense with the necessity of summoning the International Text-Book Company in a controversy concerning which both of said corporations were interested. They were separately organized, had different officials, and dissimilar interests. The testimony renders it entirely clear that W. R. Stark was not the agent of the International Correspondence Schools, but that he was the agent of the International Text-Book Company, and yet he was served with process only as the agent of the International Correspondence Schools. It follows, therefore, that, as the summons was not served on Stark as the agent of the International Text-Book Company, but on him as the agent of the International Correspondence Schools—he not being the agent of the last-mentioned company—neither company was served. We think that the motion to dismiss for want of service of process should have been granted.

We deem it best to refer to another of the assignments of error, in order that the direction with which we remand this case may be fully understood. At the conclusion of the evidence, and before the jury retired, the defendant moved the court to direct a verdict in its favor, which motion was overruled. In disposing of the questions raised by this action of the court, it will not be necessary to set forth all of the testimony before the jury, for a statement showing what was not proven will be sufficient to show whether

or not such direction should have been given. There was no evidence tending to prove that the defendant had authorized, either expressly or impliedly, said Stearns to utter the alleged slanders. There was no evidence showing that such utterance was within the scope of his employment. There was no evidence that the alleged slander was uttered by Stearns while actually employed in the business of his principal. His agency was conceded, but his authority and his duties as such agent were expressed and limited by his contract of employment, which was in evidence. The only duty of Stearns alleged in the complaint was "to check up the accounts" of the plaintiff. It is shown by the testimony that the defendant did not inform Stearns that the plaintiff had embezzled any of its money, and did not know that Stearns had made any such charge until so informed after the institution of this suit. It is quite clear that the words uttered by Stearns were beyond the scope of his employment, and that they were spoken under such circumstances as to render the agent alone responsible. In fact, it appears that the alleged slander was uttered after Stearns had checked up the account of the plaintiff below, after he had left the presence of the plaintiff, and had gone to another locality, where he was not engaged in the performance of any duty under the terms of his employment as such agent. To hold a principal responsible for slanderous words spoken by his agent, it must appear that the latter acted within the scope of his employment, and also that the words were spoken whilst the agent was employed in the actual performance of the duties of his principal. The Supreme Court of the United States, in *Washington Gas Light Company v. Lansden*, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. Ed. 543, has, in substance, so held. The following cases show the circumstances under which the principles referred to have been applied: *United States v. Halberstadt*, Fed. Cas. No. 15,276; *Pressly v. Mobile & G. R. Co.* (C. C.) 15 Fed. 199; *Kirby v. Thames & Morsley Ins. Co., Limited* (D. C.) 27 Fed. 221. A case quite similar to the one we now have under consideration is *Redditt v. Singer Mfg. Co.*, 124 N. C. 100, 32 S. E. 392. That was an action brought to recover damages because of certain alleged slanderous words spoken by defendant's agents concerning the plaintiff. There was neither allegation nor proof that such words were spoken by the authority of, or with the consent of, the defendant, or that the latter had ever ratified them. The defendant after the close of the plaintiff's evidence moved to dismiss the action on the ground that it was not liable in damages for the alleged slanderous words of its agents. The motion was overruled, and the case on exceptions went to the Supreme Court of North Carolina, which held that there was error in the refusal of the motion to dismiss. See, also, the following cases: *Wood v. Goodridge*, 52 Am. Dec. 771; *Thames Steamboat Co. v. Housatonic R. R. Co.*, 63 Am. Dec. 154; *Andrus v. Howard*, 84 Am. Dec. 680. An instructive and interesting case from the Supreme Court of North Carolina, in which the authorities are referred to and explained, is that of *S. M. Daniel*

v. Atlantic Coast Line Railroad Company (N. C.) 48 S. E. 816, from which we quote:

"It may, then, be gathered from the books as a general rule, which is clearly applicable to the facts of this case, that if the servant, instead of doing that which he is employed to do, does something else which he is not employed to do, the master cannot be said to do it by his servant, and therefore is not responsible for what he does. It is not sufficient that the act showed that he did it with the intent to benefit or to serve the master. It must be something done in attempting to do what the master has employed the servant to do."

See, also, case of Markley v. Snow, 207 Pa. 447, 56 Atl. 999, 64 L. R. A. 685.

We are of the opinion that the court below should have directed the jury to find for the defendant, as in no view of the case would it have been justified in returning a verdict for the plaintiff. Only one inference could have been fairly drawn from the evidence, as there was an utter failure on the part of the plaintiff to prove that the defendant was liable in damages for the slanderous words spoken by its agent. It is well settled that it is the duty of a court to direct a verdict for either the plaintiff or defendant, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of its judicial discretion, would be compelled to set aside a verdict if one should be returned in opposition to the one directed. That this question is a legal one for the court to decide is shown by the authorities. Phoenix Insurance Company v. Doster, 106 U. S. 30, 1 Sup. Ct. 18, 27 L. Ed. 65; Griggs v. Houston, 104 U. S. 553, 26 L. Ed. 840; Randall v. Baltimore & Ohio Railroad Company, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003; Anderson County Commissioners v. Beal, 113 U. S. 227, 5 Sup. Ct. 433, 28 L. Ed. 966; Schofield v. Chicago, Milwaukee & St. Paul Railway Company, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; Delaware, Lackawanna & Western Railroad Company v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; Aerkfetz v. Humphreys, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758; Elliott v. Chicago, M. & St. Paul Railway Company, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068; Patton v. Texas & Pacific Railway Company, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; Marande v. Texas & Pacific Railway Company, 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487.

There was error in the rendition of the judgment complained of, for which the same will be reversed, and the cause remanded to the court below, with directions to set aside said verdict and dismiss said cause.

Reversed.

MICHIGAN S. S. CO. v. THORNTON et al.

(Circuit Court of Appeals, Fifth Circuit. March 23, 1905.)

No. 1,437.

SHIPPING—FREIGHT—LIEN—DELIVERY OF CARGO.

A charter party provided that freight should be payable in cash on delivery of each cargo, that the ship should have a lien on all cargo and subfreights for freight money due under the contracts though the cargoes might have been delivered. The consignee at first paid the freight to the steamship company, and remitted to the shipper for the value of the cargo, but thereafter insisted on paying the entire amount to the shipper, leaving the latter to settle for freight. *Held* that, the consignee having remitted to the shippers for a cargo after delivery, including freight, which remittance was received by the shipper's receivers, the money so received was impressed with a trust in favor of the shipowner for freight.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

James Legendre, for appellant.

Henry P. Dart and Benj. W. Kernan, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. On October 19, 1901, the appellant, the Michigan Steamship Company, entered into a contract with the Lone Star & Crescent Oil Company, whereby the steamship company agreed to transport oil cargoes for the oil company from Sabine Pass, Tex., or other equivalent Gulf port, to New York, or other equivalent Atlantic port, of which Marcus Hook, Pa., is agreed to have been an equivalent, for five years at the rate of 37 cents per barrel of 42 gallons each. On December 15, 1902, the steamship company, by its steamship Roma, carried a cargo of bulk oil from Sabine Pass to Marcus Hook, the oil being consigned to the steamship company, and the amount of the cargo being $21,092\frac{18}{100}$ barrels of 42 gallons each. This cargo of oil, prior to its receipt by the steamship Roma, had been contracted to be sold to, and was to be delivered by the Lone Star & Crescent Oil Company to, the United Gas Improvement Company of Philadelphia, at the rate of $67\frac{1}{2}$ cents per barrel of 42 gallons each, f. o. b. Philadelphia: it being tacitly understood between the steamship company and the oil company that the amount of $67\frac{1}{2}$ cents per barrel was made up of the two sums of $30\frac{1}{2}$ cents, representing the value or price of the oil at Sabine Pass, loaded on the steamship, and 37 cents freight money for the transportation and delivery of the oil at its destination. From or soon after the date of the contract the steamship Roma had been engaged in like carriage between these points under the charter party before referred to, and in the beginning of operations thereunder settlements for freight charges were successively made by the gas company, by order of the oil company, directly with the steamship company, for several cargoes of oil as and when received; but the gas company finally ob-

jected to this mode of settlement, and insisted upon paying the entire amount of the price of the cargo, including freight charges, namely, 67½ cents, at one time, directly to the oil company, for each cargo, such settlement between the gas company and the oil company being made between the 1st and 10th days of each month by remittance of New York exchange, leaving it to the oil company to make settlement for freight charges directly with the steamship company. On January 6, 1903, the gas company, in payment of the contract price of the cargo of December 15, 1902, remitted to the oil company in New Orleans, La., the sum of \$14,173.94 in New York exchange, payable to the order of the oil company, together with a voucher showing the amount of oil received and the price thereof. It was customary for the oil company, upon receiving a remittance from the gas company to forward to the steamship company by exchange the amount due it for freight money on each cargo out of the sum received from the gas company in payment of the price thereof, such remittance to the steamship company being usually made about the 10th day of each month. The New York exchange covering the cargo of oil of December 15, 1902, reached the office of the oil company in New Orleans on January 8, 1903. On the previous day the appellees Crandell and Lemle had been appointed receivers of the oil company (by the court in which this intervention is filed), and they, on January 10th, deposited the funds resulting therefrom in the Citizens' Bank of Louisiana to the receivers' account, where the same is now on deposit.

The appellant, by its intervention in the receivership suit, averred and claimed that the sum of \$7,286.60 of the amount so received by the receivers and deposited to their credit belongs to it in full ownership, and is not an asset of the defendant company. The receivers duly answered this petition, but it is not necessary to recite the terms of their answer. The matter was referred to a master, who reported the facts substantially as herein already recited, with his conclusion of law that by the delivery of the cargo of oil to the gas company by the ship, pursuant to the contract of charter-party, which, in terms, provide a lien upon the cargo for freight in the usual form of words, namely "Freight payable in cash upon delivery of the cargo," if nothing else is to be considered but the bare contracts of charter party, the right of lien for freight in favor of the ship was lost, and, being lost, cannot be revived by a court of equity. He concluded that under another agreement (which we have not thought it necessary to recite) the appellant was entitled to payment out of the fund to the extent of \$2,109.16, and that the steamship company was entitled to recover an ordinary judgment or decree against the receivers for the balance due it of the charter money on the cargo. His report was duly excepted to, and the exceptions having been considered by him were elaborately discussed in a second report, which overruled the exceptions, and adhered to his first findings of fact and law. The case coming on for hearing before the court on the report of the master and the appellant's exceptions thereto, the exceptions were overruled, the master's report affirmed, and a decree passed that the steamship company have and recover judgment of the oil company in the sum of \$7,286.60, and that the receivers, A. W.

Crandell and Gustave Lemle, pay the steamship company on account of that debt the sum of \$2,108.18 out of the proceeds of the cargo of oil referred to in the master's report, now in the hands of the receivers; that as to the remainder of the debt, to wit, \$5,177.42, the interveners be classified as ordinary creditors of the oil company, and the debt await the settlement of the estate in due course. In addition to the provision (substantially, but not exactly, quoted in the master's report), "Freight money payable in cash on delivery of each cargo," there is also this other provision in the contract of October 19, 1901: "That the steamship company shall have a lien upon all cargoes and all sub-freights for freight money due under these contracts, although said cargoes may have been delivered to the oil company; and the oil company shall have a lien on the ship for all moneys paid in advance and unearned." In a second or supplementary contract, entered into on the 7th of April, 1902, between the parties to the contract of October 19, 1901, and providing for additional ocean tonnage, if required, it is stipulated: "Freight money, to which shall be added 5 cents for each barrel of 42 gallons as a bonus for furnishing tonnage additional to the Roma, payable in cash on the 15th day of each month," etc., in which supplementary contract the provision is retained "that steamship company shall have a lien upon all cargoes and subfreights for freight money due under these contracts, although said cargoes may have been delivered to oil company, and oil company shall have a lien upon the said tonnage for moneys paid in advance and unearned."

Even "courts of admiralty, when carrying into execution maritime contracts and liens, are not governed by the strict and technical rules of the common law, and deal with them upon equitable principles, and with reference to the usages and necessities of trade. And it often happens that the necessities and usages of trade require that the cargo shall pass into the hands of the consignee before he pays the freight. It is to the interest of the shipowner that his vessel should discharge her cargo as speedily as possible after her arrival at the port of delivery. And it would be a serious sacrifice of his interests if the ship was compelled, in order to preserve the lien, to remain day after day with her cargo on board, waiting until the consignee found it convenient to pay the freight, or until the lien could be enforced in a court of admiralty. The consignee, too, in many instances, might desire to see the cargo unladen before he paid the freight, in order to ascertain whether all of the goods mentioned in the bill of lading were on board, and not damaged by fault of the ship. It is his duty, and not that of the shipowner, to provide a suitable and safe place on shore in which they may be stored; and several days are often consumed in unloading and storing the cargo of a large merchant vessel. And if the cargo cannot be unladen and placed in the warehouse of the consignee without waiving the lien, it would seriously embarrass the ordinary operations and convenience of commerce, both as to the shipowner and the merchant "It is true that such a delivery, without any condition or qualification annexed, would be a waiver of the lien; because, as we have already said, the lien is but an incident to the possession, with the right to retain. But in cases of the kind above mentioned it is frequently—

perhaps more usually—understood between the parties that transferring the goods from the ship to the warehouse shall not be regarded as a waiver of the lien, and that the shipowner reserves the right to proceed in rem to enforce it if the freight is not paid. And if it appears by the evidence that such an understanding did exist between the parties before or at the time the cargo was placed in the hands of the consignee, or if such an understanding is plainly to be inferred from the established local usage of the port, a court of admiralty will regard the transaction as a deposit of the goods, for the time, in the warehouse, and not as an absolute delivery; and on that ground will consider the shipowner as still constructively in possession so far as to preserve his lien and his remedy in rem.” *Bags of Linseed*, 66 U. S. 114, 115, 17 L. Ed. 35.

In *The Bird of Paradise*, 72 U. S. 555, 18 L. Ed. 662, we find this language:

“Parties, however, may frame their contract of affreightment as they please, and, of course, may employ words to affirm the existence of the maritime lien, or to extend or modify it, or they may so frame their contract as to exclude it altogether. They may agree that the goods, when the ship arrives at the port of destination, shall be deposited in the warehouse of the consignee or owner, and that the transfer and deposit shall not be regarded as the waiver of the lien; and where they so agree, the settled rule of this court is that the law will uphold the agreement and support the lien.”

We quote the language of the Supreme Court in another case—*The Lottawanna*, 88 U. S. 582, 22 L. Ed. 654:

“The court [the proceeding was in admiralty] has power to distribute surplus proceeds to all those who can show a vested interest therein, in the order of their several priorities, no matter how their claims originated. The propriety of such a distribution in the admiralty has been questioned on the ground that the court would thereby draw to itself equity jurisdiction. But it is a wholesome jurisdiction, very commonly exercised by nearly all superior courts, to distribute a fund rightfully in its possession to those who are legally entitled to it; and there is no sound reason why admiralty courts should not do the same. If a case should be so complicated as to require the interposition of a court of equity, the District Court could refuse to act, and refer the parties to a more competent tribunal.”

Here we are in a court of equity, and the recitation of the facts which we have made are sufficient, we think, to show to the enlightened conscience of the chancellor that the appellant was entitled to the amount it claimed on the ground that it urged, namely, that the sum of \$7,286.60, obtained by the receivers in the manner specified, and then and now retained by them, belongs to the steamship company in full ownership, and is not an asset of the defendant company. And, waiving any express decision of the question as to the maritime lien extended and retained by contract, we, on this latter ground, conclude that the money received by the oil company and by its receivers was and is charged in their hands with a trust in favor of the appellant. We therefore direct that the decree of the Circuit Court shall be so amended as to require that A. W. Crandell and Gustave Lemle, receivers of the Lone Star & Crescent Oil Company, pay to the Michigan Steamship Company the full amount of \$7,286.60 out of the proceeds of the cargo of oil referred to herein, and now in the hands of the receivers, with its costs in the Circuit Court and in this court.

LONDON & SAN FRANCISCO BANK, Limited, v. BLOCK, Tax Collector.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1905.)

No. 1,074.

TAXATION—CREDITS.

Cal. Const. art. 13, § 1, declares that all property in the state not exempt under the laws of the United States shall be taxed in proportion to value, and that the word "property" shall include all moneys, credits, etc., capable of private ownership. Pol. Code, § 3617, declares that the word "credits" shall mean "those solvent debts not secured by mortgage or trust deed, owing to the person or corporation assessed." *Held*, that where a foreign corporation maintained branch banks in San Francisco, Portland, Or., and Tacoma, Wash., credits on the books of the San Francisco office, consisting of sums paid to the other branches for their benefit, and charged to them as mere matter of bookkeeping, without any promise or obligation on the part of the debited agencies to return the money to the San Francisco bank, were not credits arising in the state of California, or taxable therein.

Appeal from the Circuit Court of the United States for the Northern District of California.

For opinion below, see 117 Fed. 900.

Charles P. Eells, for appellant.

Percy V. Long, City Atty. (W. I. Brobeck, Asst. City Atty., of counsel), for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is a suit in equity brought by appellant, a corporation organized and existing under the laws of the United Kingdom of Great Britain and Ireland, against appellee, the tax collector of the city and county of San Francisco, to secure an injunction restraining him from making a threatened sale of appellant's real property for the taxes alleged to be due for the fiscal year 1897. In April, 1896, the assessor of the city and county of San Francisco demanded from appellant, at its branch office in San Francisco, a statement, under oath, setting forth specifically all the real and personal property in California owned by appellant, or in its possession, or under its control, at 12 o'clock noon of the first Monday in March in the year 1896. This included the real estate, \$182,040; furniture, \$1,800; money, \$251,462; and solvent credits, \$1,599,811. The assessor added to this statement an assessment for franchise, \$12,000, and divers other solvent credits, including \$116,774 due by Portland branch and \$428,539 due by Tacoma branch. Before delinquency, appellant tendered to appellee the sum of \$7,327.51, being the amount of tax collectible on the items returned by appellant in its statement. Appellee refused to accept this tender, and proceeded to advertise appellant's property for sale for the entire tax on all the property assessed, to wit, a tax of \$24,081.23. This suit was brought July 2d, the day before the sale would otherwise have been made, and the court issued a restraining order. Pending the trial, appellee received from appellant the sum of \$6,086.39 in payment of the tax for real estate, furniture, and money;

and at the trial appellant admitted that, of the items added and assessed, \$4,103.34 were liable to assessment, and appellee admitted that, of other items assessed, \$390,973.14 were not liable to assessment. The questions submitted to the court below were as to appellant's liability as to assessment of \$12,000 for its franchise; \$164,576.60, amount due by J. P. Morgan & Co.; \$116,774, amount due by Portland branch; and \$128,539, amount due by Tacoma branch. The Circuit Court rendered its opinion, and entered a decree in favor of appellant as to the amount due by J. P. Morgan & Co., and in favor of appellee on the other items, and dismissed appellant's bill. *London & San Francisco Bank, Limited, v. Block, Tax Collector (C. C.) 117 Fed. 900.* From this decree the appeal herein is taken.

In this court appellant, by agreement with appellee's attorney, abandoned its claim of error as to the item of franchise, without prejudice to its appeal upon the remaining grounds.

The only question for this court to decide is whether the court erred in holding that the items due from the Portland branch and the Tacoma branch were assessable as "solvent credits" taxable in California. The testimony in the record shows that appellant has its head office in London. It has three branch offices or agencies in the United States, one at San Francisco, Cal., one at Portland, Or., and the other at Tacoma, Wash. Each of these branches is designated as "The London & San Francisco Bank, Limited." All the capital used in these branches is supplied from the office in London, and is owned by appellant. It has its board of directors and general manager in London, who control the managers of its several branches in the United States. It is represented in its branch office at San Francisco by a cashier, manager, and assistant manager, who hold a joint and several power of attorney from the directors of the corporation in London to do everything required in the carrying on of the banking business. Each manager is required to make monthly reports of the business of the bank to the head office. In relation to the general business of making loans and investments, etc., the local officers of the branch office act on their own judgment, without instructions from the head office in London. In the conduct of its business, and pursuant to instructions from the head office in London, remittances of money are made from time to time from one branch to another, or between the branch offices and the London office. For convenience of bookkeeping these advances are entered as debits charged on its books by the office sending them to the office receiving them. On the first Monday in March, 1896, the books of the San Francisco bank showed the balance due it from the Portland and Tacoma branches in the amounts above stated.

Section 3628 of the Political Code of California provides that:

"The assessor must, between the first Monday in March and the first Monday of July in each year, ascertain the names of all taxable inhabitants, and all the property in his county subject to taxation, and must assess such property to the persons who own, claim, or have the possession or control thereof."

It appears from the testimony that the assessor took the statement of the taxable property as returned by appellant, and added thereto the solvent credits as returned in the statement made to the Bank Commis-

sioners of California, showing the condition of the bank's affairs on the first Monday in March, 1896.

It is undoubtedly true that if the money had been in the bank in San Francisco it would have been taxable as money on hand. Are the amounts of money previously transmitted to the Portland and Tacoma branches taxable as solvent credits due the bank in San Francisco?

Section 1 of article 13 of the Constitution of the state of California declares that:

"All property in the state, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership
* * *"

Section 3617 of the Political Code of California defines the term "credits" to mean "those solvent debts not secured by mortgage or trust deed, owing to the person, firm, or corporation assessed."

The entries as made in the books, and the statement to the Bank Commissioners, showed all the transactions with the head office and its several agencies, as well as the transactions conducted by the officers of the agency in San Francisco. No distinction was made in the books with reference to the business done with the head office or the offices of the other agencies. The accounts in the books are kept the same as the accounts with foreign banks, but under the testimony it is clearly shown that the credits under consideration, as shown in the books, are merely records of the facts that under instruction from the "head office" in London various sums of money in the agency of the bank in San Francisco, amounting in the aggregate to the sums heretofore stated, were sent to the Portland and Tacoma agencies. The agency at San Francisco did not secure a credit by these remittances of money. There was no promise or obligation upon the part of either of the agencies or the "head office" to return the money to the bank in San Francisco. The amounts of money forwarded to the agencies were not "solvent debts" owing to the agency at San Francisco. They were not investments made abroad with foreign banks, and do not come within the principles announced in *Nevada Bank v. Sedgwick*, 104 U. S. 111, 26 L. Ed. 703, or *Pacific Coast Savings Society v. City and County of San Francisco*, 133 Cal. 14, 65 Pac. 16, and other like cases cited by appellee. "The authorities generally agree," as was said by the Supreme Court in *Mackay v. San Francisco*, 128 Cal. 678, 686, 61 Pac. 382, 385, "that where the owner is not a resident of the state in which the credits are situated, and the credits are in the possession and control of a local agent, who holds them for the purpose of transacting a permanent business, and of investing and reinvesting the proceeds from the principal or interest in such manner that the property or credits come in competition with the capital of the citizens of the state in which the agent resides, that the credits have a situs for the purposes of taxation in the place of residence of the local agent. (*New Orleans v. Stempel*, 175 U. S. 318, 20 Sup. Ct. 110, 44 L. Ed. 174, and cases cited.)" But in the present case, while at one time previous to the assessment the money had been in the possession and control of the agency in Califor-

nia, it had not been used in the transaction of its business, and had not been invested in such a manner as to bring appellant "in competition with the capital of the citizens of the state." At the time of the assessment it had been removed to the respective agencies in Portland and Tacoma, and the money, if on hand, would be taxable there; and, if loaned out or invested by the agencies there, the solvent debts arising therefrom would be taxable respectively at the residence of the agencies in the states of Oregon and Washington, but was not taxable at the residence of the agency in San Francisco, Cal., because at the time of assessment the agency there neither had the money nor had used it in the ordinary transactions of the bank, either by loan or investments, and did not have at that time the possession or control of the money, or have any solvent debts created by its use while in its possession or control. The authority of every state to tax all property, real and personal, within its jurisdiction, is unquestionable; but the taxing power of the state is limited, in a case of this character, to property within the state. Under the facts of this case, our conclusion is that the court erred in holding that the two items under consideration, aggregating \$545,313, upon which the tax was \$7,624.56, were property assessable to appellant as solvent credits.

The decree of the Circuit Court as to the allowance of the tax and penalties on these two items is reversed, and the cause remanded to the court below to strike out this portion of the decree, and make such further order in the premises as the case may require, in accordance with the views expressed in this opinion.

EIDMAN, Collector, v. TILGHMAN et al.

(Circuit Court of Appeals, Second Circuit. February 24, 1905.)

No. 169.

INTERNAL REVENUE—LEGACY TAXES—CONSTRUCTION OF REPEALING ACT.

Under sections 29 and 30 of the war revenue act of July 1, 1898, c. 448, 30 Stat. 464, 465 [U. S. Comp. St. 1901, pp. 2307, 2308], as amended by Act March 2, 1901, c. 806, § 10, 31 Stat. 946, 948 [U. S. Comp. St. 1901, pp. 2307, 2308], which provided for a tax on legacies, to become "due and payable in one year after the death of the testator," and to be a lien, etc., such tax did not become a lien and was not "imposed" until one year after the testator's death; and hence legacies left by a testator who died within one year prior to July 1, 1902, at which time the act repealing such sections took effect, are not taxable thereunder, the repealing act of April 12, 1902, c. 500, § 8, 32 Stat. 97 [U. S. Comp. St. Supp. 1903, p. 279], saving only taxes which had been "imposed" prior to its taking effect.

In Error to the Circuit Court of the United States for the Southern District of New York.

Writ of error by the defendant in the court below to review a judgment for the plaintiffs entered upon overruling a demurrer to the complaint.

For opinion below, see 131 Fed. 651.

Charles D. Baker, Asst. U. S. Atty., for plaintiff in error.

Edward B. Whitney, for defendants in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

WALLACE, Circuit Judge. The controversy is whether the plaintiffs, executors of the will of Frederick W. Brittan, by which certain legacies were created, were properly assessed for a legacy tax under the provisions of the act of Congress of June 13, 1898, c. 448, § 29, 30 Stat. 464 [U. S. Comp. St. 1901, p. 2307], as amended by the act of March 2, 1901, c. 806, § 10, 31 Stat. 946. Brittan died October 13, 1901. The court below decided that they were not, because of the repealing act of April 12, 1902, c. 500, § 8, 32 Stat. 97 [U. S. Comp. St. Supp. 1903, p. 279].

Section 29 of the act of June 13, 1898, declares that executors having in charge or trust legacies of personal property thereafter passing by will to any person "shall be and hereby are made subject to a duty or tax to be paid to the United States" at a rate varying in the degree of consanguinity between the testator and the beneficiary. Section 30, as amended by the act of March 2, 1901, declares that the tax shall be due and payable in one year after the death of the testator, and shall be a lien and charge upon the property of the decedent for 20 years, or until the same within that period shall be fully paid to and discharged by the United States, and that any executor having in charge such trust or legacy shall give notice thereof in writing to the collector within 30 days after he shall have taken charge of such trust, and, before payment to the legatee, shall pay to the collector the amount of the duty or tax assessed upon such legacy, and shall also make and render to the collector a schedule or list of the amount of such legacy, together with the amount of duty which has accrued or shall accrue thereon, and containing the names of each and every person entitled to a beneficial interest therein, together with the clear value of such interest, which schedule or list shall be by him immediately delivered and the tax thereon paid to such collector. It further provides that in case the executor shall neglect to pay the aforesaid duty or tax to the collector within the time provided, or to deliver to the collector the schedule or list, or shall deliver to the collector a false schedule of such legacies, the collector shall make out such lists and valuation as in other cases of neglect, and shall assess the duty thereon, and shall commence appropriate proceedings in some court of the United States against the person or persons having the actual or constructive custody or possession of such personal estate or any part thereof, and subject the same to be sold upon the judgment or decree of the court for the satisfaction of the tax.

The act of April 12, 1902, is an act to repeal war revenue taxation. Section 7 repeals section 29 of the act of June 13, 1898, and all amendments of said section. Section 8 reads as follows:

"That all taxes or duties imposed by section 29 of the act of June 13, 1898, and amendments thereof, prior to the taking effect of this act, shall be subject as to lien, charge, collection and otherwise, to the provisions of section 30 of said act of June 13, 1898, and amendments thereof, which are hereby continued in force as follows."

The act, by section 9, then re-enacts section 30 of the act of 1898, as amended in 1901. Section 11 provides that the act shall take effect July 1, 1902.

It was obviously the effect of the repealing act to exempt from taxation after July 1, 1902, all legacies except such as should previously have become taxable. The repeal of a statute does not affect any right which has previously accrued under it, if the remedy is preserved by the repealing act; and, when a repealing act re-enacts the provisions for enforcing the right, it does not impair the right, and it can be enforced precisely as it could have been if there had been no repeal. *Steamship Co. v. Joliffe*, 2 Wall. 450, 458, 17 L. Ed. 805; *Wright v. Oakley*, 5 Metc. (Mass.) 400, 406. When statutes are repealed by acts which substantially retain the provisions of old laws, the latter are held not to have been destroyed or interrupted in their binding force. *United Hebrew Association v. Benshimol*, 130 Mass. 325.

The phraseology of the repealing act is happily chosen to suggest doubt as to its meaning. The tax is "imposed" by section 29 only in the sense that it is created or prescribed. That is the section which denominates the property upon which the tax is to attach, designates the person who shall be subjected to it, and establishes the rule for determining the rate and amount. Section 30 is the one which really imposes the tax, as without its provisions the provisions of section 29 would be nugatory. Without these provisions the tax would be nothing more than an inchoate right of the government. Consequently, when, in the words of the repealing act, all taxes or duties "imposed" by section 29 "prior to the taking effect of this act" are to remain unaffected by the repeal, the meaning of the word "imposed" is to be ascertained from the provisions of section 30. If, under these provisions, the tax had not been imposed at the date when the repealing act was to take effect, the plaintiffs were entitled to recover. If at that date it had been imposed, the decision below was erroneous. Nevertheless it is possible that Congress meant that the tax prescribed by section 29 was "imposed" by that section, and that any legacy passing before the repeal should remain liable, and that section 30 should continue in force for preserving the lien and enforcing payment. But Congress has not said this, and a tax is never to be exacted from a citizen by a doubtful interpretation of a taxing act. Ordinarily a tax cannot be regarded as imposed until it becomes a lien upon the property which is to be subjected to its payment. Section 30 does not in terms fix the time of the commencement of the lien, but its provisions do not necessarily import the existence of a lien prior to the time when it becomes the duty of an executor to pay the tax and render the list to the collector. We are of the opinion that this is the time when the lien first attaches, and consequently when the tax is imposed; and, however we might regard it as an original question, we are constrained to this conclusion by the decision in *Mason v. Sargent*, 104 U. S. 689, 26 L. Ed. 894. In that case the provisions of a statute practically identical in terms with section 30 were under consideration, and it was held that the tax did not become a lien upon the property bequeathed until the time when it became due and payable by the executor, and he was required to list the property for taxation. In the previous case of *Clapp v. Mason*, 94 U. S. 594, 24 L. Ed. 212, the statute under consideration made a succession tax a lien "from the time such tax shall become due and payable," and the question was whether previous to this time the suc-

cession was taxable or liable to be assessed, and the same conclusion was reached; and the court used this language: "It is manifest that the right does not accrue until the duty can be demanded; that is, when it was made payable." In both of these cases the court decided that a repeal of the taxing act, but saving its provisions for enforcing the taxes "assessed or liable to be assessed," and "the right to which has already accrued, or which may hereafter accrue," divested the government of any claim for taxes which had not become payable when the repealing act took effect. These decisions are decisive in the present case. By the original section 30 the tax did not become payable until the time of making payment and distribution to the legatees, but by the amendment of 1901 it became payable one year after the death of the testator. As one year had not elapsed since the death of the testator when the repealing act took effect, the obligation of the executor to make payment or render a list had not accrued, and no lien could attach.

The judgment is affirmed.

In re SEAHOLM.

(Circuit Court of Appeals, First Circuit. February 16, 1905.)

No. 563.

1. **BANKRUPTCY—DISCHARGE OF BANKRUPT—LIMITATION OF RIGHT.**

Under Act Cong. Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411], amending section 14, subsec. "b," cl. 5, Bankr. Law July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], so as to authorize the discharge of a bankrupt "unless he has * * * in voluntary proceedings been granted a discharge in bankruptcy within six years," a bankrupt cannot procure a discharge on own own application, either in voluntary or in involuntary proceedings, where within six years he has been granted a discharge in voluntary proceedings. The words "in voluntary proceedings" refer to the proceedings in which the prior discharge was granted, and not to the proceedings in which the second discharge is sought.

2. **SAME—AMENDMENT TO STATUTE—RETROACTIVE OPERATION.**

Act Cong. Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411], amending section 14, subsec. "b," cl. 5, Bankr. Law July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], so as to withhold from the bankrupt his previous existing right of discharge in cases where he has in voluntary proceedings been granted a discharge within six years, is not, as applied to a bankrupt who petitions for a discharge after the passage of the amendment, objectionable as retroactive.

Petition for Revision of Proceedings of the District Court of the United States for the District of Massachusetts, in Bankruptcy.

Robt. H. Benny (Stebbins, Storer & Burbank, on the brief), for petitioner.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. This appeal from the District Court of Massachusetts relates to the grounds for refusing a discharge to a

bankrupt under the bankruptcy law of July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], as amended by the act of Congress of February 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411], and raises the question whether the words "in voluntary proceedings," in section 14, subsec. "b," cl. 5, describe or have reference to the pending proceeding, in which the bankrupt himself stands upon his second application for a discharge, or to a previous and past proceeding, in which he has been discharged within six years.

But for the ingenious and somewhat subtle contention of the appellant, the meaning of the statute in this respect would seem to be clear, as, by omitting from subsection "b" all the grounds for refusing a discharge except the one material in this case, the statute would read, "investigate the merits of the application and discharge the applicant unless he has in voluntary proceedings been granted a discharge in bankruptcy within six years." Such a reading necessarily results, as the conjunction "or" connects the subject "he" with the verb in each of the five succeeding clauses. Each clause introduced by "or" naturally and necessarily refers itself back to the subject "he" and the verb "has," the verb "has" obviously referring to the past. The argument, however, is made that, through possible punctuation, like introducing a comma after the word "proceedings," then under reasonable construction the words "in voluntary proceedings" would have reference to the proceeding in which the second discharge is sought, rather than to the earlier proceeding, in which the discharge was granted. We do not think the statute reasonably susceptible of such a construction; and it is quite certain that, under the well-known rules governing the interpretation of statutes, such a forced construction would not be warranted unless unmistakable and efficient historical considerations make it plain that it was so intended by Congress.

However, in view of the argument, which was pressed with apparent confidence, and which raises, perhaps, a possible question, we deem it not inappropriate to refer briefly to the historical causes (Sutherland on Statutory Construction, § 300; *Gardner v. The Collector*, 6 Wall. 499, 511, 18 L. Ed. 890) promoting legislative enlargement of the grounds for refusing a discharge to the bankrupt when it is sought upon his own application.

It must be observed that the idea of placing restrictions and limitations upon the number and frequency of discharges to be granted to the bankrupt upon its own application does not involve a new philosophy, nor is it a new feature of bankruptcy legislation. In the older bankruptcy statutes, both in this country and in England, refusal of the second discharge was not, as a rule, limited to situations in which the first discharge was in a voluntary proceeding, but a discharge on a second proceeding was denied when the first discharge was in an involuntary proceeding as well. Under the English bankruptcy act of 1890, if the bankrupt has on any previous occasion been adjudged a bankrupt, the discharge is refused altogether, or suspended for a period of not less than two years, or until a dividend of not less than 10 shillings on the pound has been paid; and this restriction upon the second discharge results without regard to whether the earlier bank-

ruptcy involved a voluntary or an involuntary proceeding, and without regard to lapse of time between the earlier and the later proceeding.

A similar feature was present in our own bankruptcy law of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), where a second discharge was only allowed when the bankrupt's estate was sufficient to pay 70 per cent.; the rigor of this restriction being qualified only by a provision which enabled three-fourths of the creditors to consent to a discharge upon payment of a less sum.

The debates in Congress in connection with the proposed amendments of 1903 to the law of 1898, enlarging the grounds for withholding a discharge, show that the amendments were directed against alleged abuses, through the frequency of bankruptcy proceedings instituted by the same individual, and from repeated discharges in bankruptcy upon the application of the bankrupt, and that such *ad libitum* discharges resulted from the absence of the usual restriction upon the bankrupt, which was omitted through oversight.

The fifth clause of the amendments, as originally drawn and under debate in the House of Representatives, where it was attacked as oppressive to the bankrupt, was sufficiently comprehensive to direct itself against a discharge if the applicant had been granted or denied a discharge within six years in either voluntary or involuntary proceedings. It was as follows: "or (5) been granted or denied a discharge in bankruptcy within six years." The debates show that those who were against the proposed amendment, on the ground that it was oppressive, urged that a debtor ought to be discharged in an involuntary proceeding instituted by the creditors who had taken his assets, without regard to the number or the character of the previous proceedings or discharges, yet, after full debate, the amendment passed the House in its comprehensive terms, and without modification. The Senate, by amendment, modified the rigid terms of the House proposition by striking out the words "or denied," and inserting the words "in voluntary proceedings," thus presenting to the House the present clause 5, which in two substantial respects modified the House proposition: First, by omitting the words "or denied," thus limiting its operation to cases in which a discharge has been actually granted; and, second, by inserting the words "in voluntary proceedings," which withdraws its operation from cases in which the bankrupt has been discharged in a previous involuntary proceeding.

Under the Senate amendment, it was left that the applicant shall be discharged "unless he has * * * in voluntary proceedings been granted a discharge in bankruptcy within six years." To the modified clause presented by the Senate, the House agreed, and it became a law.

In view of the sweeping terms of clause 5, as originally drawn and passed by the House, and of the Senate amendment, which was merely a modification of the House policy or proposition, rather than a reversal, the conclusion is irresistible that it was not the purpose of Congress to allow a second discharge to a debtor upon his own application if the prior discharge was granted to him in a voluntary proceeding within the time limitation under which the clause operates—in other words, that it was the final intention of Congress to give the bankrupt

a second discharge, on his own application, in a subsequent involuntary proceeding, only in cases where his first discharge was in an involuntary proceeding.

The appellant's other point is that the amendment, under such construction, is retroactive, because, under the old law, the bankrupt would be entitled to a second discharge in either a voluntary or an involuntary proceeding. It is a sufficient answer to this, we think, to say that the proceeding in which the point is taken was instituted subsequently to the amendment which changed the law.

There was no vested right in the bankrupt to have the law stand as it was. No one would seriously question the right of Congress to modify the law, and state the conditions upon which debtors in the future could be discharged from their indebtedness, and, when the bankrupt made his application for a discharge in this proceeding, he invoked the law as it then was; and, under the statute of 1903, as we view it, the fact that he had been previously discharged from his indebtedness in a voluntary proceeding within six years was a statutory ground for withholding a second discharge upon his own application in this subsequent involuntary proceeding.

Judge Lowell's ruling in this case was based upon his earlier opinion in *In re Carleton* (D. C.) 131 Fed. 146, and we think the view there expressed as to both questions is the correct one, in respect to the statute as it now stands.

We have no occasion to inquire in this case whether a second discharge of a bankrupt could be effected in an involuntary proceeding upon consent or application of creditors, notwithstanding the fact that he had been discharged upon his own application in a prior voluntary proceeding within six years.

The decree of the District Court is affirmed.

KIBBE v. STEVENSON IRON MIN. CO.

(Circuit Court of Appeals, Eighth Circuit. March 6, 1905.)

No. 2,066.

1. CONSTRUCTION OF STATE STATUTES AND CONSTITUTIONS—FEDERAL COURTS FOLLOW STATE COURT.

The national courts follow the construction of the Constitution and statutes of a state given by its highest judicial tribunal in cases that involve no question of general or commercial law and no question of right under the Constitution or laws of the nation.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 956, 957.

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

2. FELLOW SERVANT LAW—STATE COURT HOLDS APPLICABLE TO MINING CORPORATIONS.

The Supreme Court of Minnesota has held that the fellow servant law of that state (section 2701, Gen. St. Minn. 1894) applies to a mining corporation which is not a railroad corporation, but which owns and uses a short line of railroad to mine its ore; that the statute applies to "all persons and corporations operating a line of railroad incident to which are the hazards and risks intended to be guarded against by the Legislature."

8. SAME—NOT VIOLATIVE OF CONSTITUTION OF UNITED STATES.

A fellow servant law thus construed is not so clearly beyond the limits of the police power of the state that it must be declared violative of the Constitution of the United States.
(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Minnesota.

Samuel A. Anderson (Albert Baldwin, on the brief), for plaintiff in error.

John G. Williams (A. L. Flewelling, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. Elmer A. Kibbe, the plaintiff in error, brought an action against the Stevenson Iron Mining Company, a corporation, organized for the purpose of and engaged in mining ore in the state of Minnesota, for damages which resulted from a personal injury, which was inflicted upon him, as he alleged, by the negligence of the corporation while he was employed by it as a railway switchman and brakeman engaged in operating a short railway which it was using for the sole purpose of drawing the iron ore from its mine to the railroad yards of the Eastern Minnesota Railway Company, where it was delivered to that corporation for transportation. The evidence disclosed these facts: The defendant was organized for the purpose of mining ore, and not for the purpose of owning or operating railroads. It owned two parallel railroad tracks from one-half a mile to three-fourths of a mile in length, which extended from the railway yards of the Eastern Minnesota Railway Company down an inclined plane into its mine. It also owned two railway engines and a number of cars that were used for drawing the ore from the mine to the yards of the railway company. The defendant was engaged as a brakeman in the operation of a train of these cars upon one of these tracks when he was injured. The plaintiff claimed that his injury was caused by the negligence of the engineer of the train, who was his fellow servant. At the close of the trial the court instructed the jury to return a verdict in favor of the defendant upon the sole ground that section 2701 of the General Statutes of Minnesota of 1894 (the fellow servant law of Minnesota) was inapplicable to this case.

The verdict and the judgment which followed it are assailed by counsel for the plaintiff on the ground that since they were rendered the Supreme Court of Minnesota has decided in the case of *Kline v. Minnesota Iron Co.*, 100 N. W. 681, the question, which was certainly debatable at the time of the trial, whether or not a mining corporation which was operating a railroad for the sole purpose of extracting ore from its mine is subject to the provisions of the fellow servant law of Minnesota, in favor of his contention. Counsel for the defendant in error contends, on the other hand, that section 2701 is inapplicable to the ownership and operation of a short railroad of such a corporation for the sole purpose of mining its ore, and that, if the statute may be

broadened by construction to cover such a case, it violates both the Constitution of the United States and that of the state of Minnesota. He has presented a brief and argument in support of these positions with an ability, learning, and force which have awakened the interest and admiration of the court, and which might have quite persuaded it to his view if these issues had not, in its opinion, become foreclosed by decisions which control its action. But a careful perusal of the opinions of the Supreme Court and of those of the Supreme Court of Minnesota has forced our minds to the conclusion that the issues of law which he presents are not open to our consideration or determination.

The national courts uniformly follow the construction of the Constitution and statutes of a state given by its highest judicial tribunal in all cases which involve no question of general or commercial law and no question of right under the Constitution and laws of the nation. *Bolles v. Brimfield*, 120 U. S. 759, 763, 7 Sup. Ct. 736, 30 L. Ed. 786; *Detroit v. Osborne*, 135 U. S. 492, 499, 10 Sup. Ct. 1012, 34 L. Ed. 260; *Madden v. Lancaster County*, 65 Fed. 188, 192, 12 C. C. A. 566, 570; *Clapp v. Otoe County*, 104 Fed. 473, 477, 45 C. C. A. 579, 582; *City of Beatrice v. Edminson*, 54 C. C. A. 601, 604, 117 Fed. 427, 430. The Supreme Court of Minnesota has decided that section 2701 governs the relation of master and servant, and the liability of the former to the latter when they are engaged in the operation of a short railroad owned and operated by a mining corporation, which is not a railroad corporation, for the sole purpose of operating its mine, and that the statute thus construed does not violate any provision of the Constitution of the state of Minnesota. It has held that this statute applies not to railroads as such, but to railroad hazards, that it governs "all persons and corporations operating a line of railroad incident to which are the hazards and risks intended to be guarded against by the Legislature," and that the statute thus construed is not violative of the Constitution of the state. *Kline v. Minnesota Iron Co.* (Minn.) 100 N. W. 681, 682; *Schus v. Powers-Simpson Co.*, 85 Minn. 447, 89 N. W. 68; *Lavallee v. Ry. Co.*, 40 Minn. 249, 41 N. W. 974; *Pearson v. Ry. Co.*, 47 Minn. 9, 49 N. W. 302; *Johnson v. Ry. Co.*, 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419; *Blomquist v. Ry. Co.*, 65 Minn. 69, 67 N. W. 804; *Roe v. Winston*, 86 Minn. 77, 90 N. W. 122; *Schneider v. Ry. Co.*, 42 Minn. 72, 43 N. W. 783; *Steffenson v. Ry. Co.*, 45 Minn. 355, 47 N. W. 1068, 11 L. R. A. 271; *Kreuzer v. Ry. Co.*, 83 Minn. 385, 86 N. W. 413. The decisions of the Supreme Court have placed beyond debate the proposition that state legislation thus construed is within the police power of the state, and does not violate the Constitution of the United States. *Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; *Holden v. Hardy*, 169 U. S. 366, 393, 18 Sup. Ct. 383, 42 L. Ed. 780; *St. Louis Consolidated Coal Co. v. Illinois*, 185 U. S. 203, 22 Sup. Ct. 616, 46 L. Ed. 872. In deference to these decisions, the conclusion of the Circuit Court that this statute was inapplicable to the servants of the defendant who were engaged in operating its railroad cannot be sustained.

The question whether or not there is any substantial evidence of the negligence of the fellow servant which could be rightfully submitted to the jury has not been considered, and no opinion has been formed or

expressed upon it, for the reason that this question does not appear to have been ruled by the court below.

The judgment below is reversed, and the case is remanded to the Circuit Court, with directions to grant a new trial.

MOUNTAIN COPPER CO., Limited, v. PIERCE.

(Circuit Court of Appeals, Ninth Circuit. February 20, 1905.)

No. 1,107.

MASTER AND SERVANT—INJURIES TO SERVANT—INEXPERIENCE—WARNING.

Where defendant directed an inexperienced servant to adjust a belt on a pulley shaft, without instructing him with reference to a collar and set screws projecting from the shaft, by which he was caught and seriously injured while endeavoring to adjust the belt, defendant was guilty of negligence entitling plaintiff to recover for injuries so sustained.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 314, 315.]

In Error to the Circuit Court of the United States for the Northern District of California.

Van Ness & Redman and T. C. Van Ness, for plaintiff in error.

Frank Freeman, William M. Cannon, and George K. Ford, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The defendant in error was seriously and permanently injured while employed upon that portion of the plant of the plaintiff in error known as the "McDougall Furnaces," and, in an action for damages therefor, was awarded by a jury \$15,000, for which, with costs, he was given judgment against the plaintiff in error.

The McDougall furnaces were used for roasting ores, and were round in form, 30 feet high, and 20 feet in diameter. They were located under a shed roof built over posts extended from the ground, the roof being 60 feet above the ground. There were six furnaces in that battery, three on each side of a revolving shaft, and located 3 or 4 feet from each other. The shaft was 3 inches in diameter, 70 feet long, revolved 10 feet above the ground, and turned belts that operated the furnaces by means of pulleys affixed to it. On each side of the shaft, running parallel with it, was a timber 8x12 inches, and distant 2 feet from and 2 feet below the shaft. These timbers are designated on the drawing "A" and "B," respectively. Two timbers, each 12x12 inches, called "J" and "K" on the diagram, extended perpendicularly from the ground above the shaft, and between the timbers A and B, leaving a space between them of 2 feet. Extending from timbers J and K was a crosspiece 12x12 inches, resting upon which was a cast-iron bearing box, through which the shaft passed, and upon the shaft, immediately to the north of the bearing box, was a collar. This collar (including that of the shaft) had a diameter of 7½ inches, and was attached to the shaft by set screws that projected

above the collar five-eighths of an inch, and, of course, revolved with the shaft. The collar and set screws had been at the outer end of the shaft, but, according to the testimony of the assistant master mechanic of the plaintiff in error, had been removed to their location between the posts J and K in order that they might be out of the line of danger. To the south of the timbers between which the collar and bearing box were placed, and nearly a foot to the south line of the timbers, was a pulley, attached to the shaft, marked on the diagram "F," which turned a belt marked "I," communicating with a furnace on the east side of the shaft. About 6 inches south of the first pulley was another pulley affixed to the shaft marked "G" on the drawing, which turned a belt marked "H," connected with machinery that operated a furnace on the west side of the shaft. From the timber K to the end of the timber B was about 6 feet. Both pulleys mentioned were $6\frac{1}{4}$ -inch face, and 8 inches in diameter. The rims of the pulleys came out beyond the hub, which was about 4 inches through. The rate of speed for which the mechanism was constructed was 250 revolutions a minute, but at the time of the accident in question it was running about 200 revolutions a minute. There was a notch of 4 inches cut into the timber B, through which the belt, I, ran, and when in operation the top of the belt was about 4 inches above the top of the timber B. There was a 4x10 inch timber bolted on the north side of timbers J and K about 3 or 4 feet below the level of the shaft. A man going upon the timber A or B to adjust the belts or machinery, or to oil the journal or bearing box, would go up a ladder to timber A or B. He could then walk along either of those timbers, stepping over the belts where necessary; and, in going from one of them to the other, he would necessarily have to step over the shaft. Everybody of ordinary sense knows, and therefore the court must know, without any testimony to that effect, that the doing of either of those things when the machinery is in rapid motion is necessarily attended with more or less danger. Up to within a few minutes of the accident in question there was nothing wrong with these belts or pulleys, and the machinery was running smoothly. But then one of the belts came off, and it became necessary to adjust it. In attempting to do so, the defendant in error received the injuries complained of.

Testimony was given at the trial tending to show that he was not familiar with machinery, and, indeed, knew little or nothing about it. He had been in the employ of the defendant company for about four or five months, working at its Ropp furnaces, in loading cars, pushing them to the proper place, and dumping the ore into the furnaces. Work having been suspended at that place for certain repairs, the defendant in error was sent by the foreman of the mine to work at the McDougall furnaces, where one Neil Ryan was already employed. The testimony of the defendant in error was to the effect that the foreman told him to report to Ryan, and to do whatever Ryan told him, whereas the testimony of the foreman was to the effect that his instructions to the defendant in error were that he should not undertake to do anything with the belting, gearing, or other machinery, but simply to look after the furnaces. The defendant in error had

been at work at the McDougall furnaces for about two weeks when the accident happened. The foreman, Davis, was in and out from time to time; and on one occasion while he was there one of the belts came off of its pulley, when Davis told the defendant in error to go up and put it on the pulley. The latter undertook to do so, but, being awkward in going up, Ryan went up instead; the defendant in error remaining below to assist Davis in putting the belt on the lower pulley. On that occasion, which was about a week before the accident in question, Ryan put the belt on the upper pulley while the machinery was in operation. On the 21st of April, 1901, one of the belts became unlaced, and Ryan called on the defendant in error to help him lace it. Davis, the foreman, was there while it was being laced, but left before the lacing was completed. When finished, Ryan told the defendant in error to climb up and put the belt on the upper pulley, and that he would remain below and put it on the lower one. The defendant in error, according to his testimony at the trial, then asked Ryan if he wanted the machinery stopped, to which Ryan responded: "No; Mr. Bennett [the superintendent's assistant] would give me h—— if he came down and found the machinery closed up." Not only was such statement by Ryan denied by the plaintiff in error, but testimony was given in its behalf that the only safe and proper way to put the belt on the pulley was first to stop the machinery. At all events, that was not done in the instance in question, and the defendant in error undertook to adjust the belt while the machinery was in operation. He testified that he knew nothing about the collar or set screws, and that neither the foreman nor Ryan nor any one else told him of their existence, nor of the danger attending the operation, or how to perform it. While it is contended on the part of the plaintiff in error that both the collar and set screws could have been seen by the defendant in error if he had properly looked, it is not contended that he was told of their existence, or of the danger attending the operation, or how to perform it. True it is that the defendant in error knew that it is dangerous to approach shafting, belting, or other machinery in motion. That fact not only appeared from his own testimony, but is a matter of such common knowledge that every one in his senses must be held to know it. Nevertheless it is the duty of the master, before sending or permitting an inexperienced employé to perform such dangerous work, to instruct him how to perform it, and especially to inform him of any hidden, concealed, or obscure danger. In the present case there were three ways in which the belt could have been put on its pulley, all attended with more or less danger if done while the machinery was in motion—one by standing on timber A, another by standing on timber B, and still another by standing on the cross-timber extending from A to B, and reaching between the upright timbers J and K over the bearing box. It is insisted on the part of the plaintiff in error that the latter was an out of the way place, and that the company could not have anticipated that any one would go there to adjust a belt. Yet it was the very place selected by this inexperienced man for the purpose, resulting in the catching of his clothing by the set screws, of which he had no knowledge, and of the existence of which he had

not been informed, and the mangling of his body in a frightful manner.

The law, in our opinion, made it the duty of the plaintiff in error to inform the defendant in error of the collar and set screws, and how to perform the dangerous task, before sending or permitting him, in the course of his employment, to undertake it. The action of the court below, both in ruling upon the motion that the jury be instructed to return a verdict for the defendant, and in its instructions, was in substantial accord with these views. And being also of the opinion that we would not be justified in holding the verdict excessive in amount, in view of the extent of the defendant's injuries and of the evidence in the case, we must affirm the judgment.

Judgment affirmed.

HULL v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals, Ninth Circuit. February 28, 1905.)

No. 1,099.

MASTER AND SERVANT—INJURY TO SERVANT—FELLOW SERVANT—INCOMPETENCY—ASSUMED RISK.

Plaintiff, the most experienced of 14 men working in the yard of defendant's railroad shops, had knowledge of the incompetency of four other servants to pile lumber, and that they had piled lumber in the yard. Plaintiff, with another servant, had previously fixed a leaning pile that was likely to fall, which had been piled by such incompetent servants, but made no objection to their employment, and was injured while taking lumber from another pile which had also been improperly piled by them. The defects in such pile were in plain view, and plaintiff's only excuse for not seeing it was that he did not take particular notice, because his attention was on his work. *Held*, that plaintiff assumed the risk.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 567-573.

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

In Error to the Circuit Court of the United States for the Western Division of the District of Washington.

This is an action for damages for personal injuries received by the plaintiff in error while in the employ of the defendant in error, through the falling of a lumber pile from which he was removing certain heavy timbers. The trial court directed the jury to return a verdict for the defendant in error, which was accordingly done, and judgment entered thereon. The plaintiff in error excepted to this action of the court, and sued out a writ of error to this court.

It appears from the pleadings and testimony that the plaintiff in error is a citizen of the state of Washington, and the defendant in error a corporation organized under the laws of the state of Wisconsin, owning and operating railroad shops at Tacoma, Wash.; that in the inclosure surrounding said shops there was a large space used as a lumber yard, for the purpose of receiving, unloading, and piling lumber and timbers for use in the said shops, and that this yard was under the general supervision of a foreman, who had charge and control of the men working therein; that along and through said lumber yard, and extending into the shops, there were railroad tracks for the purpose of hauling cars loaded with lumber, and receiving lumber and timbers, into the yard, and for the purpose of conveying lumber and timbers on trucks or cars into the shops; that the plaintiff in error had worked for

the defendant in error at said yard most of the time for two years prior to the accident; that on the 23th day of November, 1902, about 5:30 o'clock in the evening, the plaintiff in error and three others who had just come into the mill were told by the foreman of the yard to go and get some timbers of specified dimensions, which they would find somewhere up the yard between the tracks. They took a truck and proceeded up one track, and, after having switched to a second track, they came to a pile where they saw the timbers they wanted, between the tracks, piled parallel with the tracks. There was some decking on top of the pile, which they removed, and then proceeded to take away the first tier, which was about four feet in height. While doing so, some heavy timbers of the second and third tiers of the pile, about eight feet high, fell upon the plaintiff in error, crushing his back and legs, injuring his spine, producing permanent paralysis of the lower limbs, and otherwise injuring him for life. For the injuries received he claims damages in the sum of \$20,000, alleging that the defendant in error was entirely responsible for the accident, in employing incompetent men, namely, four Swedes inexperienced in the work, who failed to securely bind and stay the said timbers and lumber when piling it; that defendant in error knew of the incompetency of said workmen, and negligently failed to instruct them in the work of piling and handling lumber. It is further alleged that the plaintiff in error did not know that the said incompetent workmen had piled this particular pile of lumber, and, owing to the darkness at the hour of the accident, was not in a position to know of the unsafe condition thereof, and was not warned of it by the defendant in error. As matter of defense the defendant in error pleads that the accident resulted wholly through the careless and negligent conduct of the plaintiff in error in failing to take any precaution for his safety; that the said lumber was piled by employes of the defendant in error, and in the work of moving timbers therefrom the plaintiff in error was assisted by other employes, all of whom were engaged in a common service and employment, and were fellow servants and co-employes of the plaintiff in error; that the accident was therefore occasioned by the acts of fellow servants of the plaintiff in error. The plaintiff in error testified that there were 12 or 14 men working in the yard at that time. Among this number were four Swedes, who went to work in the yard some time in the previous August. They were not considered competent men to pile lumber by the men who were working around the yard. The plaintiff in error knew that they were incompetent men; he believed he could tell an incompetent man when he saw him at work. He knew these incompetent Swedes piled lumber, and that they piled it up in any way, just as one who does not know how to pile lumber does it. He had seen gangs working there where they had no one with them who understood the work of piling lumber, and he noticed that some of the piles were not piled right. When he had taken particular notice, he had seen piles that were not properly piled. He remembered seeing one pile in the yard that was improperly piled, and he and another pried it over, as it was leaning and was likely to fall on some one. He testified that all the defects of this particular pile were in plain view if he had taken any particular notice of it, but his attention was on his work, and he did not notice how the timbers were piled. They were not directed to any particular pile when they were sent up the yard for the timber by the foreman. They were removing the second tier when the pile fell. The court asked the question: "To whom did the foreman give this particular order for timbers?" A. Well, he gave it to me. Q. Did you have charge of filling this order? A. I was the oldest and most experienced man there, and I presume he gave it to me with the idea that I would take the order and find the timbers." O. W. Lewis testified that he worked in the lumber yard. He remembered the four people working there, called the four Swedes. They were very careless, and did not know how to pile lumber, and did not seem to try to learn. He saw three of them piling the lumber which fell and injured the plaintiff. This pile was placed there the last of October or the first week in November. Tom Lot worked in the lumber yards, and was acquainted with the four Swedes; saw them handling lumber. They did not act as if they knew very much about it; they handled it very awkwardly, and, when they were piling by themselves, he testified that they just threw it up in any old shape. Other witnesses testified that the four

Swedes were employed to handle lumber; that they handled it very awkwardly. They had been there about two months before the plaintiff in error was injured. Their general reputation about the yard was very poor.

Govnor Teats, for plaintiff in error.

B. S. Grosscup, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after stating the facts, delivered the opinion of the court.

The plaintiff in error contends, in effect, that the only question to be decided in this case was whether the plaintiff was guilty of contributory negligence in failing to use the care which a man of ordinary prudence would have exercised under like circumstances to prevent injury to himself, and that the evidence was not so conclusive against him as to justify the court in directing a verdict for the defendant, but was a question that should have been submitted to the jury for determination under proper instructions from the court. The defendant in error contends, on the other hand, that the evidence introduced on behalf of the plaintiff established the fact that he assumed the risk of the employment in which he was engaged at the time of the injury, and that he was therefore not entitled to recover.

The defense of an assumed risk was set up in the answer of the defendant, and was submitted to the court in the motion of the defendant to instruct the jury to return a verdict for the defendant. The doctrine of an assumed risk here referred to is that where a servant enters into or remains in an employment with a knowledge of defects in the master's premises, and of the danger incident thereto, and continues in the service without objection and without promise of change, he is presumed to have assumed all the consequences resulting from such defects, and to have waived all right to recover from injuries caused thereby. Was the plaintiff chargeable with such knowledge? He was the oldest and most experienced man employed in the lumber yard. The order to get the timbers was given to him. The plaintiff testified that the order was given to him probably because he was the oldest and most experienced man there. He was acquainted with the four Swedes. He knew that they had been at work in the yard since the previous August, and that they were incompetent. He could tell an incompetent man when he saw him at work. He knew these incompetent Swedes piled lumber, and that they piled it up in any way, just as one does who does not know how to pile lumber. He had seen gangs working there where they had no one with them who understood the work of piling lumber, and he noticed that some of the piles were not piled right. He saw one pile in the yard that was improperly piled, and he and another man pried it over, as it was leaning and was likely to fall on some one. All the defects of the pile that fell on plaintiff and injured him were in plain view, if he had taken any particular notice, but his attention was on his work, and he did not notice how the pile was piled. There is no evidence that the plaintiff objected to the employment of these four incompetent Swedes in the piling of lumber, or that he gave no-

tice to any one in charge of the work or of the premises that their employment was rendering the premises dangerous, and he does not appear to have had any promise from any one in authority or otherwise that such dangers would be removed or abated. The only evidence that can be claimed to in any way qualify plaintiff's knowledge of the defective premises was the fact that there were 12 or 14 men working in the yard at that time, and that he did not know that these incompetent workmen had piled the particular pile of lumber that fell and caused the injury. But the fact remains that he knew they were employed in piling lumber; that at least one dangerous pile had been found, and that he and another workman had removed that danger; and that the defects of the pile that fell were in plain view. His excuse is that he did not take particular notice, for the reason that his attention was on his work. But the law does not admit of this excuse. The servant must not go blindly to work where there is danger. He must open his eyes and take notice of his surroundings. He must see those things that are open to observation, and, if he fails in this respect, the risk is his own. The defective condition of the premises where plaintiff was employed was so obvious, and the knowledge of the plaintiff with respect thereto so complete, that only one inference could be drawn therefrom, and that was that he assumed the risk of the employment, and, upon the evidence, this was a question for the court.

The judgment of the court below is affirmed.

BUSBY v. ANDERSON WATER, LIGHT & POWER CO.

(Circuit Court of Appeals, Fourth Circuit. February 21, 1905.)

No. 564.

TRIAL—DIRECTION OF VERDICT—FAILURE TO PROVE MATERIAL ALLEGATION.

Where, in an action to recover for personal injuries alleged to have been received by plaintiff, while in defendant's employ as a servant, through the failure of defendant to furnish suitable and safe appliances for use in unloading a heavy piece of machinery, the only evidence was that introduced by plaintiff, which showed, without conflict, that at the time of the injury plaintiff was assisting an independent contractor, who was transporting and delivering the machinery, and that he had never been employed by defendant, the court properly directed a verdict for defendant, since, without proof of the relation of master and servant, a verdict for plaintiff could not have been sustained.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 146; vol. 46, Cent. Dig. Trial, §§ 379-389.]

In Error to the Circuit Court of the United States for the District of South Carolina, at Greenville.

B. F. Martin, for plaintiff in error.

T. Moultrie Mordecai and Simon Hyde, for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

BOYD, District Judge. In this action the plaintiff in error, who was also the plaintiff in the court below, seeks to recover of the de-

defendant in error damages for personal injuries. The Anderson Water, Light & Power Company, the defendant in error, is a corporation under the South Carolina laws, and in the year 1901 was constructing an electric power plant at a place called "Portman Shoals," on the Seneca river, in Anderson county, S. C. The location of the plant was several miles distant from the railway station, and the machinery for its equipment had to be transported on wagons from the railroad to Portman Shoals. In his complaint the plaintiff in error alleges, in substance, that, on or about the 19th day of January, 1901, being at the time employed as a servant of the defendant company, and engaged by its direction in assisting to unload from a wagon a piece of machinery weighing about 7,000 pounds, because of the negligence of the defendant in not furnishing safe and proper appliances for the work, and its failure to provide help sufficient to safely handle the piece of heavy machinery, the same slipped and fell upon plaintiff, crushing his foot and leg so that amputation became necessary. On the trial the defendant offered no evidence, but, at the conclusion of plaintiff's testimony, requested the court to direct a verdict for defendant on the ground that the testimony of the plaintiff was not sufficient, in law, to sustain his contention. The court so held, and, in obedience to instructions, the jury returned a verdict for the defendant, and the case comes here by writ of error.

There are several assignments of error, but they are all based on the ruling of the court that, upon the plaintiff's testimony, he was not entitled to recover. The question of primary importance in the case was whether the plaintiff was in the employment of defendant at the time of the injury. The burden was upon the plaintiff to prove this as a fact, by sufficient evidence. Upon examination of the testimony in the record, we find that the plaintiff not only failed to establish the fact that he was employed by the defendant company, but by his own witnesses it was shown that the company had contracted with one J. R. Williamson to haul the machinery from the railroad station and deliver it at the plant; that Williamson was an independent contractor; and that the company did not retain the control or direction of his work. It is true, it was shown that, after Williamson made the contract and undertook its performance, bad weather so affected the roads that he found he was losing money, and the president of the company, in order to induce him to go on with the work, assured him that he should not lose by it, and it is also true that an arrangement was made by which the company furnished the money to meet Williamson's pay rolls and other expenses incident to his work; and thereupon the plaintiff insists that the court should have permitted the jury to pass upon the question as to whether the work of transporting the machinery at the time of the injury was being conducted by Williamson as an independent contractor, or whether the contract had been abrogated, and the work was being carried on by the defendant company itself. But in our opinion there is not sufficient evidence to warrant the conclusion that the contract between Williamson and the company, except in so far as it related to payment, was modified, or the relation between them, of contractee and independent contractor, changed. The plaintiff's testimony shows that he assisted in unloading the machinery which injured him at the instance of Williamson's son, who was in charge of the

wagons and hands engaged in the work, as the agent of his father, J. R. Williamson, the contractor. Aside from this, the evidence to support the allegation that the plaintiff was employed at all was exceedingly meager. He testified himself that he was passing along the road near the power plant about dark, and that he met the wagon on which the heavy machinery was loaded; that Jeff Williamson, son of J. R. Williamson, who was in charge, told him that he was short of hands, and requested plaintiff to accompany him and assist in unloading the machinery, which he did. Plaintiff had not been employed before in this work, and there was nothing whatever said about compensation for his service. J. R. Williamson, who was a witness for plaintiff, when asked upon his examination if he did not have Busby in his employ, answered positively, "No, sir." A reasonable deduction to be drawn from these facts and circumstances is that plaintiff was not an employé, but that he was voluntarily assisting Williamson, who, the testimony shows, was his relative, in an emergency. However, in our opinion, it is not necessary to discuss this view, for, if it be a fact that plaintiff was Williamson's employé, the failure to prove that Williamson was an agent of the company whose acts would bind the company, and for whose negligence the company would be liable, leaves plaintiff's case without a foundation to support it.

The question as to the powers of the trial judges in the courts of the United States to direct verdicts has been so often before the courts that the principles of law relating to it seem to be well defined; and whilst, as in *Texas Pacific Ry. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829, it is held that "a case should not be withdrawn from the jury unless the conclusion follows, as a matter of law, that no recovery can be had upon any view which can properly be taken of the facts which the evidence tends to establish," it is equally well settled that the trial judge is authorized to direct a verdict for the defendant when, after giving to the plaintiff's testimony all the weight to which it is entitled, and granting all the inferences which can be properly drawn from it, he is of the opinion that the same is insufficient, in law, to warrant a recovery, and that, if a verdict were returned for the plaintiff, he would feel constrained to set it aside. This principle is supported by a number of decisions of the Supreme Court and also of the Circuit Courts of Appeals of the United States. Among them we cite *Commissioners of Marion County v. Clark*, 94 U. S. 278, 24 L. Ed. 59, in which the court says, "A court is not required to submit evidence to the jury, unless it be of such character as would warrant a verdict for the party producing it, and upon whom the burden of proof is imposed." And in *Herbert v. Butler*, 97 U. S. 319, 24 L. Ed. 958, it is held that "where the burden of proof is on the plaintiff, and the evidence submitted to sustain the issue is such that a verdict in his favor would be set aside, the court is not bound to submit the case to the jury, but may direct them to find a verdict for the defendant"; and the same principle is reiterated in *Treat Manufacturing Company v. Standard Steel & Iron Company*, 157 U. S. 674, 15 Sup. Ct. 718, 39 L. Ed. 853.

In the case before us there was no conflict of testimony, as the evidence, which was altogether on the part of plaintiff, was substantially in

harmony. In this situation, the proposition of law as to whether or not the testimony was sufficient to warrant a recovery was squarely presented. There are several other questions which would have entered into the case, had the relation of master and servant been established between the defendant and the plaintiff; one in regard to the character of the appliances used in unloading the machinery—whether or not the same were suitable and sufficient for the purpose, and, in case they were insufficient, whether or not the plaintiff undertook to use the same with a knowledge of their defects; and the same question would arise in considering whether there were a sufficient number of fellow servants to carry on the work. But we do not think that it is necessary to go into the discussion of these questions, for it is our opinion that the plaintiff failed to make out his case upon the first allegation, that he was a servant of the defendant.

The judgment of the Circuit Court is therefore affirmed.

THOMAS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1905.)

No. 1,090.

1. PUBLIC LANDS—UNLAWFUL INCLOSURE—FENCES.

Where defendant constructed a fence inclosing public lands in violation of Act Feb. 25, 1885, c. 149, 23 Stat. 321 [U. S. Comp. St. 1901, p. 1524], it was no defense that only a part of the fence forming the inclosure belonged to him, if, by joining his fence to the fence constructed by others, he availed himself of the latter to make a complete inclosure.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, § 25.

2. SAME—COMPLETE INCLOSURE.

Where defendant constructed a fence inclosing public lands in violation of Act Feb. 25, 1885, c. 149, 23 Stat. 321 [U. S. Comp. St. 1901, p. 1524], evidence that he took advantage of a lake to make a part of his inclosure, and that, though the fence extended into the lake, cattle could get around the ends thereof at periods of low water, and that there was a gap of three-quarters of a mile across an impassable cañon, was insufficient to establish that the inclosure was not complete.

Appeal from the District Court of the United States for the District of Montana.

The United States instituted a suit in equity against the appellant under the provisions of the act of Congress entitled "An act to prevent unlawful occupancy of the public lands." Chapter 149, p. 477, Supp. Rev. St. U. S. Act Feb. 25, 1885, c. 149, 23 Stat. 321 [U. S. Comp. St. 1901, p. 1524]. The bill of complaint alleges that an affidavit was filed with the United States District Attorney, as provided for in the second section of the act; that the United States owns the lands described in the complaint, and that the same are public lands; that the appellant has violated the provisions of said act by unlawfully inclosing and fencing said lands, and maintaining said unlawful inclosure over the same, occupying and asserting exclusive right and control thereof, and disallowing all other persons and all other stock except his own, or by his permission, to go upon or pass over said lands; that, by force, threats, and intimidations, and by fencing and inclosing, and other unlawful means, he has prevented and obstructed, and combined and confederated with others to prevent and obstruct, any and all persons from

peaceably entering upon and establishing a settlement and residence on said described lands or any thereof; that at all times stated in the bill the appellant has prevented and obstructed, and does now prevent and obstruct, free passage and transit over and through said lands, or any part of the same, by fences and other unlawful means. The appellant answered the bill, denying that said lands, or any portion thereof, are or have at any time been inclosed with any fences erected or maintained by him; denying that the lands are in his possession or exclusive use or occupancy; denying that he ever erected or maintained, or now maintains, any fences upon any of said described lands; denying that he has any use or occupation of said lands, except that certain stock, cattle, and animals belonging to him roam over and graze upon the same, as by law they may do, said lands being a part of the public domain; and denying that the appellant has or does assert or exercise exclusive right or control over the lands, or any part thereof, or that he has disallowed other persons or stock to go upon or pass over said lands, or that he has combined or does combine with others to prevent other persons from peaceably entering upon and establishing settlement and residence thereon. Upon the testimony the court entered a decree in favor of the appellee and against the appellant; finding that at the time of the commencement of the suit the appellant was maintaining and controlling, and has since that time maintained and controlled, strong and substantial fences upon the lands described in the bill, and that he was without right in so doing. The decree required the appellant to take down and remove all the fences surrounding said lands, and enjoined him from further interfering with said lands, and ordered that, in case of his failure to comply with the decree, the United States marshal remove said fences.

O. F. Goddard, for appellant.

Carl Rasch, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is assigned as error that the court held that the lands described in the bill were inclosed by a fence owned or controlled by the appellant, for the reason that the evidence shows that said lands were not entirely inclosed by any fences, either of the appellant or of any one else, in connection with the fence of the appellant, and that the court erred in requiring the appellant to remove fences owned and controlled by others, and in which the appellant had no interest. The appellant offered no evidence whatever on the hearing of the case. The evidence for the appellee showed beyond dispute that some 84 sections of odd and even numbered sections of land were substantially inclosed. The land is situated within the primary limits of the grant made in 1864 to the Northern Pacific Railroad Company. Prior to the construction of the inclosure the appellant purchased from the railroad company the odd-numbered sections within the area enclosed. The even-numbered sections are public lands belonging to the United States. The greater portion of the fences which constitute the inclosure were made by the appellant. One section of the fence between the main inclosure and one Molt, to the north of Big Lake (being a portion of the north line of the inclosure), was a division fence, but the evidence shows that the greater portion of that fence was built by the appellant. There was evidence that the appellant constructed or caused to be constructed all the fences necessary to complete the inclosure without joining with the fences of any one else. It was undisputed that the appellant told the witness

Story that he had about 84 sections which he claimed to own, and that it was all inclosed with good fences. There was other evidence that the appellant used for grazing all the lands in the inclosure, and that he allowed no one else to pasture there, and that his own stock grazed on all parts thereof. It was proven that in an action in the District Court of the Seventh Judicial District of Montana, for Yellowstone county, the appellant on January 22, 1903, obtained a decree against said Story and William Huff, who were defendants therein, enjoining them from driving any cattle in or through any of the lands mentioned in the complaint in said suit, and to desist and refrain from herding cattle over or upon said lands, or from suffering them to trespass thereon; said lands being the lands which are in the inclosure involved in the present suit. And the complaint in that case alleged that the lands therein described were inclosed by a good and substantial fence, the property of the plaintiff therein. But if it were true that any portion of the fence forming the inclosure were the fence of another, the appellant could not justify himself, nor avoid the penalty of the statute, if by joining his fences to said fence so constructed he availed himself of it to make a complete inclosure. Whether he took advantage of a portion of an existing fence, or a natural barrier impassable for cattle, if he constructed his surrounding fence with reference thereto, he is undoubtedly guilty of making and maintaining an inclosure in violation of the law. *United States v. Brighton Rancho Co. (C. C.)* 26 Fed. 218.

But it is urged that the inclosure is not complete. It is claimed that there is an opening at Big Lake of two or three miles in extent. In other words, the appellant took advantage of Big Lake to make it a part of his inclosure, and now claims the benefit of the fact that when the waters of the lake recede, as they do in the late summer or early fall, cattle can go around the ends of his fences, which extend into the lake, and may thereby enter the inclosure. It is shown, also, that there is a gap of three-quarters of a mile in the fence at a point where a cañon intervenes. It is admitted that the cañon is impassable at that point; but it is said that cattle, by going three miles down the banks of the cañon, can enter the cañon, and then by going up the cañon, can get within the inclosure. It is not shown how far they would have to proceed within the inclosure before they could emerge from the cañon. It is absurd to say that this is an opening in the inclosure. It was evidently left unfenced because it could not be fenced, and because it was deemed unnecessary to make other provision against cattle entering through the cañon. Nor can the appellant maintain that his inclosure is not complete by showing that by the 1st of September in each year cattle may, if they possess sufficient intelligence or are driven there, go around the ends of the fences which extend into the lake. There is no evidence that cattle or stock of any kind ever entered the inclosure through these so-called openings. The whole contention that there are openings in the inclosure, and that therefore the appellant is not amenable to the law, is so plainly without merit as to require no further discussion.

The decree of the Circuit Court will be affirmed.

DEMKO v. CARBON HILL COAL CO.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1905.)

No. 1,100.

1. LOGGING RAILROADS—MAINTENANCE—CARE REQUIRED.

A corporation operating a logging road solely for its own purposes, and on which no freight or passengers are carried, is not required to maintain the road with the same degree of care as is required of commercial railroads.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 221.]

2. SAME—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where a brakeman on a logging railroad was injured by the derailment of one of the cars while he was riding on the floor of the rear end of the engine, with his feet hanging between the engine and the first car, and there was no reason why he could not have occupied a seat in the cab of the engine, as he had been directed to do, where he would have been safer than in the place selected by him, and where he would not have been injured, he was guilty of contributory negligence, precluding recovery.

In Error to the Circuit Court of the United States for the Western Division of the District of Washington.

Govnor Teats and J. H. Easterday, for plaintiff in error.

James M. Ashton, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The defendant in error owned and operated coal mines, and in connection therewith owned and operated a narrow-gauge road about a mile in length for hauling timbers for props in the mines. For this purpose it used a small engine of about 7 tons in weight, and logging trucks, about 10 feet long, weighing about 1,300 pounds each. The engine was provided with two seats, one on each side, in an inclosed cab at the rear end. One seat was for the engineer, and one for an employé called a brakeman, whose duty it was to keep the track sanded, to assist in loading and unloading the lumber, and to obey the orders of the engineer. The plaintiff in error had occupied the place of brakeman for about a week or ten days prior to the accident which is complained of. He had been over the road about 50 times. The rate of speed was from three to four miles an hour. The trucks were often derailed by small rocks falling on the track from the sides of a cut about 60 feet long and 6 or 7 feet in height, through which the track passed, the stones being dislodged by passing cattle and horses. The engineer and brakeman were accustomed to look out for these stones and remove them. When the trucks were derailed thereby, they put them back on the track by means of a peavy. On the morning of the accident the engineer and the plaintiff in error were proceeding from the mines to the timber. The engine was going backward, and was pushing before it two trucks. A drawbar connected the engine with the first truck. The plaintiff in error was seated on the floor of the rear end of the engine, with his feet hanging between the engine and the first

truck. When passing through the cut the trucks were derailed, probably by some small stones on the track. The drawbar was broken, and the first truck was thrown around so as to catch the foot of the plaintiff in error, whereby he sustained serious injury. He brought the present action to recover damages, alleging negligence in the defendant in error, in that it had not properly constructed its road through the cut, and had not made provision against the falling of stones on the track. At the close of the testimony, the court directed the jury to return a verdict for the defendant in error.

The evidence was that the plaintiff in error was accustomed to ride on the front end of the engine when the weather was fair, and in the cab with the engineer when it was rainy. There is no evidence as to the weather on the day of the accident. The plaintiff in error testified that he sat where he did for the reason that the floor space between his seat and that of the engineer was filled with fuel. He did not say nor prove that he could not have ridden inside. That he could have ridden there, seems to be indicated by the photographs which he introduced in evidence. The evident reason was that his seat was occupied by a man, not in the employ of the defendant in error, who was riding in the cab with the permission of the engineer and of the plaintiff in error. No satisfactory reason was shown for occupying the dangerous position in which the plaintiff in error was when he was hurt. He did not deny that he had been cautioned to be careful, and had been told by the foreman that inside the cab was the proper place for him to ride. It was his duty to have demanded the place which the stranger was occupying in the cab, or, in any event, to have found a safe place in the engine or elsewhere. No reason is shown why he could not have ridden on the front end of the engine. The defendant in error in its answer relied on the defense that the injuries sustained by the plaintiff in error were caused solely through his carelessness and negligence, and such seems to have been the ground on which the court instructed the jury to return the verdict.

The defendant in error is not to be held to the same accountability in constructing a logging road used solely for its own purposes, and on which no freight or passengers are carried, that would apply to the case of an ordinary railroad. *Williams v. The Northern Lumber Co.* (C. C.) 113 Fed. 382; *Wade v. Lutchter & Moore Cypress Lumber Co.*, 74 Fed. 517, 20 C. C. A. 515, 33 L. R. A. 255. But whatever may be the rule applicable to the owner of such a road for negligence in constructing the same, it seems clear that the plaintiff in error was guilty of contributory negligence in unnecessarily occupying an obviously dangerous position. In the case of *Railroad Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506, the plaintiff was one of a party of men employed by a railroad company in constructing and repairing its roadway. They were conveyed by the company to and from their place of work in a box car assigned for their use. The plaintiff, on returning from work one evening, rode on the pilot or tender of the locomotive, when the train passed through a tunnel and collided with cars standing on the track. There was room for him in the box car, and he had been warned of the danger of riding

as he did. It was held that he was not entitled to recover, for the reason that he had not used ordinary care and caution. Said the court:

"The plaintiff had been warned against riding on the pilot, and forbidden to do so. It was next to the cowcatcher, and obviously a place of peril, especially in case of collision. There was room for him in the box car. He should have taken his place there. * * * The plaintiff was not entitled to recover."

The doctrine of that case was affirmed and applied in *St. Louis &c. Railway v. Schumacher*, 152 U. S. 77, 14 Sup. Ct. 479, 38 L. Ed. 361.

The judgment is affirmed.

GORMAN v. WRIGHT.

(Circuit Court of Appeals, Fourth Circuit. February 21, 1905.)

No. 569.

1. BANKRUPTCY—SECURED CLAIMS.

Under Bankr. Act July 1, 1898, c. 541, § 1, subd. 23, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3419], providing that the term "secured creditor" shall include a creditor who has security for his debt on the property of the bankrupt of a nature assignable under the act, or who owns such a debt for which some indorser, surety, or other person secondarily liable for the bankrupt has such security, a creditor, in order to be "secured," must either hold security against the property of the bankrupt himself, or be secured by the individual obligation of another who holds such security.

2. SAME—PROOF OF CLAIMS—PARTICIPATION DIVIDENDS.

Where a creditor was properly allowed to prove his claim as against a bankrupt indorser as an unsecured claim, he was not required to realize and credit the proceeds of collateral securities held by him against the maker of the obligation, who was the principal debtor, before being allowed to participate in the distribution of the estate of the indorser.

Appeal from the District Court of the United States for the Eastern District of North Carolina, in Bankruptcy.

For opinion below, see 132 Fed. 274.

Wm. B. Guthrie (Wm. A. Guthrie, on the brief), for appellant.
Manning & Foushee, for appellee.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

GOFF, Circuit Judge. In the matter of B. W. Mathews, bankrupt, one P. H. Gorman filed a claim founded on a note dated November 29, 1901, signed by J. N. Gorman, payable to the order of P. H. Gorman, for \$10,000, due on demand, and indorsed by said B. W. Mathews. R. H. Wright, a creditor of the bankrupt, objected to the allowance of this claim, assigning as cause therefor that P. H. Gorman held security for its payment not disclosed in his proof thereof, and therefore he asked the court to direct that it be not allowed as an "unsecured" claim against said bankrupt estate. Such proceedings were had before

the referee as made it appear that the maker of said note placed in the hands of the payee thereof (P. H. Gorman), as additional security for its payment, 96 shares of the capital stock of the Gorman-Wright Company, which said payee still held in his possession; that said company was in the hands of a receiver, and such stock practically worthless; that said J. N. Gorman had also been adjudicated a bankrupt; and that all the dividends to which such claim would be entitled out of both of said bankrupt estates, together with any proceeds of the sale of such stock so placed as collateral, would be insufficient to pay in full the amount due on said note. The full amount of the claim, \$11,376.66, had theretofore been proved as an unsecured debt, as of the day of the adjudication of Mathews a bankrupt.

The referee sustained the contention of the objecting creditor, and held that the claim of P. H. Gorman could not participate in the estate of the bankrupt until it had been credited with the full value of the collateral mentioned. This action of the referee was certified to the District Court for review, and on consideration thereof the judge of that court, stating the question before him as follows, viz.: "Whether a creditor who has been allowed to prove his claim as an unsecured creditor against a surety or indorser must realize and credit the proceeds of collateral securities held by him against the principal debtor before being allowed to participate in the distribution of the estate of the surety or indorser"—answered such question in the affirmative, thereby affirming the order of the referee. From this conclusion of the court below this appeal is prosecuted.

That the claim of P. H. Gorman was properly proven as an "unsecured" claim against the estate of the bankrupt Mathews is entirely clear. The security held by said Gorman was the property of the maker of the note, in which the bankrupt had no interest, and, therefore, under subsection 23 of section 1 of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3419], the claim was properly allowed against the estate of the bankrupt indorser for the full amount due, regardless of said security. In *re* Headley (D. C.) 97 Fed. 765, 771; *Coll. Bankr.* (3d Ed.) 314, 386; *Swarts v. Fourth Nat. Bank of St. Louis*, 117 Fed. 1, 54 C. C. A. 387, 393; *In re Anderson*, 12 N. B. R. 502, Fed. Cas. No. 350; *In re Dunkerson et al.*, 4 Biss. 253, Fed. Cas. No. 4,157.

While the court below affirmed the referee in permitting said claim to be filed as an unsecured claim against the estate of the bankrupt Mathews, it subsequently, in approving the order for a dividend, directed the withholding of all payments on said claim until after it had been credited with the proceeds of the collateral given the payee by the maker of the note, and this in effect was holding that such claim was "secured," to the extent at least of the value of the collateral mentioned. This was error, for under the bankruptcy law a creditor, to be "secured," must either hold security against the property of the bankrupt, or be secured by the individual obligation of another who holds such security; and, as it is clearly shown by the record that P. H. Gorman did not come within either of said classes, it must follow that the order requiring the application of the collateral of the principal

creditor was treating the claim as secured to that extent, and hence error.

The court below, in directing that a creditor who has been allowed to prove his claim as an unsecured creditor against the bankrupt indorser must realize and credit the proceeds of collateral securities held by him against the principal debtor before he will be allowed to participate in the distribution of the estate of such indorser, may have been observing the usual equity rules applicable to the adjustment of similar matters in ordinary proceedings, but in so holding we think that due force and effect was not given to that portion of the bankruptcy act which defines the two classes of creditors, the "secured" and the "unsecured." We have hereinbefore in effect described the "secured" debts. All other debts than those so mentioned must be "unsecured."

The security held by P. H. Gorman was not the property of the bankrupt Mathews, and its value is immaterial; for Gorman was entitled not only to prove his entire claim against such bankrupt estate, but also to receive the regular dividends thereon, and then proceed to enforce his claim upon his security. The equitable rule that a creditor having a lien upon two funds must exhaust that one upon which other creditors have no lien does not apply in cases where it operates to the injury of the party having the double lien, and this rule has, in substance, been made part of the bankrupt act.

There is error in the order complained of, which will be reversed, and this cause will be remanded to the court below, with directions to proceed further herein, as indicated by this opinion and judgment. Reversed.

KENNEDY v. WESTON & CO.

(Circuit Court of Appeals, Fifth Circuit. January 24, 1905.)

No. 1,400.

CHARTER PARTY—BREACH—ACTION FOR DAMAGES.

For persons who have chartered a vessel to carry lumber, to load thereon lumber which is wet, and so will deteriorate, and to procure from the master, over his protest, a clean bill of lading, is a breach of the charter party, giving the owner of the vessel a cause of action in admiralty against the charterers; judgment for damages on account of the condition of the lumber when loaded, and the failure to note it on the bill of lading, having been rendered against him in a foreign court of competent jurisdiction in an action by him against the indorsees of the bill of lading for the freight.

Appeal from the District Court of the United States for the Southern District of Florida.

This appeal is from a decree in admiralty on a libel in personam. The libel propounds: That the libellant was owner of the Swedish bark Heidi, and chartered her to respondent to carry a cargo of sawn timber and/or deals and/or boards, at charterer's option, to a port on the continent between Hamburg and Havre, on signing bills of lading, and there to deliver the same. That the vessel, at Fernandina, Fla., received from the charterer, under the charter party, 3,888 pieces, consisting of 32,181 superficial feet, of pitch-pine boards and planks. That during the loading the master discovered that portions of the cargo delivered to the vessel were wet, and, in consequence there-

of, would become damaged and deteriorate in value, but charterer refused to admit such to be the fact, and insisted that the master should give a clean bill of lading for the cargo, without noting thereon the fact that any part of it was wet or in a condition to deteriorate upon the passage. The master protested against the insistence of the appellee, and made a formal protest before a notary public for the purpose of protecting owners from any loss or damage he might sustain by reason of the condition of the cargo, and by reason of any claim that might be made against libelant on account thereof, all of which charterer well knew. That after making the protest, and after the charterer acquired full knowledge of the intention of the master, in behalf of the owners, to hold the charterer liable for all damages and loss that might result from the condition of the cargo, the master executed a bill of lading for the whole of the cargo, without noting thereon the fact that any portion of it was wet. That, upon the arrival of the vessel at Gluckstadt with the said cargo on board, it was ascertained by the holders of the bill of lading, who had become the owners thereof and of the cargo, that a portion of the cargo was damaged, and thereby reduced in value, solely by and on account of the same having been shipped wet by charterer, on account of which the holder of the bill of lading and owner of the cargo made a claim against the libelant for damages which he was compelled to pay, amounting to \$1,150.00, and that libelant was compelled to make such payment by means of a judgment of a German court of competent jurisdiction, and now seeks in this action to recover the same from respondent, Weston & Co. The respondent excepted to the libel, claiming (1) that the allegations of the libel disclose no cause of action in admiralty; and (2) that the libel does not show facts which warranted libelant to pay out money for and on account of appellee. The exceptions were allowed to stand until after the amendment of the libel, and were sustained by the District Judge, who supported his decree with an opinion. The libelant appeals, and assigns errors, which present the points passed upon adversely by the District Judge in his opinion, to wit, that the allegations of the libel do present a case in favor of libelant and against respondent, upon which libelant has a right to recover.

John C. Avery, for appellant.

E. P. Axtell and C. D. Rinehart, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts). The shipment and loading of damaged lumber over the objections of the master was a breach of the charter party for which the charterers were liable, and the procurement from the master, over his protest, of a clean bill of lading therefor, was not a condonement of the breach, but, rather, an aggravation thereof. According to the libel, this breach resulted in damages to the owners; and this does not appear to be controverted, but, rather, admitted, in the claim put forward, and sustained by the District Judge, that the owners could have protected themselves on the delivery to the consignees, notwithstanding the clean bill of lading improperly obtained by the charterers from the master. This view of the case seems to be fully negatived by the fact alleged in the libel, to wit:

"That libelant was compelled to pay the damages against the said Messrs. F. & H. Gehlsen by means of a judgment or decree of a German court of competent jurisdiction. That the said judgment or decree was rendered in a cause which was brought by the libelant herein against the firm of F. & H. Gehlsen for the balance of four thousand marks (4,000) alleged to be due for freight on the said cargo, and payable by the said F. & H. Gehlsen, buyers thereof, upon the arrival of the said vessel at Gluckstadt, Germany. That libelant claimed the said balance of 4,000 marks, with interest from the day

the discharge of the vessel was completed; and the said F. & H. Gehlsen, as defense to libellant's action, claimed that they were entitled to compensation from libellant as against his claim for the balance of freight of 4,000 marks, because at the loading of the said cargo in Florida a portion thereof delivered to the master, to wit, about thirty-two (32) standards, at one hundred and sixty-feet (165) cubic feet per standard, were found to be in obviously bad condition—wet and covered with mussels—and that the master had made no note thereof upon the bills of lading, and that therefore they, the said F. & H. Gehlsen, as receivers of the said cargo, were entitled to damages on account of the condition thereof as aforesaid; and the said court wherein the said cause in Germany was pending as aforesaid tried the same according to the German law, and adjudicated the matters in said suit involved, and decreed in favor of the said F. & H. Gehlsen, against libellant, the sum of 4,543.77 marks, equal to \$1,150 in money of the United States; and libellant accordingly paid so much thereof as was in excess of the balance of the freight for which suit had been brought as aforesaid; the said amount sued for as aforesaid being by judgment or decree aforesaid of the said German court allowed in part payment of the damages which the said German court found in favor of the said F. & H. Gehlsen."

Under the bill of lading improperly obtained by the respondent from the master, it is doubtful whether, under the admiralty jurisprudence in this country, the owner could have protected himself against the demands of the indorsees thereof. See *Bags of Linseed*, 1 Black, 108, 17 L. Ed. 35; *Crossman v. Burrill*, 179 U. S. 110, 21 Sup. Ct. 38, 45 L. Ed. 106; *Dayton v. Parke*, 142 N. Y. 400, 37 N. E. 642. *Brown et al. v. Powell Duffryer Steam Coal Company*, 10 C. P. 562, while directly in point, and adverse to libellant's right to recover, is not accepted as conclusive.

The decree of the District Court is reversed, and the cause remanded, with instructions to overrule the exceptions to the libel.

Ex parte MARKS.

MARKS v. BROWN, Judge, et al.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1905.)

No. 1,121.

1. JUDGMENTS—CORRECTION—CLERICAL ERRORS—MANDATE.

Where a mandate after appeal directed the trial court to take such further proceedings in the cause as according to right and justice and the laws of the United States ought to be had, it authorized such court, on ascertaining that a mistake had been made in the computation of the amount of the judgment, to correct the error.

2. SAME—OBJECTIONS.

Where plaintiff's attorney was relied on by the trial court to compute the amount of a judgment to be entered, and by such attorney's mistake a sum which plaintiff was not entitled to recover was inserted in the judgment, such attorney should not thereafter be permitted to object to the correction of the error on the ground that the court's jurisdiction was terminated by the expiration of the term.

Rule to Show Cause why Petition for the Writ of Mandamus Should not be Issued.

L. S. B. Sawyer and Malony & Cobb, for petitioner.

Lewis P. Shackleford (Charles B. Marks, of counsel), for James M. Shoup.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is a petition for a writ of mandamus to compel the District Judge of Alaska, Division No. 1, to vacate a judgment entered by him July 22, 1904, and to enforce the judgment rendered by him in the case of Antone Marks v. James M. Shoup, as United States marshal for Alaska. The original judgment in the District Court of Alaska in favor of Marks was for the sum of \$3,390.35, with costs, and bore interest at the rate of 8 per cent. per annum. From this judgment an appeal was taken to this court, and the judgment was thereafter affirmed and a mandate issued. Upon receipt of the mandate the District Court of Alaska entered a judgment in strict accordance therewith. After the expiration of the term it was discovered that the judgment improperly included an item of \$258. Upon this discovery being made, counsel for Sharp moved the court "that the said judgment be reduced in the sum of \$258, with interest thereon from the 10th day of May, 1898, at the rate of eight per cent. per annum, to the said 5th day of May, 1903. This motion is based upon the records and files herein, and upon the accompanying affidavits, and is made on account of an error in the computation of the amount recoverable by the plaintiff, which was overlooked through inadvertence and excusable neglect by the defendant, and of which the defendant did not have notice until early in the month of February, 1904." This sum of \$258 was the sum realized upon eleven cases of boots and shoes which were no part of the goods in controversy in the action of Marks v. Shoup, and this fact was shown by affidavits at the time the motion was made for the reduction of the judgment. No denial of these facts was ever made. The record before us shows that Mr. Crews, one of the counsel for Marks, "stated in open court that he doubted the authority of the court to act in the premises; but if the error in computation had been made—and he believed it had—he had no objection to the correction being made." This is what all of the counsel for Marks ought to have agreed to. But Mr. J. H. Cobb, of the firm of Malony & Cobb, who also appeared for Marks, raised some objection to the jurisdiction of the court to act, but in no wise contended that the error in computation had not occurred as claimed in the motion and stated in the affidavits, and he declined to consent to the order. The judge of the court, speaking of the error in the amount included in the original judgment, says:

"Mr. J. H. Cobb made the computation and presented the same to the court, and the court, trusting in Mr. Cobb's honesty and clerical ability, directed the clerk to enter the judgment for the amount as figured by Mr. Cobb. * * * The error was the result of Mr. Cobb's clerical mistake, or was a willful and corrupt misstatement of the fact. I prefer to accept the theory that the sum returned by Mr. Cobb was the result of a clerical error on his part rather than a corrupt misstatement of the fact. But that there was an error of calculation and a patent mistake as appeared upon the face of the papers referred to there is no doubt."

Under these circumstances, Mr. Cobb ought not to be allowed to raise any objections to the order made by the court reducing the judgment.

His client was not entitled to the sum of \$258. Moreover, he, as counsel, had made the mistake in calculating the amount of the judgment, and it was his duty of his own motion to ask that the correction be made. The court had the inherent power, when the matter of the mistake was brought before it, to correct the error, in the interest of common honesty and justice. It seems unnecessary to cite authorities in favor of this power, which all courts must necessarily possess, to have their own records speak the truth. As is said by Freeman on Judgments, vol. 1 (4th Ed.) § 71, in speaking of correcting clerical errors and admissions:

"The rule that the record admits of no alteration after the term is obsolete.
* * * All courts have inherent power to correct clerical errors at any time."

In Black on Judgments, vol. 1 (2d Ed.) § 161, the author says:

"All courts, from the highest to the lowest, whose proceedings are preserved in any species of record or memorial, have the power and authority to make such corrections therein as truth and justice require and the rules of law permit; and this power, being inherent, belongs to a court merely as such, and does not depend upon a statutory grant of jurisdiction."

In Rousset v. Boyle, 45 Cal. 64, 69, the court said:

"Whatever conflict may be found * * * between the authorities as to the right and duty of the trial court to correct its records in order to make them conform to the truth, and so prevent them from being turned into instruments of injustice, we think that it must be conceded that under no system of jurisprudence recognized among civilized people has it ever been permitted that a party who has by the mere misprision of the clerk obtained against his adversary the entry of a judgment never in fact pronounced or rendered by the court should, while substantially admitting the fact of the mistake, retain its fruits."

The mandate issued by this court commanded the District Court of Alaska "that such further proceedings be had in the said cause as according to right and justice and the laws of the United States ought to be had." The mandate by its terms authorized the court below, upon ascertaining that a mistake had been made in the computation of the amount of the judgment, to correct the error. In Railroad Co. v. Soutter, 2 Wall. 510, 17 L. Ed. 900, the court held that, although it was the duty of the lower court to follow the mandate of the appellate court, yet where the mandate is granted upon a supposition which is subsequently proved to be without foundation in fact the mandate ought not to be followed so as to work manifest injustice. In Story v. Livingston, 13 Pet. 359, 373, 10 L. Ed. 200, the court said:

"The mandate is to be interpreted according to the subject-matter to which it has been applied, and not in a manner to cause injustice."

In Canerdy v. Baker, 55 Vt. 579, 581, the court, in discussing this question, said:

"We think it would be more consonant to the liberal spirit pervading the practice in the English chancery to guard against apparent error to hold that a chancellor might rehear a cause remanded from the appellate court when based upon proper grounds and seasonably filed and certified as our rules require. The 'proper grounds' have already been somewhat indicated. They should be limited to substantial errors apparent or manifest from the papers and pleadings, errors plainly resulting from inadvertence or oversight of an uncontroverted or settled fact, errors or mistakes such as it is evident the Supreme Court would correct upon suggestion before the cause was remanded."

See, also, *Kindel v. Lithograph Co.*, 19 Colo. 310, 312, 35 Pac. 538, 24 L. R. A. 311; *Packard v. Kinzie A. H. Co.* (Wis.) 81 N. W. 488; *Pleyte v. Pleyte* (Colo. Sup.) 24 Pac. 579; *The Sabine* (C. C.) 50 Fed. 215, 217.

When the error was discovered counsel for Marks should have been moved by a spirit of justice to avail himself of the privilege of correcting the error which he himself had caused, and accepted the amount of money due on the judgment, less the sum of \$258 with the interest thereon, in full satisfaction of the judgment, instead of asking this court for a writ to compel the District Court to take such action as would enable him to collect the sum of \$258 and interest to which he was not entitled. No such writ will be issued by this court.

The petition is denied, with costs.

SOUTHERN PAC. CO. v. MALONEY.

(Circuit Court of Appeals, Eighth Circuit. March 4, 1905.)

No. 2,007.

1. TRIAL—DIRECTION OF VERDICT—QUESTION FOR JURY.

In an action by a passenger against a railroad company, based on the alleged act of a train employé in wrongfully taking plaintiff's satchel when she was on a journey, and stealing therefrom her purse, containing all her money, where there was evidence to support such allegation, the loss of the money alone was sufficient to sustain the action of the court in refusing to direct a verdict for defendant without regard to the proof in respect to her claim for other damages.

2. ERROR—REVIEW—INSTRUCTIONS.

Where no exception was taken to that portion of the court's charge defining the elements of damages to be considered by the jury, and no further instruction on the subject was requested, an assignment of error based on that given cannot be considered by the appellate court.

3. SAME—AMOUNT OF RECOVERY—CONCLUSIVENESS OF VERDICT.

In the federal appellate courts, where no error of law appears upon the record, a verdict is conclusive in respect of the amount of damages.

4. SAME—MATTERS NOT REVIEWABLE—RULING ON MOTION FOR NEW TRIAL.

Rulings on motions for new trial are not reviewable in the federal courts because made in the exercise of the sound discretion of the trial court.

In Error to the Circuit Court of the United States for the District of Nebraska.

Sarah Maloney, being possessed of a ticket entitling her to be carried as a passenger over the railroad of the Southern Pacific Company from Ogden, Utah, to San Francisco, California, and desiring to take a train which was standing at the company's station at Ogden, between 1 and 2 o'clock in the morning, and was about to start to San Francisco, made inquiry of a colored porter connected with that train respecting the location of the chair car, whereupon the porter offered to show her to the car, took her satchel, and conducted her into a nearby car, which was not part of the San Francisco train, and was not lighted. He then hastily departed with the satchel, and almost immediately the car was moved about 500 feet away from the San Francisco train, and out into the station yards. Mrs. Maloney alighted from the car, returned to the station, and made complaint of the loss of her satchel and its contents, which included her purse, her railroad ticket, and be-

tween \$19 and \$20, which was all the money she had. Shortly thereafter the satchel was found and was returned. The money was also found on the person of the porter, but was not returned. The purse and ticket were not found, and were not returned. After some further inconvenience resulting from the loss of her ticket and money, Mrs. Maloney started for San Francisco on one section of the train which she at first intended to take. She was not provided with another ticket, but an order to carry her without a ticket was delivered to the conductor, who failed to hand it to the next conductor, and during the journey Mrs. Maloney had considerable difficulty in inducing the several succeeding conductors to permit her to proceed without a ticket. Money to pay for her meals en route was provided by other passengers, whom she did not know before. The action in the court below was brought by Mrs. Maloney to recover from the Southern Pacific Company the damages resulting from the wrongful acts of the porter. The petition alleged, and there was evidence tending to show, in addition to what is before stated, that the wrongful acts of the porter put her in fear and caused her mental suffering, but no objection appears to have been made to the introduction of this evidence. There was a verdict for the plaintiff assessing her damages at the sum of \$2,500, which, by her remission, was reduced to \$1,500, and judgment was given in her favor for that amount.

John N. Baldwin and Edson Rich, for plaintiff in error.

C. J. Smyth (Ed. P. Smith, on the brief), for defendant in error.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

VAN DEVANTER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is complained that the court denied the defendant's request for a directed verdict in its favor; that the court instructed the jury that the defendant was liable for the "damages naturally resulting" to the plaintiff from the wrongful acts of the porter, thereby permitting damages to be awarded for mere inconvenience, fright, and mental suffering; that the damages awarded are excessive; and that the court denied the defendant's motion for a new trial.

In support of the contention that there should have been a directed verdict, it is said that the petition failed to allege, and the evidence failed to show, any substantial injury to the plaintiff, and that, therefore, there was nothing upon which a verdict in her favor could be properly rested. The contention is not well taken. The petition alleged and the evidence established that the porter wrongfully took the plaintiff's money, and she was entitled to a verdict for that amount, no matter what view should have been taken of her claim to damages in other respects.

Nor was there error in the instruction that the defendant was liable for the "damages naturally resulting" from the wrongful acts of the porter. While the language used was quite general, and not calculated to convey to the jury a very definite idea of what could be considered by them in assessing the damages, it stated the law correctly as far as it went, and, if the defendant desired that the jury be more particularly instructed upon that subject, it should have prepared and presented an instruction embodying correct legal propositions applicable to the state of the evidence, and have requested that it be given. This was not done. The record, however, discloses that the subject was not left in the condition suggested by the instruction complained of, but that in the

succeeding portion of the charge the court defined with particularity the elements of damage which the jury should consider. No objection was made or exception taken to that part of the charge. It was therefore assented to, and its correctness is not now open to consideration.

In the federal appellate courts, where no error of law appears upon the record, a verdict is conclusive in respect of the amount of damages. *Railroad Co. v. Froloff*, 100 U. S. 24, 31, 25 L. Ed. 531; *Ash v. Prunier*, 44 C. C. A. 675, 678, 105 Fed. 722; *Metropolitan Street R. R. Co. v. Beattie*, 50 C. C. A. 472, 111 Fed. 945. And in those courts rulings upon motions for new trial are not reviewable, because such a motion is addressed to the sound discretion of the court. *Railway Co. v. Heck*, 102 U. S. 120; *McClellan v. Pyeatt*, 1 C. C. A. 613, 50 Fed. 686; *City of Manning v. German Insurance Co.*, 46 C. C. A. 144, 107 Fed. 52; *Walker v. Moser*, 54 C. C. A. 262, 117 Fed. 230. The judgment is affirmed.

HUDSON et al. v. MONONGAHELA RIVER CONSOLIDATED COAL & COKE CO.

(Circuit Court of Appeals, Third Circuit. February 27, 1905.)

No. 40.

COLLISION—STEAMERS MEETING IN RIVER—CONSTRUCTION OF PASSING RULE.

Under rule 1 of the pilot rules, relating to the passing of steamers on rivers, which requires the pilot of the ascending steamer to first indicate the side on which he desires to pass, his signal is controlling, unless the descending steamer shall deem such passing dangerous, and shall indicate such fact by danger signals and by a contrary signal, as required by the rule.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, § 209.

Signals of meeting vessels, see note to *The New York*, 30 C. C. A. 630.]

Appeal from the District Court of the United States for the Western District of Pennsylvania.

Arthur O. Fording, for appellants.

H. A. Jones, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. The only question raised by the assignment of errors in this case is whether the court below erred in its finding that the collision between the *Monterey* and the *Florence Belle* was caused by the latter's faulty navigation. The learned proctor for the appellants contends that this finding was erroneously "based chiefly upon the following premises: (1) That 'the *Monterey*, coming upstream, had the choice of right of way'; and (2) that, 'if the position assigned the two boats by the respondent's answer be correct, the accident can be accounted for on no reasonable or probable theory of human action.'"

1. The appellants' argument as to the first of these "premises" severs one clause of the pilot rules from its context, and applies it to a single

phrase abstracted from the opinion of the court below. Neither the rule nor the opinion should be so dealt with. The rule is:

"Rule 1. When steamers are approaching each other from opposite directions, the signals for passing shall be one blast of the whistle to pass to the right, and two blasts of the whistle to pass to the left. The pilot on the ascending steamer shall be the first to indicate the side on which he desires to pass; but if the pilot on the descending steamer shall deem it dangerous to take the side indicated by the pilot of the ascending steamer, he shall at once signify that fact by sounding the alarm or danger signal of three or more short blasts of the whistle, and it shall be the duty of the pilot of the ascending steamer to answer by a similar signal of three or more blasts of the whistle, after which the pilot of the descending steamer may indicate by his whistle the side on which he desires to pass, and the pilot of the ascending steamer shall govern himself accordingly, the descending steamer being entitled to the right of way. The signals for passing must be made, answered and understood before the steamers have arrived at a distance of 800 yards of each other: * * *"

Now, when the rule is fairly read, it becomes manifest that the ascending steamer is required, in the first instance, to indicate the side on which it desires to pass, and that its indicated desire is to be controlling, unless the descending steamer shall sound the danger signal, and, upon that being responded to, shall indicate the side on which it desires to pass. In other words, the descending steamer is not given the right of way absolutely, but subject to the performance by it of the conditions precedent which are plainly prescribed. With the rule, when thus understood, there is no difficulty in reconciling the remark of the learned judge that the Monterey had the right of way, for he also said:

"After carefully weighing the proofs in this case, we have reached the conclusion that the Monterey duly signaled the Belle of her intention to pass to the left; that, receiving no answer, she reversed, and so continued until the collision, made no change in her course, and was in no fault."

If the learned judge was right, as we think he was, in finding that the Monterey had duly signaled her intention to pass to the left, and had received no answer to that signal, then, clearly, he was right in holding that under the rule the Monterey's "choice of right of way" remained operative, and was binding upon the Belle.

2. The second contention of the appellants goes merely to an observation which was made by the learned district judge in the course of his reasoning. In our opinion, that observation was justified, but we need not dwell upon it, for the true question is not whether the judge's reasoning was faultless, but whether the court's conclusion that the Belle alone was blamable was in accordance with the weight of the evidence, and attentive examination of the record has satisfied us that it was. Much of the testimony was conflicting, and no useful purpose would be served by discussing it. We think the learned judge was right in especially relying upon that of the witness Stinkle, who was in no way concerned in the accident, and who did not appear to be subject to any biasing influence.

The case, as we view it, involved only questions of fact, and as, in our judgment, they were rightly resolved by the court below, its decree is affirmed.

In re BENJAMIN.

(Circuit Court of Appeals, Second Circuit. March 24, 1905.)

BANKRUPTCY—OFFICIAL AUCTIONEER—APPOINTMENT.

Bankr. Act July 1, 1898, c. 541, § 2, subd. 7, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3421], gives courts of bankruptcy powers to cause the estate of a bankrupt to be collected, reduced to money, and distributed. Subdivision 15 authorizes the making of orders necessary for the enforcement of the provisions of the act, and section 47, subd. 2, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3438], declares that trustees, in collecting and reducing the money and property of bankrupts, shall act under the direction of the court. *Held*, that such sections authorize the appointment of an auctioneer by the court to sell property of a bankrupt's estate in advance of any particular occasion therefor.

Petition for Revision of Order of the District Court of the United States for the Southern District of New York, in Bankruptcy.

Albert Stickney, for petitioners.

Hamilton Odell, for respondent.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. By rule of the United States District Court for the Southern District of New York it was provided that sales of property of bankrupt estates in New York City should be by public auction by an official auctioneer, unless otherwise specially ordered; and such auctioneer was required to give a bond for the faithful performance of his duties, and for the faithful and prompt accounting of all the moneys and property which might come into his possession; and thereafter one Shongood was by order of the court designated as the official auctioneer. Subsequently the trustee of the bankrupt, Benjamin, for the purpose of selling the personal property of the bankrupt at auction, employed one Bronner as auctioneer, and removed the property to Bronner's place of business. Thereupon some of the creditors of the bankrupt applied to the court to direct the trustee to sell through the agency of the official auctioneer of the court, and the court, after hearing the trustee and the auctioneer, Bronner, granted the application of the creditors, and restrained Bronner from proceeding with the sale.

The trustee and Bronner, by this petition of review, challenge as erroneous the order of the court. Their main contention is that the court had no power to appoint an official auctioneer, and that consequently its interference was unwarranted.

It is quite unnecessary to discuss the question whether the court has created an office without authority. The circumstance that it has denominated the auctioneer as official auctioneer is quite immaterial. If it had power, in advance of any particular occasion which might call for the selection of an auctioneer to sell a bankrupt's estate, to designate some particular auctioneer who should act for the trustee in that behalf, unless upon further consideration some other auctioneer should be designated, there is no just ground for criticism of the order.

Among the general powers conferred upon the District Courts in bankruptcy are those enumerated in section 2, as follows:

"(7) To cause the estate of the bankrupt to be collected, reduced to money and distributed." "(15) To make such orders * * * in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act." Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3421].

As respects trustees, and their proceedings in selling the property of bankrupts, the act vests the bankruptcy courts with complete discretionary power of control. It distinctly provides—section 47 (2) (30 Stat. 557 [U. S. Comp. St. 1901, p. 3438])—that trustees, in collecting and reducing the money and property of bankrupts, shall do so "under the direction of the court." In the exercise of this power of direction, it is plain that the court may, if it sees fit, in a particular case, disapprove the selection of an auctioneer to sell the property which the trustee has made, and order him to select another designated by the court. If the court can do this after the trustee has made a selection, there seems to be no good reason why it may not, if it sees fit, do so before.

It is urged for the petitioners that the effect of the rule is to deprive the creditors of the judgment of the trustee in selecting the auctioneer by whom the sale of the bankrupt's estate is to be made. But this would be the effect of the order in a particular case, and equally so whether it were one made in advance, or made subsequently to the selection of the auctioneer by the trustee.

It is unnecessary for us to consider whether the rule which has been assailed is or is not an expedient or salutary one, but it should be said that it was made because grave irregularities were supposed to have occurred previously. Judge Holt states in his opinion granting the order now under review the reasons that led to the adoption of the rule. He says:

"For some time after the bankrupt act went into operation, trustees and receivers making sales selected the auctioneer. It is said that under that system there were, in certain cases, undue competition and intrigue to obtain the business, combinations to suppress bidding, and improper bargains with attorneys for the division of commissions. There are undoubtedly some objections to the appointment of a special person to perform such services; but, in view of the facts that under the present system the official auctioneer is under a large bond, that he takes goods in storage before sale without charge, that the rate of fees is less than the ordinary charges of auctioneers, and that, in the opinion of my predecessors, and, it is believed, of a large majority of the leading members of the bar engaged in bankruptcy practice, the selection of one responsible auctioneer is preferable to having the business open to general competition, I think that the present system should be maintained."

The order is affirmed.

LA CONNER TRADING & TRANSPORTATION CO. v. WIDMER.

(Circuit Court of Appeals, Ninth District. March 6, 1905.)

No. 1,103.

1. APPEAL—DISMISSAL—GROUNDS—DEFECTIVE BOND.

An objection to an appeal bond on the ground that it does not conform to the rules of court, and that its terms are such that it only binds appellant for the judgment of the Court of Appeals, is not ground for a dismissal of the appeal.

2. SHIPPING—CARRIAGE OF GOODS—DELAY—DAMAGES—ESTIMATION.

On a libel for damages for unreasonable delay in transporting horses to Alaska during the Klondike rush of 1898, the evidence showed that a horse was worth \$20 a day during the period of delay. It further showed that the horses were put on board the vessel on February 22d, that the vessel did not sail until February 24th, that it stopped two days on the way, that it arrived at its destination on March 6th, that the horses were not discharged until March 9th, and that, owing to a further delay in unloading their equipment, they were not available for service until March 14th. This delay was caused by using a lighter which was used, notwithstanding the payment of wharfage by the shipper in advance in order that there should be no such delay. *Held*, that an estimate of damages on the basis of 10 days' delay was reasonable, and an award of damages on such basis was not excessive.

3. DAMAGES—INTEREST—DISCRETION OF COURT.

The allowance of interest on damages for delay in the transportation of horses depends upon circumstances, and rests in the discretion of the court.

Appeal from the District Court of the United States for the Northern Division of the District of Washington.

This is a libel in personam, brought by the appellee, J. M. Widmer, for himself, and as the assignee of others, to recover from the appellant, La Conner Trading & Transportation Company, for loss and damage sustained by the libellant and his assignors by reason of the unreasonable delay in transporting 19 horses from Seattle, Wash., to Skagway, Alaska, in the year 1898, on the bark Enoch Talbot, as a common carrier of merchandise and live stock upon contracts of shipment, transportation, and subsistence. The court below found that there was unreasonable delay in commencing the voyage, in prosecuting the voyage, and in discharging the cargo at the point of destination; that this unreasonable delay amounted in the aggregate to 10 days, for which damages were assessed by the court at the rate of \$20 a day for each of the 19 horses, amounting to \$3,800. To this amount was added interest at 6 per cent. per annum from the date of the filing of the libel, amounting to \$779.

Ira Bronson and Ballinger, Ronald & Battle, for appellant.

James Kiefer, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after stating the facts, delivered the opinion of the court.

The appellee has interposed a motion to dismiss, on the ground that the bond on appeal does not conform to the rules of the court, and that its terms are such that it only binds the appellant for a judgment of this court, and, if this court should direct the court below to modify its decree, the sureties of appellant would not be liable for the payment of such decree. This objection to the appeal bond is no ground for dis-

missing the appeal. *Hudgins v. Kemp*, 18 How. 530, 535, 15 L. Ed. 511, 514; *Beardsley v. Arkansas & L. Ry. Co.*, 158 U. S. 123-127, 15 Sup. Ct. 786, 39 L. Ed. 919. The motion to dismiss is therefore denied.

The claim of the appellant that it is not liable because it acted as agent of the bark *Enoch Talbot*, and not as the principal, is contradicted by the written contracts between the parties for the transportation of the horses, in which the appellant is named as the principal making the contract.

It is assigned as error that the decree awarding damages is excessive, and is not supported by the evidence. The appellant contends that the evidence does not show that the appellee or his assignors would have made any profits had there been no delay in the delivery of the horses at the point of destination. The evidence shows that the horses were shipped to Skagway for the purpose of being used for packing and hauling freight from Skagway to the lakes at the head of navigation on the Yukon river, and in and about Skagway. This business was connected with the transportation engaged in the great Klondike rush of 1898, and it is a matter of public notoriety that this transportation was in great demand, and there is evidence that it was remunerative to a majority of those engaged in it. It will serve no useful purpose to review the testimony upon this subject. It is sufficient to say that it appears from the record that the weight of evidence supported the findings of the court below that each horse was worth at least \$20 a day in Skagway during the period they were delayed on the voyage, and at Skagway before they were discharged from the vessel. With respect to the number of days the transportation of the horses was delayed unreasonably, the libellant claimed that the delay amounted to 43 days, including a period commencing February 5, 1898, when the horses were ready for shipment, and evidence was introduced to support that claim. But the court found a delay of only 10 days. This finding was based upon evidence showing that the horses were taken on board the vessel on February 22, 1898, but the vessel did not sail until February 24th. The vessel stopped two days at Nanaimo, and arrived at Skagway on March 6th. The horses were not discharged until March 9th, and the harness and pack saddles and other equipment were not finally discharged until March 13th, and the horses were not available for service until March 14th. The voyage was to be a continuous one, and wharfage at Skagway was paid by the shipper in advance, in order that there should be no delay at the port of discharge. Notwithstanding this arrangement, the cargo was discharged by lighter, causing the delay at Skagway. We think the estimated delay of 10 days was very reasonable, under all the circumstances, and as shown by the testimony.

The court below allowed interest on the damages, caused by the delay, from the date of the filing of the libel to the date of the entering of the decree. The allowance of interest on damages depends upon circumstances, and rests in the discretion of the court. *The Scotland*, 118 U. S. 507, 518, 6 Sup. Ct. 1174, 30 L. Ed. 153.

Finding no error in the record, the decree of the District Court is affirmed.

W. K. NIVER COAL CO. v. PIEDMONT & GEORGES CREEK COAL CO.

(Circuit Court of Appeals, Fourth Circuit. February 21, 1905.)

No. 523.

1. CONTRACTS—EXECUTION—UNDISCLOSED PRINCIPAL.

Where the N. Coal Company was a general coal dealer, and not the selling agent of defendant, but bought coal from defendant and others, which was sold to whomsoever it pleased, defendant was not liable as an undisclosed principal for the N. Company's breach of a contract for the sale of coal to plaintiff.

2. SAME—EVIDENCE—DECLARATIONS OF AGENT.

In a suit by a third person, directly against an alleged undisclosed principal, for breach of a contract made by the alleged agent, declarations of such agent as to the character of his authority are incompetent.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 416-419.]

3. SAME—DECLARATIONS AGAINST INTEREST.

Declarations against interest, made by such an agent, as to the character of the business relations existing between him and the alleged principal, are competent in such action, when the alleged agent is offered as plaintiff's witness.

In Error to the Circuit Court of the United States for the District of Maryland.

John E. Semmes and James Piper, for plaintiff in error.

Robert H. Gordon and J. Walter Lord, for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and BRAWLEY, District Judge.

GOFF, Circuit Judge. The plaintiff in error brought an action at law in the court below against the defendant in error, alleging a breach of contract concerning the sale of coal. The contract relied on was made by the National Coal Company with the W. K. Niver Coal Company, by which the former agreed to furnish the latter 25,000 tons of Big Vein Georges Creek Coal, during the 12 months beginning April 1, 1902, at \$1.25 per ton of 2,240 pounds, f. o. b. at mines; conditioned upon car supply, strikes, accidents, and other causes beyond control. In the declaration filed by the plaintiff below, it is alleged that this contract was in fact made on behalf and by the authority of the defendant below, and that said company, the Piedmont & Georges Creek Coal Company, subsequently ratified and confirmed it. The declaration charges that only a small portion of said coal was furnished, and that the plaintiff below had been greatly damaged. The case was tried to a jury, which, by the direction of the court, found for the defendant. The assignments of error relate to the action of the court in refusing the prayers requested by the plaintiff, and in directing a verdict for the defendant.

If the court below was right in directing a verdict for defendant, it will follow that the prayers asked for by the plaintiff should have been refused, as they, in effect, directed a verdict for the plaintiff, leaving the jury to find the damages. The evidence offered by the plaintiff below was at least inconclusive, and the explanation of counsel for the plain-

tiff in error that his client labored under the disadvantage of having the National Coal Company, "an irresponsible company" (but the party with which the contract had been made), attempt "by the testimony of its president to protect the defendant," was but a proper recognition of its unsatisfactory character. It appears from the record that the National Coal Company, as a general dealer, bought and sold coal from the mines of the defendant company, as well as from other mines, including those of the plaintiff in error. It is, we think, clearly disclosed by the testimony that the National Coal Company was not the selling agent of the defendant company, but that it made its own contracts for the purchase of coal from the defendant, and sold to whom it pleased. The contention of the plaintiff in error is that the defendant in error occupied to the National Coal Company the relation of undisclosed principal. The evidence required to charge an undisclosed principal to a contract made by his agent is neither greater nor less, when suit is brought by a third person directly against such alleged principal, than it would be had a recovery been had against the agent by such third person, and such agent was seeking to recover damages from the principal. Declarations of the alleged agent as to the character of his authority are, in a suit of this kind, no more competent as evidence than they would be in a suit in which such agent was the plaintiff himself, and admissions against interest made by the alleged agent as to the character of the business relations existing between him and the alleged principal are as competent (when such agent is offered as plaintiff's witness) as they would be were he the plaintiff and testifying in his own behalf. In *Central Trust Company v. Bridges*, 57 Fed. 763, 6 C. C. A. 550, Judge Taft, speaking for the Circuit Court of Appeals, Sixth Circuit, says:

"One may be liable for the acts of another as his agent on one of two grounds: First, because by his conduct or statements he has held the other out as his agent; or, second, because he has actually conferred authority on the other to act as such. * * * An agency is created—authority is actually conferred—very much as a contract is made, i. e., by an agreement between the principal and agent that such relation shall exist. The minds of the parties must meet in establishing the agency. The principal must intend that the agent shall act for him, and the agent must intend to accept the authority and act on it, and the intention of the parties must find expression either in words or conduct between them."

If we apply this law, which is applicable to this case, to the facts as disclosed by the evidence before the jury, it is quite apparent that the court below was fully justified in giving the instruction complained of.

We are unable to find from the record that the defendant in error at any time, in any way, either by conduct or statements, held out the National Coal Company as its agent, and it is clearly shown that both parties to the alleged contract denied that it had ever been entered into. The burden of proving the existence of the agency was upon the plaintiff in error, and we concur with the court below in holding that the evidence offered was not sufficient to entitle said plaintiff to recover. The judgment complained of is without error.

Affirmed.

PETERS v. HANGER.

(Circuit Court of Appeals, Fourth Circuit. March 8, 1905.)

No. 503.

CIRCUIT COURTS OF APPEALS—LEGAL CONSTITUTION—SITTING OF DISTRICT JUDGES.

Under section 3 of the act of March 3, 1891, creating the Circuit Courts of Appeals (chapter 517, 26 Stat. 827 [U. S. Comp. St. 1901, p. 548]), in the absence of the Chief Justice or an Associate Justice of the Supreme Court or of a Circuit Judge, such court is legally constituted where made up by three District Judges of the circuit, regularly designated by particular assignments to attend as members for the term.

Pritchard, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Virginia.

On Motion of Plaintiff in Error to Set Aside Judgment.

See 134 Fed. 586.

W. H. Singleton (H. M. Smith, Jr., and Charles E. Riordon, on the briefs), for plaintiff in error.

James Alston Cabell (Philip Mauro, on the briefs), for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

GOFF, Circuit Judge. On the 23d day of May, 1904, this cause, a writ of error to the Circuit Court of the United States for the Eastern District of Virginia, was argued and submitted to District Judges Brawley, Purnell, and McDowell, then regularly attending as members of this court, neither the Chief Justice nor a Circuit Judge being present. At that time the vacancy caused by the death of Circuit Judge Simonton had not been filled. The court so constituted, speaking through Judge McDowell, on the 15th day of November, 1904, filed an opinion disposing of the questions raised by the assignments of error, and affirming the judgment complained of. The plaintiff in error duly presented a petition for a rehearing, and also filed a motion to set aside the judgment of affirmance. The petition for a rehearing having been considered and denied, the motion to set aside said judgment remains to be now disposed of.

It is insisted by the plaintiff in error that the court which rendered the decision mentioned was not legally constituted; that is, that it did not have the proper personnel. The act of Congress approved March 3, 1891, c. 517, 26 Stat. 827 [U. S. Comp. St. 1901, p. 548], creating this court, in the third section thereof provides as follows:

"In case the Chief Justice or an Associate Justice of the Supreme Court should attend at any session of the Circuit Court of Appeals he shall preside, and the Circuit Judges in attendance upon the court in the absence of the Chief Justice or Associate Justice of the Supreme Court shall preside in the order of the seniority of their respective commissions.

"In case the full court at any time shall not be made up by the attendance of the Chief Justice or an Associate Justice of the Supreme Court and Cir-

cuit Judges, one or more District Judges within the Circuit shall be competent to sit in the court according to such order or provision among the District Judges as either by general or particular assignment shall be designated by the court:

"Provided, that no justice or judge before whom a cause or question may have been tried or heard in a District Court, or existing Circuit Court, shall sit on the trial or hearing of such cause or question in the Circuit Court of Appeals."

It appears that when this case was called for argument the Chief Justice was not in attendance, nor was a Circuit Judge present, but that at that time the court was made up of three District Judges of this circuit, who had been theretofore regularly designated by particular assignment to attend as members of this court for that term. We think that the court so constituted was authorized by the statute to hear and decide the case then submitted to it, it appearing that neither of the judges so hearing and deciding it had participated in the trial of said case in the court below.

In our judgment, the decision complained of, announced by the three District Judges so attending as members of this court, was the decision of the Circuit Court of Appeals of this Circuit, and the judgment based thereon will not be set aside.

Motion denied.

PRITCHARD, Circuit Judge. I dissent from this judgment on the ground that the court which heard the case was not properly constituted. The act creating the Circuit Court of Appeals does not, in my opinion, contain any provision which authorizes the court to be composed exclusively of District Judges, but, on the contrary, the act clearly indicates that it was the intention of Congress that either the Chief Justice, one of the Associate Justices, or one of the Circuit Judges should be present, and preside at each term of the court.

FULTON v. INSURANCE CO. OF NORTH AMERICA.

(Circuit Court of Appeals, Second Circuit. February 28, 1905.)

MARINE INSURANCE—PLACE OF LOSS.

Where a houseboat insured was lost while within the "natural" boundary of the inland waters of New York Harbor, as well as within the statutory lines dividing such inland waters from the high seas, fixed by the Secretary of the Treasury, the craft was covered by a policy containing a warranty that the boat should be confined to the inland waters of New York, New Jersey, and Long Island, and that no liability should exist for a loss during a deviation of the limits so named, though such deviation should not avoid the policy, which should reattach on the return of the vessel within such limits.

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 127 Fed. 413.

E. C. Dusenbury, for appellant.

Lawrence Kneeland, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. The action was brought to recover under a one-year marine policy of insurance covering the houseboat *Mon Mon*, which sank while under tow from Gravesend to Sheepshead Bay, and when about opposite the Oriental Hotel, and within about a quarter of a mile of Coney Island. There is no question of seaworthiness or navigation; the only controversy is as to the application of these clauses of the policy:

"Warranted confined to the inland waters of New Jersey, New York and Long Island."

"Any deviation beyond the limits named in this policy shall not avoid this policy; but no liability shall exist during such deviation; and upon the return of said vessel within the limits named herein, no disaster having occurred, this policy shall be and remain in full force and effect, unless a disaster occurs while deviating."

"Against perils of the Harbors, Bays, Sounds, Seas, Rivers and other waters as above named."

By the act of February 19, 1895, c. 102, § 2, 28 Stat. 672 [U. S. Comp. St. 1901, p. 2900], the Secretary of the Treasury was authorized, empowered, and directed from time to time to designate and define, by suitable bearings or ranges, with lighthouses, light vessels, buoys, or coast objects, the lines dividing the high seas from rivers, harbors, and inland waters, the act being supplementary to the act to adopt regulations for preventing collisions at sea. Pursuant to such act, the line for New York Harbor has been established as follows:

"From Navesink (southerly) Light-house N. E. $5/8$ E. easterly to Scotland Light-vessel; thence N. N. E. $1/2$ E. through Gedney Channel Whistling Buoy to Rockaway Beach Life Saving Station."

This line lies considerably outside of the place where the vessel was lost.

The appellee insists that the line laid down under this statute has no application in this case, because it was fixed solely for the purpose of arbitrarily determining where one set of regulations as to navigation ends and another begins. It is unnecessary now to discuss or decide that point, because we are of the opinion that, if the "natural" boundary of inland waters is to be taken instead of the "statutory" boundary, it will be found in the line which connects the extremity of Sandy Hook with the nearest point on Rockaway Beach, these headlands being the natural fauces terræ. The *Mon Mon* was lost well inside of that line, and was covered by the policy.

The decree is reversed, with costs, and cause remanded with instructions to decree in favor of the libellant, with interest and costs.

CROWN CORK & SEAL CO. OF BALTIMORE CITY v. STANDARD STOPPER CO. et al.

(Circuit Court of Appeals, Second Circuit. December 19, 1904.)

No. 189.

I. APPEAL—INTERLOCUTORY ORDER GRANTING INJUNCTION.

The fixing of the bond to be given on appeal from an interlocutory order granting an injunction rests in the discretion of the trial court, under the provisions of Act June 6, 1900, c. 803, § 7, 31 Stat. 660 [U. S. Comp. St. 1901, p. 550], and its order is not reviewable on the appeal; nor does such an appeal affect the proceedings in the court below, except as to such injunction, unless a stay is granted by that court.

[Ed. Note.—Finality of judgments and decrees for purposes of review, see notes to *Brush Electric Co. v. Electric Imp. Co.*, 2 C. C. A. 379; *Central Trust Co. v. Madden*, 17 C. C. A. 238; *Prescott & A. C. Ry. Co. v. Atchison, T. & S. F. R. Co.*, 28 C. C. A. 482.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

On motion to increase security or to remand.

For opinion below, see 136 Fed. 199.

Wetmore & Jenner and Robert H. Parkinson (John C. Rose, on the brief), for the motion.

J. J. Kennedy, opposed.

Before WALLACE and COXE, Circuit Judges.

PER CURIAM. We cannot review the order of the court below refusing to stay the taxation of costs by the complainant, or its action in fixing the amount of the bond to be given by the defendant upon the appeal. The order is not reviewable, unless upon an appeal from the final decree. There are no circumstances which authorize us to interfere with the judgment of the judge in fixing the amount of the bond. *Martin v. Hazard Powder Co.*, 93 U. S. 302, 23 L. Ed. 885.

As the appeal is from an interlocutory decree granting an injunction and ordering an accounting, the cause, for all purposes except a review of the injunction below, including the taxation of costs, is unaffected by the appeal, in the absence of an order by that court staying the proceedings. Section 7, Court of Appeals Act June 6, 1900, c. 803, 31 Stat. 660 [U. S. Comp. St. 1901, p. 550].

BARCUS et al. v. SHERWOOD.

(Circuit Court of Appeals, Fourth Circuit. February 21, 1905.)

No. 551.

ATTORNEY AND CLIENT—CONSTRUCTION OF CONTRACT—EXTRA SERVICES.

A decree construing a contract for the services of an attorney, and allowing him compensation for services rendered outside of those contracted for, reviewed and affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia, in Equity.

For opinion below, see 130 Fed. 364.

C. V. Meredith, for appellants.

John B. Sherwood and H. R. Pollard, for appellee.

Before GOFF and PRITCHARD, Circuit Judges, and BRAWLEY, District Judge.

GOFF, Circuit Judge. The real question in this appeal is one of fact, as to whether or not the services of the appellee, as attorney for the appellants, were covered by the terms of his contract with them, referred to in the proceedings of this cause. The court below found from the testimony that the appellee was entitled to compensation for services rendered by him, other than those included in the contract referred to. In this conclusion we fully concur. The allowance made the appellee by the court below, due regard being had to the character of the litigation, to the services rendered, and to the time required therefor, was reasonable, and has our approval. The valuations placed by the court below on the property recovered, on which the amount of the fee due under the contract for services was allowed, were not only suggested by the evidence, but were entirely justified by it, and therefore will not be changed by this court. See 130 Fed. 364, for report of this case and opinion of the court below.

There is no error in the decree complained of, and the same is affirmed.

UNITED STATES v. STRAUSS BROS. & CO.

(Circuit Court of Appeals, Second Circuit. January 7, 1905.)

No. 70.

1. CUSTOMS DUTIES—PING-PONG BALLS—COLLODION—TOYS.

Ping-pong balls are not "toys," as provided for in paragraph 418, Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1674], but are dutiable under paragraph 17 of said act, Schedule A, § 1, c. 11, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1628], as articles of collodion.

2. SAME—REVIEW OF FINDINGS OF COLLECTORS OF CUSTOMS.

Where a decision of a collector of customs as to the dutiability of imported merchandise is under review by the Board of General Appraisers or the courts, his findings of fact, when based on no other evidence than that afforded by the articles themselves, may be reversed without any further evidence. The collector, the board, and the courts are all equally entitled to avail themselves of such information as may be derived from an inspection of the articles in connection with the facts of common knowledge and experience, of which judicial notice may be taken.

3. EVIDENCE—JUDICIAL NOTICE—PING-PONG BALLS.

In deciding whether ping-pong balls are toys, or articles constructed for the amusement of children, judicial notice may be taken of the fact that the game of ping-pong is ordinarily played on a table of such height that it would be difficult for children to play the game; that it is a game which is indulged in by adults, and which requires a degree of skill not ordinarily possessed by children; and that the balls are sold in stores that deal in athletic goods that are not within the category of toys.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a judgment of the United States Circuit Court for the Southern District of New York (128 Fed. 473), affirming the decision of the Board of General Appraisers, which had reversed the classification of the collector of the port of New York. Note *United States v. Wanamaker* (C. C.) 136 Fed. 266.

Charles D. Baker, for the United States.

A. H. Washburn, for appellees.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. The articles in question are ping-pong balls. They were returned and classified for duty as "manufactures of pyroxylin," and were assessed as such by the collector, under paragraph 17, Act July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1628], which is as follows:

"Collodion and all compounds of pyroxylin, whether known as celluloid or by any other name, 50 cents per pound; rolled or in sheets, unpolished, and not made up into articles, 60 cents per pound; if in finished or partly finished articles, and articles of which collodion or any compound of pyroxylin is the component material of chief value, 65 cents per pound and 25 per cent. ad valorem."

The importers protested, claiming that said articles were dutiable as toys, under paragraph 418 of said act (section 1, Schedule N, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1674]), which is as follows:

"Dolls, doll-heads, toy marbles of whatsoever materials composed, and all other toys not composed of rubber, china, porcelain and parian, bisque, earthen or stone ware, and not specifically provided for in this act, 35 per cent. ad valorem."

In reversing the action of the collector, the Board of General Appraisers held as follows:

"We find from the papers before us that the articles described on the invoices as 'ping-pong balls,' are of the same general character as those passed upon in G. A., 1,644 (T. D. 13,223), and board decision (unpublished) dated April 30, 1903, protest 55,065B, and there held to be toys. Following these rulings, we sustain the protests. * * *"

The Circuit Court affirmed the decision of the board. No evidence was taken either before the board or in the Circuit Court. The argument in the court below was confined to the question whether, in the absence of any evidence upon a question of fact, the Board of General Appraisers had the power to reverse the finding of fact by the collector. It is unnecessary to consider how far this argument might be applicable in a case where the collector had acted upon the evidence of witnesses produced before him. It has no relevancy to the question at issue in the case at bar, where the only evidence consisted in the articles themselves. The collector, the board, the court below, and this court are all equally entitled to avail themselves of such information as may be derived from an inspection of the articles in connection with the facts of common knowledge and experience, of which judicial notice may be taken. Here it does not even appear that the Board of General Ap-

praisers based their decision either upon inspection of these specific articles, or upon the facts of which they were entitled to take judicial notice. It appears from their opinion that they found the articles to be toys, because they "are of the same general character as those passed upon in" certain prior decisions. Said decisions are not incorporated in the record, and this court is without information as to whether the former conclusions were reached upon the hearing of testimony, or upon inspection of the articles, or otherwise. We are unable to concur in the conclusion of the board that these articles are toys. A "toy" is defined as follows:

"An article constructed for the amusement of children; a plaything, as a doll or Noah's ark; hence: any trifling or amusing object; any bauble or knickknack; trinket; trifle." Standard Dict.

We cannot close our eyes to the fact that the game of ping-pong is ordinarily played on a table which is of such a height that it would be difficult for children to play the game; that it is a game indulged in by adults, and one which requires a degree of skill not ordinarily possessed by children; and that ping-pong balls are sold in stores where athletic goods such as footballs and baseballs, tennis and golf balls, are sold. The fact that small boys indulge in games of baseball and football does not serve to bring the balls within the category of toys. These ping-pong balls are imported and sold to be used in a game of skill played by adults.

The decisions of the Circuit Court and of the Board of General Appraisers are reversed, and the classification of the collector is sustained.

M. SOLMSON & CO. v. BREDIN et al.

(Circuit Court of Appeals, Fourth Circuit. February 21, 1905.)

No. 577.

1. PATENTS—INVENTION—WEATHER STRIPS.

The Sims patent, No. 424,905, for a flexible metallic weather strip, consisting of a thin strip of zinc doubled on itself in the center to form a rib, which projects into a groove in the edge of a sliding window sash, while the edges of the strip are turned at right angles to the rib to make a flat back, which is fastened in the recess of the casing, was not anticipated and shows invention. Claims 2 and 3, also, *held* infringed.

2. SAME—INFRINGEMENT.

The particular form of the back of a patented weather strip, or the manner of fastening it to a window casing by making holes therein for the tacks used, are not essential parts of the invention, and a variation therein does not avoid infringement, where the principle of the invention is appropriated.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 371, 377.]

Appeal from the Circuit Court of the United States for the District of Maryland.

For opinion below, see 132 Fed. 161.

C. M. Clark and Thomas W. Bakewell, for appellant.

L. S. Bacon and J. H. Milans, for appellees.

Before GOFF and PRITCHARD, Circuit Judges, and WADDILL, District Judge.

GOFF, Circuit Judge. This appeal is from a decree of the court below in favor of the appellees, adjudging claims 2 and 3 of patent No. 424,905, granted April 1, 1890, to A. C. Sims, for an improvement in weather strips, to be valid and infringed. The bill asked for an injunction and for an accounting. The answer averred that the device of the patent was anticipated, and invalid for lack of patentable invention, and that the appellant had not infringed it.

The assignments of error charge that the court below erred in finding that the appellant had infringed the patent in suit, in not adjudging that the letters patent were invalid, in granting the injunction prayed for, and in not dismissing the bill. The questions before this court are: First, is the patent valid? Second, has it been infringed by the appellant?

The subject-matter of the patent in suit relates to metal weather strips for windows. In the application of the strip, it is placed and secured in the bottom of the runways of a window; the strip having a part which projects into a groove in the sash. The inventor states:

"This invention relates to weather strips for windows fitted with sliding sashes, and has for its object to provide a simple, inexpensive, and durable device, which will answer fully the purpose for which it is intended. * * * To this end my invention consists in the peculiar construction and combination of the aforesaid frame or casing, a metal weather strip, and the sliding sash, substantially as will be hereinafter more fully described and claimed. * * * The sides of the frame or casing are recessed, * * * to receive the base of the weather strip, so that the latter will lie flush with the inner side of the casing. The sliding sashes * * * are provided on opposite sides with inwardly projecting grooves of such dimensions that they will fit the projecting ribs. In this manner it will be seen that these ribs or projections, by fitting into the aforesaid recesses of the corresponding sides of the sliding sashes, effectually exclude rain, snow, or dust, without in the least interfering with the easy operation of the sash."

The second and third claims of the patent declared on in the bill are as follows:

"(2) As an improved article of manufacture, a metallic weather strip, composed of a flat strip of suitable metal, bent or doubled longitudinally to form a raised rib at right angles to the flat base, and provided on opposite sides of said ribs with a series of equidistant apertures, substantially as set forth.

"(3) The combination of the frame or casing recessed on its inner sides, the metallic strips provided with flat bases and having projecting ribs extending centrally at right angles to the bases, the latter fitting in the recesses of the casing, and the sliding sash frames grooved on opposite sides to receive the projecting ribs of the casing, substantially as set forth."

A careful study of the testimony impels us to concur in the conclusion reached by the court below, and as the reasons for reaching that result are clearly stated in the opinion of that court, we quote and adopt portions of it as follows:

"The complainants' device, which is known to the trade as the 'Chamberlain Metal Weather Strip,' is made of a thin strip of zinc, which has been doubled upon itself to form a projecting rib, with sides bent outwardly at right angles, so as to form a base. This shaped device is placed in the recess of a window frame, the sliding sash of which has been grooved so that the projecting rib of the metal strip projects into the groove and fits in it sufficiently tight to exclude wind and dust, but allows the sash to be easily moved up and down. The strip is made fast in the recess either by being tacked down, or is sometimes applied in actual use, when practical, by being inserted under the ad-

joining strip of beading. The advantage claimed for this form of construction is thus stated in the specifications of the patent:

"By constructing the metallic strips as shown in the drawings—that is to say, forming the raised part or rib, D, by doubling the metal upon itself, leaving the narrow space, d,—a certain amount of elasticity is given to this part, so as to enable it to fit closely in its appropriate groove, E, of the sliding sash, thereby taking up wear, so as to insure a close fit at all times therein."

"The defendant's device is in all respects similar, except that the strip of zinc intended to be secured in the recess of the window frame is doubled twice upon itself, so as to form two parallel ribs, and the groove in the sliding sash has inserted in it a similarly formed metallic strip doubled upon itself either once or twice, and forming ribs which interfit with the rib or ribs of the stationary member fixed in the recess of the window frame. The defendant's device may be made either with a flange on one side only, or the flange may be dispensed with and the metallic rib secured in place by tacks driven through the bottom of the groove formed by the walls of the double rib. In actual use, however, the proof shows that it has been only used commercially by tacking down the flanges, just as the complainants' device is intended to be used, and is used.

"In support of the defense of noninfringement, defendant relies upon the different manner of attaching the stationary metal strip to the recess of the window frame. It is claimed that the defendant does not infringe the second clause, because his metal strips are not provided 'on opposite sides of said rib with a series of equidistant apertures,' through which the tacks or nails or screws may be inserted to clamp the strip to the wood surface of the recess of the window frame, but tacks or nails are driven through the thin strip of metal, without special attention to their being equidistant, and without previously prepared perforations. This, it seems to me, is an immaterial difference. The description in the second claim of the method used to fasten the strip to the frame is not of the substance of the device or of the invention. It is only a matter of detail, which could not give patentability to the device or affect its patentability. It is further urged that claim 3 is not infringed because it described the rib as being located centrally with reference to the base, while in the defendant's device the rib is either more to one side of the center of the base on one side, or sometimes may be omitted altogether. The word 'centrally' does not necessarily mean in the exact center, and the exact center is not called for in any part of the specification. All that is made essential is that the projecting rib shall fit into the groove made in the sliding sash to receive it. It is also urged, in support of the defense of noninfringement, that claim 3 is for a combination of a frame or casing recessed on its inner side with the metal strip, having its flat bases fitting in the recesses of the casing, while the strip of the defendant and the strip of the complainants, as actually applied, is not laid in any specially grooved out recess of the frame, but is laid in the bottom of the recess made by the runway, in which the sash slides up and down. To say that the bottom and sides of the runway do not constitute a recess, and is not the recess intended by the patent, is to ignore the obvious fact. It is true that, if the original sash and frame fitted tightly, it might be necessary, on introducing the thickness of the metallic strip between the two, to either score out the depth of the recess or to slightly plane off the surface of the opposing edge of the sliding sash; but that is a mere matter of ordinary carpentering. The inventor in his specification says:

"In practice I manufacture these metallic strips in suitable lengths, which will easily be cut by the purchaser to the right size to fit the windows or doors for which they are intended, to which they can readily be applied by any person of ordinary intelligence, and without the assistance of skilled labor."

"This seems to imply, as the actual application has in fact demonstrated, that the ordinary runway in which the sliding sash moves up and down in the casing is the recess mentioned in the specification and claim of the patent, and it does not require skilled labor to so apply it. That the defendant may possibly, in some instances, make a metal strip having the base only on one side of the rib, does not, I think, answer the charge of infringement. It is

in all essentials the metallic weather strip of the complainant, with a rib to some extent elastic, because made of thin metal doubled upon itself. It required no invention to omit the base on one side of the rib. It is the same device, only less complete. I think the defense of noninfringement has failed.

"The defense urged with more confidence by the defendant is lack of invention in view of the former state of the art. It is urged that runways of metal having a rib centrally placed and a base on each side to form a track for a sliding door was a well-known device, and it is urged that the metallic strip of the complainants, with its rib and similar bases, is anticipated by it; but the use is so different and the purpose so different, and the construction of the metal track so rigid and the rib so broad and inelastic, that I cannot see that one would suggest the other, and in point of fact it would appear that it never did. The numerous patents put in evidence are either for various kinds of substitutes for the ordinary sliding sash, with its beading and recessed runway, or for some kind of a joint-closing device for doors or hinged windows; but, after a careful consideration of them all, I am of opinion that they do not fairly anticipate the device of the patent as applied by the inventor and by the complainant. They do show that for a long time the attention of mechanics and inventors has been directed to the perfecting of some inexpensive and simple joint-closing device to be applied to windows and doors. Not one of them would appear to have gone into general use, and it is a strong argument in favor of the novelty of the complainants' device that it has by its merits secured against so many competitors a commercial success, which is a practical indorsement of its usefulness. The general manager of the corporation which manufactures the metal strips of the defendant at one time handled and advocated the use of the complainants' device.

"It is further urged that the English patent No. 9,591, July 2, 1888, to Edward Thorp, is an anticipation. Very persuasive proof has been adduced to show that the actual date of the invention of the complainants' device antedates the date of the sealing of the Thorp patent, which was November 23, 1888; but, without entering upon or deciding that question of fact, I am of opinion that the Thorp patent, so far as it approaches to the complainants' device, is too obscure and indefinite to amount to anticipation. The essentials of the complainants' device consist in the elastic quality of the rib, arising from its being of a thin metal doubled upon itself and still capable of further compression, and the adaptability of the bases of the rib for the insertion in the ordinary recess of the runway of the sliding sash. Neither of these essentials is suggested in any manner in the specifications of the Thorp patent. By a close study of one of the drawings representing the Thorp bar, there is seen a drawing of a U-shaped bar of material about one-eighth of an inch thick, represented in combination with a hinged joint; but it does not seem to me that the drawing in any way leads the mind toward the thin metallic strip used by the complainants.

"I am of opinion that the patent owned by the complainants is a good and valid patent, that the infringement is obvious, and that the complainants are entitled to the relief prayed for."

The decree appealed from is affirmed.

LAUMAN v. URSCHEL WHITE LIME CO.

(Circuit Court of Appeals, Sixth Circuit. February 17, 1905.)

No. 1,358.

PATENTS—INVENTION—PROCESS OF SLAKING LIME.

The Lauman patent, No. 678,500, for a process of slaking lime by agitating it in a closed cylinder with sufficient water to convert it into a dry hydrate of lime, is void for lack of patentable invention, in view of the prior art, and especially of the process shown in the Adams patent, No. 309,383.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

John H. Roney, for appellant.

Almon Hall and F. M. Dotson, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

PER CURIAM. This is a bill by A. H. Lauman against the Urschel White Lime Company, charging the infringement of patent No. 678,500, granted July 10, 1901, for a method or process of treating lime. The bill was filed November 28, 1902. The court, without an opinion, sustained the defenses and dismissed the bill on the ground that the patent was void and was not infringed.

As described in the patent, Lauman's invention was a process of "dry-slaking the burnt lime by adding thereto just that quantity of water sufficient to convert the lime into a hydrate of lime, and then by agitating or mixing the materials until the resultant product becomes a thoroughly dry hydrate of lime; air being excluded from the lime during the slaking operation, and the steam confined within the vessel during the operation." In carrying out this process, the patentee employs "a substantially air and steam tight" cylinder or vessel, in which is mounted on a shaft a series of arms or paddles, capable of being rotated. The burnt lime is charged into this vessel with just sufficient water to moisten and disintegrate it. The vessel is then sealed, and the agitators revolved until the lime is reduced to a powdered, dry hydrate of lime, uniformly and evenly slaked. The specification states:

"In the beginning of the operation, the union of the lime and water creates a high temperature within the sealed vessel, which converts a portion of the water not at once combined with the lime into steam, which, during the constant agitation of the materials, is thoroughly and uniformly absorbed by the lime, converting the same into a dry hydrate."

The claim reads as follows:

"The herein described method or process of treating lime, which consists in adding to burnt lime just sufficient water to convert the same into a dry hydrate; the mixture being constantly agitated and thoroughly commingled and air excluded and pressure maintained during the conversion of the burnt lime into a dry hydrate of lime."

It is claimed the patent is void because the process lacks patentable novelty, being old and anticipated in prior patents; those relied upon being No. 137,323, issued to James H. Rowland, April 1, 1873; No. 237,500, issued to Dimelow & Peadro, February 8, 1881; and No. 309,383, issued to William I. Adams, December 16, 1884.

It is only necessary to consider the Adams patent, which is for a process of slaking lime. After the burnt lime has been pulverized, the specification says:

"It is passed into the slaking chamber, which is provided with mixing paddles, which are driven by any suitable power, and which continually disturb the lime as the water is applied; thereby subjecting all portions of the lime to the water as it slakes. The chamber being air-tight, comparatively speaking, prevents any particles or substance from escaping as the slaking

is taking place; the water being supplied through pipes of suitable construction. After it is thoroughly mixed or slaked, it is drawn off into vats, and left standing therein a sufficient time under water to allow any particles which may not be thoroughly slaked in the mixing chamber to become so, from which it is removed, and is then ready for use."

Adams' claims are:

"(1) The method, as herein described, of slaking lime by first reducing the lime to a uniform condition by pulverization and bolting, then placing it in a tight or covered slaking chamber, and, while inclosed, applying the water and stirring, for the purpose as herein specified.

"(2) The process of slaking lime by first reducing it to a uniform condition by pulverization, and then subjecting it to the water while in an inclosed mixing chamber, for the purpose as herein specified."

It is urged that this is not the process used by Lauman; that a measured quantity of water (being the only water used) is not added to the lime at the start, and the mixture then confined in the closed vessel, but water is continually added as the process goes on, and the product is not a dry hydrate, but a semifluid mass, capable of being "drawn off into vats." But the only difference is in the quantity of water used, and the time when it is applied. The use of the closed chamber, "airtight, comparatively speaking," the introduction therein of the lime with the water to slake it, and the employment of a suitable stirring apparatus during the slaking operation, are present in each process. Lauman, however, ascertains in advance the quantity of water necessary to do the slaking, and introduces it at the start, while Adams introduces the water as needed until the lime is all slaked. Adams' chamber being substantially airtight, the same pressure from the confined steam resulting from the union of the lime and water would be obtained. The question therefore is, was the modification of Adams' process by ascertaining the quantity of water needed, and introducing it at the start, an act of invention? Did it involve an exercise of the inventive faculty? We are satisfied it did not. Nothing but an acquaintance with the usual processes of slaking lime, and the exercise of ordinary powers of observation and deduction, were required to suggest this change. To find out how much water was needed, it was only necessary to experiment and observe; and to apply that water at the start, so that all the water might be mixed at the same time with all the lime, the exercise of powers of reflection and reason, common to all, might suffice to suggest. No superior gift of intelligence, no intuitive faculty of discovery, none of those higher powers which patents are intended to reward and inspire, were required or employed to suggest the change made by the Lauman patent.

Holding the patent void for the reason stated, the judgment below is affirmed.

LAUMAN v. URSCHER LIME CO.

(Circuit Court of Appeals, Sixth Circuit. February 18, 1905.)

No. 1,359.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

John H. Roney, for appellant.

Almon Hall, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

PER CURIAM. This case is similar to No. 1,358 (August H. Lauman v. The Urschel White Lime Company, 136 Fed. 190). It charges an infringement of the same patent, and was decided in the same way in the court below, the bill being dismissed. Having held the patent void, the judgment must be affirmed.

ROBERTS v. BENNETT.

(Circuit Court of Appeals, Second Circuit. January 20, 1905.)

No. 95.

1. PATENTS—DESIGNS—METAL BASKET.

The Bennett design patent, No. 25,927, for a design for a basket made of metal, is void for anticipation by the patentee's prior mechanical patent No. 541,805, and also because the design shown has no novel element of beauty to commend it to the eye and render it patentable.

2. SAME—ACTION AT LAW FOR INFRINGEMENT—MATTERS OF WHICH COURT MAY TAKE JUDICIAL NOTICE.

In an action for infringement of a patent for a design for a basket, irrespective of the evidence of anticipatory devices, the court may take judicial notice of the ordinary and conventional bushel basket.

3. SAME—QUESTIONS FOR COURT.

Where a patent is void on its face, or is shown to have been anticipated by prior patents, or where the presumption of novelty arising from the grant is overcome by proof of the prior art, or by facts of which the court may take judicial notice, it is the duty of the court to so instruct the jury in an action at law for its infringement.

In Error to the Circuit Court of the United States for the Northern District of New York.

This cause comes here by writ of error to review a judgment of the United States Circuit Court for the Northern District of New York in favor of plaintiff below for \$168.90, entered upon a verdict of a jury in an action for infringement of plaintiff's patent No. 25,927, granted to him August 11, 1896, for a design for a basket.

Louis Marshall, for plaintiff in error.

Edward H. Risley, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. The decisive question herein was raised by defendant's exception to the denial of his request to instruct the jury to render a verdict for defendant upon the ground, inter alia, that the patent in suit showed no such invention as is requisite to sustain a design patent, and was not ornamental.

The material portions of the specification and claims and Fig. 1 of the patent are as follows:

"Baskets of my design are of the form shown, constructed of metal and without openings or perforations as distinguished from baskets heretofore made of splints or flexible strips interwoven, and the basket is provided with a small roll, A, on its upper edge, and an indented bottom, B, with handles, C, C, all substantially as shown in the drawings. The body of the basket is round, and of a slight conical shape between the roll and a point where the material is curved inward to form the bottom.

"What I claim is:

"(1) The design of a basket herein shown and described.

"(2) A basket of the form shown, and having rolled edge, an indented bottom, and handles projecting above the edge, as shown and described."

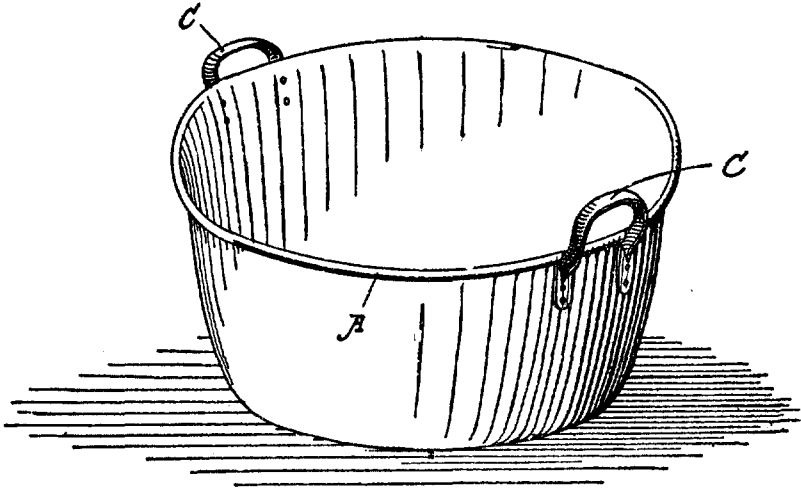


Fig. 1.

The patent is invalid for the following reasons:

1. Plaintiff's prior patent, No. 541,805, described, claimed and illustrated a metal basket, which, he says:

"Is designed to form a desirable substitute for the ordinary willow basket now used, * * * adapted to contain about one bushel, * * * with a curved, upwardly extending bottom, * * * with an annular exterior flange (at) the extreme upper end of the receptacle. * * * Large handles may be secured by rivets or other means to the receptacle near the upper end thereof. The object of the invention is to provide a new and improved basket, which combines durability and strength with lightness," etc.

The drawings show a basket almost identical in shape, barring some negligible corrugations, with that shown in the design patent.

If the plaintiff was entitled to any patent for the advantages claimed for such a construction, they were covered by the prior mechanical patent. "Functional utility entitled the patentee to the mechanical patent already discussed, but mere functional utility did not entitle him to a design patent for the same article." *Christopher C. Bradley v. Richard Eccles*, 126 Fed. 945, 61 C. C. A. 669; *Royal Metal Mfg. Co. v. Art Metal Works (C. C.)* 121 Fed. 128; *Id. (C. C. A.)* 130 Fed. 778.¹

2. There is nothing in the shape or construction of the basket of the patent in suit which "appeals in any way to the eye, or serves to commend it to purchasers and users as a thing of beauty." *Bradley v. Eccles*, *supra*. It is not useful as a design. "The term 'useful' in relation to designs means adaptation to producing pleasant emotions. There must be 'originality and beauty; mere mechanical skill is not sufficient.'" *Rowe v. Blodgett & Clapp Co. (C. C.)* 103 Fed. 873, 874; *Bevin Bros. Mfg. Co. v. Starr (C. C.)* 114 Fed. 362; *Eaton v. Lewis (C. C.)* 115 Fed. 635, affirmed 127 Fed. 1018, 61 C. C. A. 562.

3. Irrespective of the fact that prior metal baskets of the same general shape shown were introduced at the trial, the court may take judicial notice of the conventional bushel basket, which the design patent is evidently intended to simulate in general shape, inwardly curved bottom, and handles. *Black Diamond Coal Mining Co. v. Excelsior Coal Co.*, 156 U. S. 611, 616, 15 Sup. Ct. 482, 39 L. Ed. 553, and cases cited. In these circumstances it is unnecessary to discuss plaintiff's contention that the questions of novelty and patentability are not open for review in this court. Where the patent is void upon its face, or is shown to have been anticipated by prior patents, or when the presumption of novelty arising from the grant is overcome by proof of the prior art, and, as in this case, by facts of which the court may take judicial notice, it is the duty of the court to instruct the jury to that effect. *Black Diamond Coal Mining Co. v. Excelsior Coal Co.*, *supra*; *Market Street Cable Railway Co. v. Rowley*, 155 U. S. 621, 15 Sup. Ct. 224, 39 L. Ed. 284, and cases cited.

The judgment is reversed, with costs.

¹ See, also, 136 Fed. 210.

CALCULAGRAPH CO. v. WILSON.

(Circuit Court, D. Massachusetts. March 18, 1905.)

No. 2,064.

1. PATENTS—INFRINGEMENT—VIOLATION OF INJUNCTION.

The Hamilton patent, No. 424,291, for an apparatus for recording measurements of time, space, or quantity, claim 1, and the Abbott patent, No. 593,320, for a calculagraph, which embodies the invention of the Hamilton patent in a machine for automatically recording the length of time a long-distance telephone has been in use, claim 1, *held* infringed by a new machine, made by defendant after having been enjoined from infringement of said claims, and the offering for sale of such new instrument to have been a violation of both the preliminary and permanent injunctions, constituting a contempt of court.

2. SAME—PROCEEDINGS FOR CONTEMPT.

The attempt of a defendant who has been enjoined from infringement of a patent to see how closely he can imitate the patented device without infringement is not looked upon with favor by the courts, and where the new structure in fact infringes it is no defense to contempt proceedings for violation of the injunction that defendant acted under advice of counsel.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 479; vol. 38, Cent. Dig. Patents, §§ 616-618.]

In Equity. In the matter of petition for attachment for contempt.

Edwin J. Prindle, for petitioner.

Frederick L. Emery and J. Steuart Rusk, for respondent.

HALE, District Judge. This case now comes before the court upon a rule to show cause on a petition for attachment for contempt, brought by the complainant against the defendant. This court, in 132 Fed. 20, had before it the question of the validity of the patents in suit and of their infringement. The court ordered a decree to be entered for the complainant, for an injunction, and for an accounting. A preliminary injunction had already been decreed by the court. Defendant is charged with violating both the preliminary and the final injunctions. The affidavits brought before us show that since the issuance of the injunction the defendant has designed, manufactured, and offered for sale a certain machine, which is referred to for convenience as the "New Wilson Machine." The evidence offered in the affidavits tends to show that this machine is designed for use on telephone switch boards. It consists of a case, having a rotating clock movement, an annular die within a stationary dial die. The annular die is provided with two graduations, spaced apart a distance equal to the initial period allowed by the telephone companies for the minimum charge, usually three minutes. The machine shows a pointer in juxtaposition with the zero or initial graduation, the pointer being curved around to connect with the last graduation, the two graduations and the pointer thus forming a U-shaped or horseshoe figure. The annular die rotates once an hour. Within the annular die is a disk carrying an hour hand. A single platen serves to press a card against the dies. The card is held in a definite position by the base of the bracket which forms the guide for a plunger stem, and by another guide secured upon the frame of the

machine. In the operation of the machine, the card is placed against the guides. When the telephone is put in use, the platen is depressed, making an impression showing the hour dial and the zero or initial graduation, with the pointer in juxtaposition thereto. It also shows the final, or three minutes, graduation, and also the hour hand. At the close of the period of the use of the telephone the card is again replaced, and the platen again depressed, resulting in a second impression of the hour dial, and in a second impression of the pointer. The initial and the three minutes graduations are also imprinted. The hour hand is also again printed, but, as nearly all the telephone messages are less than three minutes in duration, the change in the position of the hour pointer is usually very slight. It will be seen that the impressions of the rotating graduations and pointer are made very close to the graduations of the hour dial; and so the period of use can be determined by simply counting the graduations on the hour dial occurring between the two impressions of the pointer. It can also be determined at a glance whether or not the initial period has been exceeded by noticing whether or not the two horseshoe impressions formed by the zero and three minutes graduations and the pointer overlap. If they overlap, it is evident that the telephone was in use less than the initial period, and that there are no excess minutes to be charged for. If the two horseshoe impressions are separated from each other, it will be seen at a glance that the initial period was exceeded. The amount of excess time can be determined by counting the graduations on the hour dial, either between the two impressions of the pointer, or between the first impression of the three minutes graduation and the second impression of the pointer.

The defendant urges that his machine is merely an adaptation of the time stamp of the Emerson patent, and that it involves nothing new when compared with that patent. We have already discussed the Emerson patent in our former opinion, and have stated the material elements in the time stamps which were brought before us in considering the prior art. The Emerson machine was not intended automatically to record elapsed time. Upon a careful examination and study of the new machine, we are satisfied that the defendant has added new elements to the Emerson patent, and has brought his device within the range of infringement. In coming to this conclusion we have given full weight to the very elaborate, ingenious, and able argument of the learned counsel for the defendant. The Emerson patent was not an anticipation of the patents at issue in this case. His machine was not a device for automatically recording elapsed time. The defendant appears to have taken the Emerson stamp as his basis, but he has added elements to it which have made it a device for automatically recording elapsed time. He has made use of the transverse end of the pointer or arrow, which appears, as it seems to us, to be by chance in the form of a horseshoe. This he has modified and applied in such a way as to make it capable of showing at a glance a three-minutes interval of time. He has thus made two graduations out of the two ends of the horseshoe device, and made these two graduations to show at a glance whether the initial period has been exceeded. It will be noted, also, that the time in minutes within the grasp of the horseshoe, or outside of it, can be deter-

mined by counting the graduations on the hour dial, which may be conveniently used for that purpose, and is evidently intended for such use. The new machine also shows guides which were not in the original Emerson patent, but which are necessary for effecting an accurate second impression and for automatically recording elapsed time. He has effected what he assumes to be a great improvement over the timometer, or the calculagraph, in that the horseshoe device shows at a glance whether or not a conversation has extended beyond the limit of initial time. The series of two graduations made by his horseshoe device seems to be an equivalent in its purpose, function, and method of performance of the semicircle of graduations of the Hamilton patent.

Comparing the defendant's construction now brought before us with the first claim of the Hamilton patent, we are of the opinion that this device is not, in practice, different from the minutes dies of the timometer. The evident purpose of the series of two graduations which the horseshoe device presents is to enable the operator to ascertain automatically the interval of elapsed time. As such, we think it is an equivalent of the series of progressive numerals in the Hamilton patent. We come to this conclusion after giving the doctrine of equivalents the same scope that we applied in discussing the timometer in our former opinion. Comparing the device now brought before us with the first claim of the Abbott patent, we think that the new Wilson machine is an offending device within the terms of this claim. This machine is especially adapted for measuring a space of three minutes elapsed time. To do this it has two graduations, which take the place of the more numerous graduations of the timometer. But this machine, as well as the timometer, is a device for printing a record of intervals and for printing the time of day. The clockwork which drives the shaft in this machine is a "single motor for driving the dies." This machine, as well as the timometer, has a lever adapted by alternate movements to cause impressions to be made from the dies. The machine before us appears to be the equivalent of a combination found in the timometer to infringe the first claim of the Abbott patent. The defendant lays great stress on the fact that infringement of the Abbott patent by the timometer was found by the court because of the additional seconds dial having the two-part platen, whereas this seconds dial and its platen are wholly lacking in the device now brought before the court. Defendant argues from this fact that he has escaped infringement of the first claim of the Abbott patent; but the modification of the seconds elapsed time dies of the timometer, by incorporating into them features of the minutes dies of the timometer, does not in any way eliminate the principles of the inventive thought which forms the subject of this claim of the Abbott patent. It makes no difference in principle whether the seconds dies are taken as the method of printing the record of intervals or whether the minutes dies are so taken. The two sets of dies must be held to be equivalents. It does not avoid infringement to substitute one equivalent for the other, with a corresponding change of the operating lever.

It is not necessary in passing upon the matter of contempt to go into the details of infringement. We are satisfied that the new machine is not in principle different from the timometer in its relation to the first claim

of the Hamilton patent, nor in relation to the first claim of the Abbott patent; we think it is an infringement of the first claim of both patents. We are of the opinion that both machines perform the same function in substantially the same way to effect the same result. The whole testimony brought before us in the affidavits tends to persuade the court that the defendant, in producing this device, was endeavoring to avoid infringement, and at the same time to imitate as closely as possible the devices which we have passed upon in our former decision. That he did this under the advice of counsel is no defense. The attempt to see how near one can come to an infringement and escape it involves great danger, and is not looked upon with favor by courts. We are of the opinion that in making his new machine the defendant has violated the preliminary injunction in this case; and that, by offering the machine for sale and furnishing it to others to use, he has violated both the preliminary and the final injunction. We will not now pass upon the question of penalty, but leave it for a future decree. Let the decree therefore be entered:

Defendant adjudged to be in contempt of both the preliminary and the final injunction in this case.

CROWN CORK & SEAL CO. OF BALTIMORE CITY v. STANDARD
STOPPER CO. et al.

(Circuit Court, S. D. New York. October 25, 1904.)

1. PATENTS—NOVELTY—SUFFICIENCY OF DESCRIPTION IN PRIOR PUBLICATION.

A prior publication in a paper, patent, or otherwise, will not negative the novelty of an invention unless it describes a complete and operative invention capable of being put into practical operation, or contains such a disclosure of the invention that any omission would ordinarily be supplied by one skilled in the art.

2. SAME—INFRINGEMENT—IMPERFECT CONSTRUCTION OF INFRINGING ARTICLE.

Infringement cannot be avoided by simply constructing the patented thing so imperfectly that its utility is diminished, but such a colorable variation or change is merely evidence of an attempt at evasion by narrowing the function of usefulness of the device infringed.

3. SAME—BOTTLE STOPPERS.

The Painter patents, No. 468,258, covering broadly a bottle-sealing device consisting of a flat disk of wood or similar material inclosed in a hard metal cap, preferably of tin plate, having a pendent flange provided with corrugations, and adapted to be bent into locking contact with a shoulder on the neck of the bottle, and No. 582,762, for a specific form of construction of such general invention, were not anticipated nor deprived of patentable invention or novelty by anything in the prior art. Claims 1, 2, and 3 of the first patent and 1 and 2 of the second also held infringed by the device of the Patterson patent, No. 682,993.

In Equity. Suit for infringement.

Wetmore & Jenner and Robert H. Parkinson (John C. Rose, on the brief), for complainant.

Phillip, Sawyer, Rice & Kennedy, for defendants.

TOWNSEND, Circuit Judge. Complainant, by its bill, seeks an injunction and accounting by reason of alleged infringement of its patents No. 468,258, dated February 2, 1892, and No. 582,762, dated

May 18, 1897, both granted to William Painter for improvements in bottle-sealing devices. The object sought and successfully accomplished by the patentee was to provide an inexpensive substitute for the long cork, capable of very swift application and of swift and easy removal by the ordinary user, and free from the objections of injury to liquid from use of a cork or the re-use of the ordinary bail stopper, and so perfect in its sealing qualities that it would withstand an interior pressure of 150 pounds. The means employed comprised a thin, flat disk, composed, preferably, of woody matter and gum or other similar materials, inclosed in a hard metal cap, preferably of tin plate, said cap having a pendent flange, which so encircles the periphery of said disk as to confine it against lateral expansion, said flange being provided with corrugations so as to afford circumferential resiliency, and thus be adapted to be bent by lateral pressure into conformity with an annular engaging shoulder on the neck of a bottle. The lower edge of said flange has a projected edge capable of engagement with a lever, whereby the whole cap may be removed from the bottle.

The construction, in a preferred form, of the patented cap, is shown by the following copy of Fig. 2 of patent No. 468,258:



The claims in suit of patent No. 468,258 are as follows:

"(1) The combination, substantially as hereinbefore described, of a bottle having on its head an annular engaging shoulder, a sealing-disk, and a metallic sealing-cap which encircles the periphery of the disk and has a flange which is bent into locking contact with said shoulder, and which also has a projected edge to afford a surface with which a bottle-opener may reliably engage for detaching the cap from the bottle.

"(2) The combination, with a bottle having on its head an annular locking-shoulder and below said shoulder a projecting surface, of a sealing-disk and a hard metal sealing-cap having a flange which is bent into locking contact with said annular shoulder and has a projecting lower edge for engagement by a bottle-opener lever fulcrumed on the projecting surface of the bottle below said edge.

"(3) The combination, substantially as hereinbefore described, of a bottle having a head provided with an annular engaging shoulder, a sealing-disk, and a hard metal sealing-cap having a flange which encircles the disk and is bent into locking contact with said shoulder and is corrugated in the bent portion in the line of said locking contact."

It was not contended on the argument that the patents in suit were anticipated. But it was contended that, in view of the prior art, no invention was required to construct the patented cap. The arguments in support of this contention will be considered in the order in which they were presented by defendants.

It was first argued that patent No. 468,258, hereafter called the "first patent," does not purport on its face to be a pioneer. It contains four disclaimers, which refer to (1) prior "metallic sealing caps; * * * (2) of tinned sheet iron * * * flaring pendent flange, * * * the lower edge of flange ornamentally corrugated; * * *

(3) of hard metal plate * * * provided with a flange cut or slotted; * * * (4) pendent spring-arms, which were corrugated at their inwardly-bent extreme lower ends to afford strong fingers at their points of contact with an engaging shoulder on the bottle." The patents relied on to illustrate the scope of these disclaimers and to defeat the claim of invention will be discussed in the order in which they appear in defendants' brief.

Painter patent No. 468,226, was not pressed on the argument. Although issued on the same date as the first patent in suit, the application therefor was subsequent to the application for said first patent, and for this and various other reasons it need not be discussed.

The Berthoud French patent of 1877, and the Gedge British patent of 1878, founded on the Berthoud invention, with certain additions, next discussed by the defendants, may be treated together under the head of Berthoud-Gedge. Most of the argument on both sides as to validity is necessarily directed to a discussion of the disclosures of this patent and the history of its devices. The defendants' expert fairly states the invention of Berthoud as follows:

"A cap of tin [tinned] sheet iron having its flange at right angles to its top is forced down upon a glass vessel, there being a sealing ring or disk interposed between the cap and the vessel, and the cap is then affixed to the glass vessel by bending in the flange of the cap with a rubbing or milling tool, the flange being bent in without shock or jar and far enough to hold the cap in place on the vessel."

Berthoud-Gedge further states that the cap may be removed "by inserting any pointed instrument beneath it"—one of the ways described by Painter in which his cap may be removed. It may be assumed that the edge of the flange of said cap might be sufficiently projected to permit the insertion of such pointed instrument under certain conditions. While Berthoud does not show his cap applied to the specific type of bottle described by Painter, such bottles were old in the art. And inasmuch as the removal either of the Painter or Berthoud cap by a "pointed instrument" is attended with difficulty, and Berthoud subsequently, in his additions, described the use of tearing strips therefor, defendants have shown by Livermore patent of 1866 that it was old in the art to remove caps from receptacles by means of openers which engaged the projected edge of the flange of a cap. It is therefore claimed that:

"The Berthoud contribution to the bottle-sealing art, as it appears on the face of the French patent and on the face of the British patent, is a bottle cap consisting of tinned sheet iron and containing a sealing disk, the cap being locked to a bottle having an annular locking shoulder thereon, by bending the flange of the cap beneath the shoulder, the flange being so bent in that the cap can be removed by inserting a pointed instrument beneath the flange."

And to this may be added the claim that Livermore disclosed a method of removal by a lever such as is shown by Painter. Glass jars containing soup, closed by the Berthoud cap, provided with a tearing tongue, were in use and on sale in this country for several years prior to 1890. The reply to the claim as to the "projected edge" is as follows: The Berthoud-Gedge patents recite that "the closing of the metal on the glass is somewhat dangerous," and propose to remedy this difficulty by the application of gradually applied pressure through

a rubbing tool, so that by a process of spinning or rubbing the edge of the metal might be bent down gradually, or, as the patentee says, "without any shock." This operation would naturally also result in a close-fitting flange edge. In the original Berthoud patent no means of removal was suggested. But in its additions and in Gedge are described the tearing strip or tongue, already referred to, projecting beyond the circumference of the disk, which, being raised, "may be grasped with the handle of a knife, a key, the end of a corkscrew, or any article which will permit the fingers to get a good grip of it. Then, without any great force, the tin may be torn from part or the whole of the surface of the lid or cover so as to produce a section dividing it."

The necessity of this opening appliance and the impracticability of removing the cap with a pointed instrument is emphasized by Gedge, who says, referring to the projected lip, "For without it there would be great difficulty, and even danger, in opening a glass bottle," etc. Berthoud says:

"This arrangement for opening the seal is of as great importance as the seal itself, for, without it it was difficult, and even dangerous, to open a flask which does not have the large base of a tin. The tool used might slip, and thereby wound the person attempting to open the flask."

This cap, therefore, was confessedly by the statements of the patentees capable of application only by a gradual operation, such as that of spinning, and incapable of practical or quick or safe removal by a "pointed instrument." Nor could it be removed by the Livermore opener without material modifications, because the upward movement of its engaging lip would break the Berthoud-Gedge bead, as it would the Painter shoulder. And it is at least doubtful, in view of the conflicting testimony of the experts as to their experiments, whether the Livermore opener, even with the modifications made by defendants, could be practically used with the Berthoud or Painter cap. It would seem, therefore, to be established by the foregoing facts, in connection with the Berthoud drawings, that its spun, uncorrugated, close-fitting flange did not present any such projected edge as that of the first or second claims of Painter, or any edge which could be readily engaged with any opening lever of the prior art. But even if it could be so removed by a pointed instrument or engaged by a lever, the result is totally different in its effect upon the two caps. Painter's cap is not necessarily injured by removal, because only the folds of its corrugations are spread apart, and it may be replaced for temporary use, Berthoud-Gedge, being without corrugations, and therefore having been spun on and fastened necessarily by consequent molecular change in the metal, could ordinarily be removed only by a process of destruction similar to that described by the patentee in the use of his tearing device. There is no evidence that said cap was ever actually removed by an opener engaging the edge of the flange.

The foregoing statement is made upon reasoning from the proved facts, and without reference to the testimony of experts, on the one side, to the effect that the removal of the caps was quickly effected and without injury by the Livermore opener, and of one expert on the other side that in his strenuous efforts, using his "best intelligence to find the most favorable point of attack on the cap by the so-called Livermore

opener [the modified form introduced by defendants], * * * after exerting my utmost strength several times, I failed to produce any useful effect whatever in removing the cap, but did produce a contusion of my hand"; and of another expert that he exerted himself to his apparent utmost without budging the cap, and that he contused his hand also. Berthoud had neither the corrugated flange of Painter nor its equivalent. And herein is found the crucial test whereby Berthoud-Gedge is differentiated from Painter. Berthoud, recognizing "that the operation of setting [resistant metal] upon glass is somewhat hazardous," conceived the idea of subjecting a plain cap "with a right-angle bend" to the action of "a rubbing tool, * * * and to bend down the edge of the metal without any shock," and by means of said gradual rotating pressure effecting a molecular change "the setting of the metal around the neck of the bottle is produced." Painter conceived the idea of providing corrugations in his flange so as to afford "the circumferential resiliency, which is a characteristic feature." This resiliency permitted instantaneous outward lateral circumferential pressure, because the outer folds of the corrugations not only acted as a cushion to prevent shock, but served to transmit such pressure to the inner folds of the corrugations, and effect their hermetical closure with the neck of the bottle. Berthoud constructed a plain metal capsule adapted to be gradually spun onto the bottle neck. Painter constructed a cushioned metal capsule adapted to be instantaneously forced against the bottle neck. Thus the two devices were radically different in conception, construction, function, and result. This and the other fundamental differences previously discussed, in the whole plan of the two structures, indicates the reason why Berthoud and Gedge later suggested the tearing strip as the only practicable means for removal, and why their cap was finally abandoned, and why neither they nor any other inventor or skilled mechanic during the 13 years which elapsed between the date of said patents and the Painter application ever conceived of the possibility of adapting the Berthoud-Gedge construction, or actually modified it, so as to embody the theory of the Painter invention.

The next alleged anticipation discussed by defendants is Whittlesey patent No. 38,617, dated May 19, 1863, for "a cap for fruit jars." The specification states that:

"The nature of this improvement consists in striking up a flat piece of metal into a cap having a flat top, slightly tapering sides, and corrugated flange edge, the object of which is to produce a cheaper, more durable, useful, and ornamental article for sealing cans, jars, etc., air-tight."

The "corrugated flange edge" of this cap, if sufficiently extended, might be bent in so as to grip a shoulder of a bottle neck, and it is claimed that such bending could have been effected by the Berthoud spinning machine. There is no proof of any prior use by Whittlesey in any way like that of the patent in suit, and no statement in the specification of any proposed mode of application of said edge. Whether the corrugations were intended to afford a projected edge to facilitate removal, or to be bent in, as above suggested, or were merely the element specified, which made such a top "a more ornamental article," is not indicated in the patent. The construction specified and claimed of "slightly tapering sides," shown in the drawing as flaring in a down-

ward direction, would seem to indicate that the sloping sides of the cap were to be pressed down against the side of the cap or jar until a tight fit was effected. Whittlesey shows no sealing disk, no shoulder, no engagement.

Counsel for defendants, in his argument in support of noninfringement, referring to defendants' modified Whittlesey cap, admits "that in applying such a cap as this one to a bottle * * * there is nothing but plain metal opposite the locking shoulder on the line of its greatest circumference, which is obviously the line where the greatest pressure is brought to bear by the applying tool," and "that the cap could not be forced down onto such a bottle far enough to compress the sealing disk, if at all, without absolutely stretching the metal, which is precisely what the patentee is endeavoring to avoid, and what his invention was devised to prevent." If Whittlesey disclosed a construction either capable of modification, without the exercise of invention, so as to accomplish the result of Painter, or one which could have been combined by a skillful mechanic with Berthoud-Gedge so as to produce the Painter cap, the question arises why was it subjected to the obscurity of a paper patent for nearly 30 years, when the whole commercial world of bottlers were calling for some substitute for the ancient long cork and bail stopper? It is thought that by reason of the imperfect disclosures of this brief and indefinite patent and its history of obscurity it falls within the general rule that a prior publication will not negative the novelty of an invention unless it describes "a complete and operative invention capable of being put into practical operation" (*Seymour v. Osborne*, 11 Wall. 516, 555, 20 L. Ed. 33), or contains such a disclosure of the invention that any omission would ordinarily be supplied by one skilled in the art (*Chase v. Fillebrown* [C. C.] 58 Fed. 374; *Downton v. Yeager Milling Co.*, 108 U. S. 466, 3 Sup. Ct. 10, 27 L. Ed. 789).

In *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658, the Supreme Court says:

"Their device evidently approached very near the idea of an equalizer; but this idea did not apparently dawn upon them, nor was there anything in their patent which would have suggested it to a mechanic of ordinary intelligence, unless he were examining it for that purpose. It is not sufficient, to constitute an anticipation, that the device relied upon might, by modification, be made to accomplish the functions performed by the patent in question, if it were not designed by its maker, nor adapted, nor actually used, for the performance of such functions."

The situation herein is aptly stated in *Robinson on Patents*, § 335, as follows:

"So when the inventor of the patented invention has included in the art or instrument some act or part without perceiving its significance, and thus, in patenting it, fails to specifically describe such part or act, although, if his invention had been practically employed, such act or part might have become known to the public, his patent does not place it in their reach."

See discussion by Judge Putnam in *Chase v. Fillebrown* (C. C.) 58 Fed. 374, 377, 378.

Butler patent, No. 128,849, of 1872, shows a metal cap stamped down in the center so as to create an "annular depression around its rim

on the under side," and a flange with slitted edges. The cover is secured to the jar by means of melted wax, and by "simply turning in the lower slitted edge of the flange E, * * * gives a neat finish to the jar or bottle, but all danger of the packing wasting out or of the top coming off by accident is entirely and successfully avoided." It is claimed by complainant that the drawings of the Norton patent, No. 78,474, referred to by Butler, show that the edge of the flange is to be turned in under the wax to prevent it from running out and to house or protect the rim of the flange. But, irrespective of this question, a cap constructed to be sealed by hot wax and removed by melting the wax, with the edge of its flange turned in so as not to project and be knocked off, and which has no corrugations and could not use the Painter corrugations because the wax would run out and between them, is so foreign to the Painter construction that it will not be further discussed.

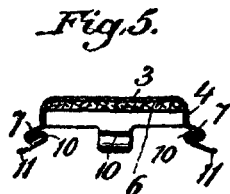
The Drummond patent of 1861, for a paint can, Bellerjean patent of 1868, next discussed in defendants' brief, were not pressed on the argument, and need not be here discussed.

Taylor patent of 1885 is for a self-sealing fruit jar of the ordinary well-known type, except that its circular stopper is fastened down on a shoulder inside the neck of the jar by spring hooks extending downwardly and laterally pressed so as to spring into a recess below the neck of the jar. The hooks are not bent into conformity with the neck or shoulder; there is no cushioning operation; the bottle is closed and opened by springing the side arms in and out by virtue of their elasticity.

The Goulding patent, next reached in defendants' brief, was not pressed on the argument.

Thompson British patent of 1885 is discussed in defendants' brief and upon the argument to show that it was old in the art to provide "a construction in which a projected edge on a cap is used for the purpose of detaching the cap from the receptacle, the edge of the cap being engaged by a suitable opener, the cap being pried or wrenched from the bottle thereby." Thompson is for a metal box with a groove near its top and a conical lid provided with a rim which may be pressed into the groove, and which, the patentee says, may be pried off by a lever. It is very doubtful whether this removal could be thus effected. But if the sole contention of defendants concerning it in this connection, quoted above, be admitted, it is so remote from the Painter and Berthoud-Gedge problem as not to require discussion.

Defendants' cap is manufactured under Patterson patent, No. 682,995, issued in 1901. Its construction is shown by the following copy of Fig. 5 of the drawings of said patent:



The cap, 3, is provided with a downwardly extending flange, 4, which is so slotted, as shown in the drawing, as to provide pendent extensions, which are bent into horizontal folds, shown at 7, "preferably so arranged as to be forced into engagement with the shoulder on the container by bending the leg to which it is connected inward. * * * The fastening device may be readily unlocked by pressing upwardly and outwardly against the fingerhold" at 11.

In support of the defense of noninfringement of claims 1 and 2 of the first patent it is argued as follows:

"(1) The defendants' cap does not have the 'projected edge' feature of these claims, as this 'projected edge' must be defined in view of the language and statements in the specification of the patent.

"(2) Any interpretation of the term 'projected edge' which would cause it to cover the construction of the defendants' cap causes it also to cover numerous constructions of the prior art, as well as a construction specifically stated by the patentee not to have the 'projected edge.'

"(3) The defendants' cap does not have the 'flange bent into locking contact' with the bottle shoulder called for by these claims."

That defendants' flange has a "projected edge to afford a surface with which a bottle opener may reliably engage for detaching the cap from the bottle" (claim 1), or "a projecting lower edge for engagement by a bottle opener lever fulcrumed on the projecting surface of the bottle below said edge" (claim 2), is shown by the drawings of defendants' patent, by an inspection of their caps, and by the undisputed fact that defendants' caps are ordinarily removed by complainant's openers.

The previous discussion disposes of the second contention as to the prior art.

The contention as to "a construction specifically stated by the patentee not to have the projected edge" is founded upon the following language in the specification:

"In some instances it is desirable that the edge of the flange be so thoroughly housed within the recess below the engaging shoulder as to practically eliminate the projecting edge feature, and to thereby secure specially high resisting power—as, for instance, with some kinds of malt liquors bottled for shipment to tropical countries—and then either the loops described in my said other application may be relied upon for opening purposes, or the central perforation for receiving a corkscrew, and it will be obvious that, while all of the corrugated caps shown will afford a well-defined, stiff, and strong projecting edge, either of them, on being well compressed on the line of the middle of the recess in the bottle head, will have the entire lower portion of the flange made substantially flush with and merging with the surface of the bottle head below the recess."

Defendants have caused drawings to be made of this Painter construction and of their construction, from which it appears that the effective projection of the lower edge of their flange extensions is less than that of Painter. Hence it is argued that they do not have Painter's projected edge, but one "so housed as to practically eliminate the projecting edge feature." How far the rights of the patentee should be affected, if at all, by the foregoing statement, is a doubtful question. This statement cannot work an estoppel against the rights of the patentee in this case, for this suggested construction is not involved in the claims in suit. It would seem that it should not be construed as such an admission as would deprive him of the right to proceed against the

user of a cap which, as above shown, does in fact have a cap with such a projecting edge that it is actually removed by complainant's openers in general commercial use. The statement is inserted merely by way of explaining how the "lower portion of the flange" may be utilized to "secure specially high resisting power * * * with some kinds of malt liquors bottled for shipment to foreign countries."

The third contention—that "defendants' cap does not have the 'flange bent into locking contact' with the bottle shoulder"—is without merit. It rests upon the argument that, because defendants have cut out a portion of the flange—a construction suggested by Painter—and have designated the remaining portions of said flange "legs," these extended portions are not part of the flange, but are "spaced locking levers." This contention is highly technical, contradicts the dictionary definition selected by defendants' expert of a flange as "a projecting rim, edge, or rib * * * used * * * to keep the object in place, to facilitate its attachment to another object," and, if permitted, would defeat this meritorious invention, so far as concerns these claims, by the mere mutilation of one of its members so as to escape the charge of infringement.

The defense of noninfringement of the third claim for a flange "corrugated in the bent portion," etc., is founded upon the argument that the first patent is limited to vertical corrugations. The specification of the first patent describes and the drawings show only such corrugations. And it is contended that the functions therein alleged for corrugations can only be discharged by vertical corrugations, and that defendants' horizontally bent flange extensions are not corrugations, and that their folds do not discharge any of the functions claimed for the corrugations of said first patent. These contentions are only sustained so far as it is shown that the horizontal folds of defendants' flange, which are functionally and actually corrugations, have been so constructed in the attempt to escape infringement that they are not adapted to be so effectively applied to bottles having shoulders of different heights, or so safely applied without danger of fracture as those of complainant. The elaborate and ingenious argument for defendants on this point only serves to show that their caps appropriate the functions of the corrugations, but discharge them imperfectly. No man is permitted to evade a patent by simply constructing the patented thing so imperfectly that its utility is diminished. Walker on Patents, § 376. Such a colorable variation or change is merely evidence of an attempt at evasion by narrowing the function of usefulness of the device infringed. Blake v. Robertson, 94 U. S. 728, 24 L. Ed. 245; Whitely v. Fadner (C. C.) 73 Fed. 486. The patentee has described and shown as the best form of his generic invention vertical corrugations, and in one of his claims, not in suit, has specifically claimed them. But the patentee in the specification describes the very construction adopted by defendants as follows:

"Such of my caps as have a slotted flange have in substance a series of pendent arms; but they differ from all prior cap arms in that each arm is so far corrugated that each inner corrugation is adapted to and is forcibly conformed to the contour of the engaging shoulder on a bottle, and therefore such variations as are liable to and do occur in the form and location of said shoulder do not and cannot cause any variations in the relation of the top

of the cap to the upper surface of a sealing-disk, which is forced upon and held in close contact with the mouth of the bottle during the bending of the flange of the cap into locking contact with the engaging shoulder on the bottle."

In fact, a reading of the specifications shows that every feature of defendants' cap and the functions of their corrugations and projected edge are stated by the patentee as elements of his generic invention, but are in many cases distinguished because they are not thought by him to exhibit the best form of the possible embodiments of his invention. It is thought, therefore, that the patentee under the broad claims in suit is entitled to protection against appropriation of his invention as already construed, and which consisted in the conception of a new construction peculiarly adapted for use with a certain well-known type of bottle, and when so used presenting new advantages and hitherto undeveloped practical possibilities of instant sealing engagement, adequate for all ordinary commercial requirements, and without danger of breakage, between a bottle and a cheap, safe, sanitary cap, by means of corrugations serving the purpose of cushions, which both enable the flange to be bent into locking contact with the neck of the bottle by lateral pressure and at the same time protect the neck of the bottle against danger of breakage by the transmission of pressure through the outer folds upon the inner folds of the bottle, said cap being provided with means for instant removal in its projected edge.

Painter patent No. 582,762, hereafter called the "second patent," covers a specific form of the generic invention, wherein the horizontally folded flange is in the form of a bead, which provides the cushioning effect of the vertical corrugations of the first patent. The claims in suit are as follows:

"(1) A hard-metal sealing-cap having a flange provided at its edge with an integral bead, having an open interior and adapted to be bent into engaging contact with a bottle head substantially as described.

"(2) The combination substantially as hereinbefore described, of a bottle having on its head an annular locking shoulder, a sealing-disk, and a hard-metal sealing-cap provided with a flange having a bead at its edge, the said disk being under sealing-pressure on the lip of the bottle, and said bead bent into locking-contact with the bottle-head adjacent to the locking-shoulder, and confining the disk in sealing contact with the coincident surface of the bottle."

Infringement of these claims is so clear that the arguments thereon will not be discussed. The specification of the patent in suit describes defendants' construction and operation as follows:

"For many kinds of service the beads may be open at short intervals at right angles to the rounded edge of the flange. It is not necessary, with these caps, to always compress the entire bead, it being quite practicable to obtain good locking contact if pressure be evenly applied to the bead at five or six different but equidistant points."

But it is argued that these claims do not cover a patentable invention in view of the prior art. British patent to Thompson, No. 2,910, already briefly discussed, is chiefly relied on to support this defense. It shows a flaring metal cap and a beaded flange. The experts are hopelessly in conflict as to whether or not the Thompson bead is shown as containing a wire such as is ordinarily used in such constructions. If it does, it could not be bent into an annular groove provided near the

top of the metal box to which the cap is to be applied. The patentee says it can thus be bent in by pressure, and the weight of testimony supports this statement and the contention of defendants to this effect. If it can be so bent in, it shows a construction within the terms of said first claim, except that it is "adapted to be bent into engaging contact" with a "metal box" instead of a "bottle head." Does this Thompson British patent so far disclose the conception of the second Painter patent as to invalidate it? The patentee says:

"This invention has for its object a cylindrical 'tin' or other metal box and lid constructed in such a manner that when the lid is down on the box a sunken bead or groove in the box allows room and a fulcrum or abutment for a lever to be used to raise the box lid or cover, and so that no amount of side crushing shall separate the bottom from the box, and yet both bottom and lid can be put on and held without solder."

The whole problem solved by Thompson is comprised in this statement. There is no problem of uniting metal with glass, no cushioning bead, no sealing disk, no sealed joint, "the lid also made slightly conical to fit tightly on B (the upper conical part of the tin box), with space to spare between B and the top to allow for wear and the repeated forcing down of the lid." The "impervious fit" is effected by pressure on the upper of two conversely beveled surfaces. It is true that "to make the lid extremely tight" the bead is pressed in, but there is no cushioning against glass by means of pressure exerted on the outer rib and transmitted to the inner one. It is very doubtful whether this construction could be used practically with a sealing disk. The following citations from the testimony of complainant's expert, See, further emphasize the distinctions between the Thompson patent and the Painter second patent:

"The idea is to force the cover tightly down on the box in the hope that the tight fitting will make the joint liquid tight. I can say that in the absence of grinding to place, the joint, while firm and tight, would not resist liquid or gaseous pressure. It is suggested that in some cases the bead of the cover may be pressed or turned into the groove of the box, but it is manifest that, if this be done, while it would serve as a lock, and prevent the actual displacement of the cover, the operation would tend to destroy such tight fitting as had been secured when the cover was forced to place on the head of the box. It is to be borne in mind that the tightness of the closure is due not to any inturning of the bead, but merely to the tightness with which the cover is forced on the head of the box. The cover having been forced on, it is as tight as it can ever become under any circumstances, and no inturning of the bead has any effect in arriving at that tightness of the joint. It merely increases the difficulty of breaking a joint in the formation of which it took no part. * * * In the Painter invention the sealing work of the cap is done entirely by its strains in a vertical direction on a sealing medium, and no sealing effect is gotten by peripheral engagement of the flange of the cap with the external portion of the bottle mouth; and if such close fitting, for the purpose of forming a tight joint, were provided, it would detract from, instead of add to, the sealing capacity of the Painter invention. Reversely, in the Thompson construction, the joint of closure is a peripheral one, and the introduction of the sealing disk involving vertical action would detract from, instead of add to, the merit of the peripheral joint. The two systems are distinctly different. The Painter invention is not only adapted for, but is admirably adapted for, the closure of bottles containing liquids under pressure—gaseous pressure. The Thompson device is not at all adapted for that purpose, and the system could not be practically applied to that

purpose. To realize the Thompson system in bottling liquids under gaseous pressure it would be essential to form the exterior of the neck of the bottle with a taper made with practically unattainable accuracy, and then to form the cap of substantial, thick material, and then to accurately grind the cap in place on the bottle neck. This would be so very expensive as to be quite out of the question for practical purposes. It would necessarily individualize each cap with its own bottle, which of itself would be fatal to availability in the common bottling art. Again, a small particle of foreign matter, a mere grain of dirt, getting accidentally onto a ground joint before it is put together, is fatal to the tightness of that joint. Again, assuming a nicely made cap, properly ground to the bottle, and properly seated thereon to close the bottle and retain its contents, any tinkering with this cap in the way of internally compressing its lower edge would distort the cap and ruin the fit. This Thompson affair may be a very admirable spice box, but the very system on which it is founded precludes its practicable availability in the bottling art."

It is believed that the foregoing discussion covers all the questions which must control the decision of this case. But if there were any doubts as to the validity of said patents, or the utility of the Painter inventions, the overwhelming evidence of the commercial success of the patented cap, its general use, and the extent to which it has displaced all prior devices used for analogous purposes—facts so generally known that the court may take judicial notice thereof—must turn the scale in its favor.

Let the usual decree be entered for an injunction and an accounting.

WILLIAMS CALK CO. v. NEVERSLIP MFG. CO.

(Circuit Court, M. D. Pennsylvania. February 14, 1905.)

1. PATENTS—HORSESHOE CALK.

The Williams patent, No. 666,583, for a horseshoe calk, is void for double patenting, in view of the previous design patent to the patentee for the same device, or, if not, is for a combination of old elements, and only entitled to a very narrow construction, and, as so construed, held not infringed.

2. SAME—DESIGN AND MECHANICAL PATENTS—ANTICIPATION.

A design patent will operate as an anticipation of a subsequent patent to the same inventor, just as though issued to another person, where everything to be found in the one is portrayed in the other. Cary Mfg. Co. v. Neal (C. C.) 90 Fed. 725, followed; Collender v. Griffith (C. C.) 2 Fed. 206, dissented from.*

3. SAME—DOUBLE PATENTING.

A design patent will render void a mechanical patent subsequently issued to the same inventor within two years, as a matter of double patenting, where the two are indistinguishable in their characteristics and are manifestly the outcome of the same inventive idea.

4. SAME—PRIOR INVALID PATENT.

The fact that a prior design patent is invalid, because the subject of it is not within the law, will not save a subsequent mechanical patent for the same device from constituting a case of double patenting; the patentee having enjoyed a nominal, and for a time an apparently unquestioned, monopoly therefrom, and it not being open to him to set himself right for a mistake which he has made in the character of the patent by taking out another and different one for substantially the same thing.

* See, also, 136 Fed. 193.

5. SAME—HORSESHOE CALK.

A horseshoe calk, the whole value of which consists in the uses to which it can be put, and to which the mind of the inventor is therefore addressed, cannot be covered by a design patent.¹

6. SAME—DESIGNS—UTILITY OF—WORDS AND PHRASES.

The utility intended by Rev. St. § 4929 [U. S. Comp. St. 1901, p. 3398], authorizing the granting of a patent for any new, "useful," and original shape or configuration of any article of manufacture, is artistic, and not practical. What is meant is that the design shall constitute something which is artistically worth the while, and is not frivolous or hurtful.

7. SAME—INFRINGEMENT.

Similarity to the eye of a person of ordinary intelligence and observation is what governs on the question of the infringement of a design patent. Useful or functional features cannot be resorted to to make this out.

8. SAME—HORSESHOE CALK.

The Williams design patent, No. 29,793, for a horseshoe calk is void, because the subject of it is not patentable as a design; also, if of conceded validity, *held* not infringed.

In Equity. Suit for infringement of letters patent No. 29,793 for a design for a horseshoe calk, granted December 13, 1898, and No. 666,583, for a horseshoe calk, granted January 22, 1901, both to John R. Williams. On final hearing.

Hervey S. Knight and Beers & Grambs, for complainant.
Archibald Cox and Walter Briggs, for defendant.

ARCHBALD, District Judge. It is to be regretted that the inventor did not at the outset, as he did later, take out a mechanical, instead of a design, patent for his horseshoe calk; for it certainly is in its useful features that the whole value of the invention resides, and not in its pleasing configuration to the eye, whatever that may contribute to it; and, the contrary being the fact, I do not see how, all things considered, either patent can be sustained. So far as the mechanical patent is concerned, everything to be found in it is portrayed in the design patent, which thus stands as an anticipation, the same as though granted to another person, except as the one was applied for within two years after the other issued, and was to the same inventor. This was expressly decided by Judge Wheeler in *Cary Mfg. Co. v. Neal* (C. C.) 90 Fed. 725, where he observed:

"It is said that an inventor of a machine or manufacture may have a patent for the thing and another for the design of the thing; but the description of the thing would show the design, and an inventor cannot have a valid patent,

¹ The subject of design patents is now regulated by Act May 9, 1902, c. 783, 32 Stat. 193 [U. S. Comp. St. Supp. 1903, p. 408], whereby section 4929, Rev. St., is amended so as to read: "Any person who has invented any new, original, and ornamental design for an article of manufacture, not known or used by others in this country before his invention thereof, and not patented or described in any printed publication in this or any foreign country before his invention thereof, or more than two years prior to his application, and not in public use or on sale in this country for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law and other due proceedings had, the same as in cases of inventions or discoveries covered by section forty-eight hundred and eighty-six, obtain a patent therefor."

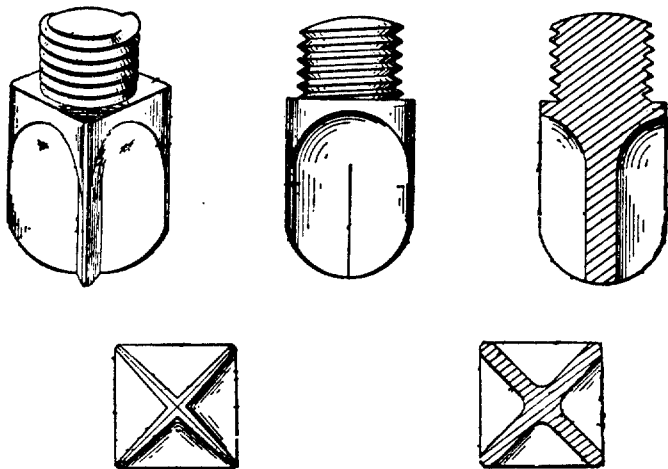
applied for two years later, for that which is described in a prior patent to himself, any more than in one to another."

Conceding, however, that the mechanical patent is saved from being anticipated by the design patent in the present instance, because, although it was not granted until January 22, 1901, it was applied for December 28, 1899, which was within two years of the date of the design patent, which was December 13, 1898, it is nevertheless difficult to see how the two can stand together, so as to escape the charge of double patenting. A person cannot, of course, take out two patents for the same invention (*James v. Campbell*, 104 U. S. 356, 26 L. Ed. 786; *Mosler Safe Co. v. Mosler*, 127 U. S. 354, 8 Sup. Ct. 1148, 32 L. Ed. 182; *McCreary v. Pennsylvania Canal Co.*, 141 U. S. 459, 12 Sup. Ct. 40, 35 L. Ed. 817; *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121); the reason being that the power to create a monopoly is exhausted by the first patent, and that a new and later patent for the same invention would operate to extend or prolong the monopoly beyond the period allowed by law (*Odiorne v. Amesbury Nail Manufactory*, 2 Mason, 28, Fed. Cas. No. 10,430). It does not detract from this that one is for a design and the other for a mechanical device, where, as here, the two are indistinguishable in their characteristics, and manifestly the outcome of one and the same inventive idea. It is true that the opposite view was expressed in *Collender v. Griffith* (C. C.) 2 Fed. 206, where a mechanical patent, taken out more than two years after a design patent, was sustained, even though the structure in both was the same; it being held that the purposes of the two patents were different, one being for the shape and the other for the mechanical combination involved. But this does not seem to meet the objection, nor did it prevent a contrary ruling from being made in *Cary Mfg. Co. v. Neal* (C. C.) 90 Fed. 725, already referred to, in the same court. Even if the case can be likened to process and product, each of which may, under some circumstances, be separately patented (*Thomas v. Electric Porcelain Mfg. Co.* [C. C.] 111 Fed. 923), it is to be observed that even there there is no unrestricted right (*Mosler Safe Co. v. Mosler*, 127 U. S. 354, 8 Sup. Ct. 1148, 32 L. Ed. 182). And where, as here, the whole value of that which is the subject of the design patent is to be found, as already pointed out, in its useful, and not in its artistic, features, the proof of which is shown in the attempt to have it extend to both, a subsequent mechanical patent, the purposes of which, without any new inventive idea, is simply to protect the useful part of the same invention, certainly presents a case of double patenting, which cannot be sustained. It is true that in the present instance, as we shall presently see, the design patent is itself invalid, not being within the purview of the law; but that does not change the result. Not only has the patentee, by means of it, enjoyed a nominal, and until now an apparently unquestioned monopoly, with all the benefits accruing therefrom, but it was not open to him to set himself right for a mistake which he had made in the character of the patent by taking out another and different one for substantially the same thing. Whether this could have been accomplished by a surrender and reissue I will not undertake to say.

These observations, however, are somewhat obiter, for, giving the mechanical patent its full force, it is clear that the defendants do not infringe. The single claim is for—

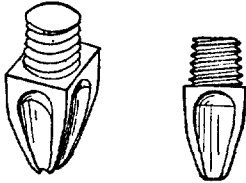
"A horeshoe calk constructed with an attaching screw-shank, a square base, radial blades having vertical flattened beveled edges, vertical straight sides, and rounded, beveled, outwardly-tapering knife-edge lower ends providing a conoidal-shaped tread, and arching recesses between the blades beneath the square base, the widening of the inner ends of the blades to form the arching recesses preventing the calk from becoming completely worn down so as to leave a wrench-hold."

These features are shown in the following diagrams:



The object to be attained as stated by the inventor is "to provide an article * * * which may be forged from high-grade calk steel, which will be more effective and durable in use, will avoid liability of turning the animal's ankles, will maintain its advantageous features until practically worn out, and when worn out will still be in a condition to permit convenient removal without taking off the shoe." Assuming that a calk of this form is possessed of the advantages claimed for it, and that the exact combination is not to be found in the prior art, almost every feature of it, taken by itself, undoubtedly is. It was not new, for instance, to attach the calk to the shoe by a screw shank; this—if not, indeed, an obvious arrangement—being shown in some nine different previous patents from the Jorey (1859) down. Neither was it new to have a square base (Jorey, Chase, Lesueur, Hall and Petzold), nor radial cruciform blades (Chase, O'Neill, De Pass) having vertical straight sides (Chase, De Pass), nor arching recesses between the blades (O'Neill, Mason, De Pass, De Sales), nor even a conoidal-shaped tread (Mason). Radial blades, with vertical sides, and somewhat rounded knife edge lower ends, are also shown in a design patent issued to the same inventor in 1896; while the form of calk (Exhibit 5) put out and sold by him in the spring of 1897—which was one of the steps, as he says, leading up to the present device—has every feature that is now relied upon except the rounding of the lower

edges by which a conoidal-shaped tread is produced. In addition to this, a calk with a conoidal tread (Exhibit 11) has been manufactured by the Neverslip Company, defendants, for nearly 20 years. With this record against the inventor, it is a matter of some doubt just what point of patentable novelty he is entitled to claim. But without stopping to definitely determine that question, it is clear that the invention is of exceedingly limited range; and that, restricting it as we must, the defendants, as already stated, do not infringe.



It is true that there are many points of similarity in the defendants' calks. A screw shank, for instance, is employed, in conjunction with a square base (Exhibit 20), although in the later forms (Exhibit 10, Exhibit A) this is modified into one with rounded corners. There are also radial blades, having vertical, flattened, beveled edges, and, to a certain limited extent, rounded, beveled, outwardly tapering, lower ends, providing a conoidal-shaped initial tread. Some forms also show arching recesses between the blades, although in others these recesses have a somewhat square shoulder; but, whether one or the other, the widening of the inner ends of the blades, by which the particular form is produced, has the effect claimed in

the patent of preventing the calk from becoming worn down so but that a suitable and safe wrench-hold is left. But all these features are old, as well as the functions assigned to them, and the defendants, in order to infringe, must have adopted not merely a part of the invention, but the whole. The significant point of difference is that where the claim calls for blades with strictly vertical sides, developing into completely rounded ends, the defendants, after narrowing down their calks by tapering the sides, cut off the ends of the blades so as to form a sort of truncated pyramid or cone, the cruciform radial effect being at the same time retained, and an effective gripping surface provided, by a notching or pointing of the ends. Form here is essential, and equivalency of function counts for little, in view of the prior art, as well as the express terms of the claim. The old features adopted had substantially the same functions in the calks in which they were first employed, which the inventor could not, therefore, monopolize. Neither could he make these features his own by assigning certain special functions to them, since these necessarily resided in them in previous devices where they appear, even though not expressly claimed. Arched recesses, formed by the widening of the inner ends of the blades, for instance, were equally effective in the De Pass, the O'Neill, and the De Sales, to prevent the calk from getting worn down so close as to leave no wrench-hold; and rounded lower edges on the blades, to provide a conoidal tread, not only appear, as already pointed out, in the Mason, or the old "Neverslip" peg calk, manufactured by the defendants for years, but is a form into which every calk is likely to get by the wearing away of the corners, which, as pointed out by

the examiner, is calculated to make every one who takes advantage of these common devices an infringer in the mere course of ordinary use. However much, therefore, in some respects, the defendants' calks approach to the invention in suit, they differ from it in others to such an extent that, giving all the effect that can be legitimately claimed for the features which they have in common, infringement is not made out.

I reach a conclusion adverse to the complainants also on the other branch of the case. It was never the intention of Congress, in allowing patents for designs, to duplicate the existing law, so that an inventor, at his option, could cover that which had nothing but a practical value either with a design or a mechanical patent, or, as is now claimed, with both. A distinct class of inventions, having characteristics and features of its own, was intended to be reached by the statute, and to this it is to be confined. It is, indeed, a perversion to attempt to extend it to anything else. *Weisgerber v. Clowney* (C. C.) 131 Fed. 477. It has been accordingly expressly decided that a horeshoe calk, such as we have here, was not patentable as a design (*Rowe v. Blodgett* [C. C.] 103 Fed. 873, 112 Fed. 61, 50 C. C. A. 120); nor a syringe (*Marvel v. Pearl* [C. C.] 114 Fed. 946); nor plates to hold together the ends of machine belting (*Eaton v. Lewis* [C. C.] 115 Fed. 635); nor a thill coupling and washer for carriages (*Bradley v. Eccles*, 126 Fed. 945, 61 C. C. A. 669). In each of these instances it is manifest that artistic configuration, addressed to the eye, practically counted for nothing, the whole value of the device being found in the uses to which it could be put, to which the mind of the inventor was naturally addressed. To say that the form into which such articles are cast adds to their attractiveness to a purchaser, and thus enhances their salable value, enlarging the demand, merely obscures the issue. It is true that this is recognized in *Gorham Co. v. White*, 14 Wall. 511, 20 L. Ed. 731, as one of the objects, in providing for design patents; but that it thereby made the law applicable to anything and everything, without regard to its character, or whether it was otherwise within the purview of the statute, by no means follows. Neither is anything to the contrary to be made out of the word "useful"¹, to be found in the statute. The utility intended by this is artistic, and not practical, as is implied from the context. The design, with respect to the article of manufacture for which it is devised, must contribute something which is artistically worth the while, and which is not hurtful or frivolous. *Westinghouse Mfg. Co. v. Triumph Electric Co.*, 97 Fed. 99, 38 C. C. A. 65; *Rowe v. Blodgett* (C. C.) 103 Fed. 873; *Marvel v. Pearl* (C. C.) 114 Fed. 946. *In re Seaman*, 4 O. G. 691; *Ex parte Norton*, 22 O. G. 1205;

¹Rev. St. § 4929 [U. S. Comp. St. 1901, p. 3398]: "Any person who, by his own industry, genius, efforts, and expense, has invented and produced any new and original design for a manufacture, bust, statue, alto-relievo, or bas-relief; * * * or any new, useful, and original shape, or configuration of any article of manufacture, * * * may * * * upon due proceedings had, the same as in case of inventions and discoveries, obtain a patent therefor."

Ex parte Schulze-Berge, 42 O. G. 293. This is not to say that that which is covered by a design may not also have useful features (Hecla Foundry Co. v. Walker, L. R. 14 App. Cas. 550); but only that, where the article to which it is applied has nothing but that which is useful or functional to commend it, a mechanical, and not a design, patent is the proper one to take out. In the present instance, conceding that there may be artistic lines in the configuration of the complainants' calks, these add nothing to it, and amount to nothing, except as they make for its greater usefulness. In that lies its real value, and it is that which the inventor has contributed to the world, if he has contributed anything. As applied to a horseshoe calk, which is made for use in ice, snow, and grime, art is wasted, and display so inappropriate as to be frivolous, and so not useful, within the meaning of the law.

But, even if the patent is not open to these objections the defendants do not infringe. The following diagrams will show what is covered by it:

FIG. I.

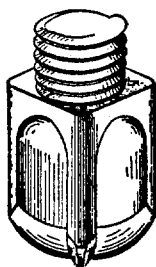


FIG. II.



FIG. III.

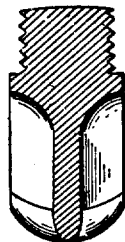


FIG. V.

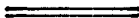


FIG. IV.



"As shown in the drawings," says the inventor, "the leading or material features of my design consist in an angular base, radial wings having rounded corners and ends arched from corner to corner, U-shaped grooves formed between the wings, and inclined portions from the inner ends of the grooves to the sides of the base." Imitation—and close imitation at that—is essential to make out infringement of a design. There may be some range of equivalency, but it is necessarily small. Similarity to the eye of the ordinary man is the test (*Gorham Co. v. White*, 14 Wall. 511, 20 L. Ed. 731); and that the defendants' calk would be mistaken for that of the complainants by any one of ordinary intelligence and observation, who was reasonably familiar with either, I am not prepared to believe. Upon the occasions testified to when there has been any apparent confusion the parties evidently did not know. Looking to the plain difference in configuration between the two, it is only to be explained upon that basis, and they had no right to be confused if they were. Moreover, by giving to their calks the name of "Cant-Slip," where the defendants for years had made use of the name "Neverslip," the complainants invited confusion, if they did not actually bring it about; and how far this may have contributed we cannot say. Of course, the useful or functional features of a design cannot be resorted to to make out infringement. *Hecla Foundry Co. v. Walker*, L. R. 14 App. Cas. 550; *Cone v. Morgan Envelope Co.*, 4 Ban. & Ard. 107. And yet that is what the complainants are compelled to rely upon, in the final analysis here, to sustain the charge. The constant temptation and effort to extend design patents so as to take in functional features on the issue of infringement is one of the strongest reasons for holding to the construction of the law which is adopted above. At most, the utility is an incident. If calculated to serve a useful purpose, it is nevertheless open to any one to attain the same end by using an article which differs from the other in configuration and shape (*Hecla Foundry Co. v. Walker*, *supra*); and that is all that has been done here.

Let a decree be drawn dismissing the bill, with costs, both on the ground of the invalidity of the patents and because they have not been infringed.



WESTINGHOUSE ELECTRIC & MANUFACTURING CO. v. CUTTER
ELECTRIC & MANUFACTURING CO.

(Circuit Court, E. D. Pennsylvania. March 8, 1905.)

No. 11.

1. PATENTS—CONSTRUCTION OF CLAIMS—NEW COMBINATION OF OLD ELEMENTS.

Where claims for a new combination of old elements have been rejected by the Patent Office, and the action acquiesced in by the applicant, and only subsequently allowed when so amended as to contain a single

new feature, the patent will be restricted to that new element, and is not infringed by a device which uses the other elements if that one is omitted.

2. SAME—INFRINGEMENT—ELECTRIC CIRCUIT BREAKER.

The Wright & Aalborg patent, No. 633,772, for an automatic electric circuit breaker, is limited by the prior art to a single new element in the combination shown. As so construed, *held* not infringed.

In Equity. Suit for infringement of letters patent No. 633,772, for an automatic electric circuit breaker, granted to G. Wright and C. Aalborg, March 23, 1899. On final hearing.

Wesley G. Carr and Bakewell & Byrnes, for complainant.

John P. Croasdale and Joseph C. Fraley, for respondent.

HOLLAND, District Judge. The bill filed in this case alleges an infringement by the defendant of claims Nos. 2 and 5 of a patent issued to G. Wright and C. Aalborg on March 23, 1899, No. 633,772, for a new and useful improvement in automatic circuit breakers. The answer denies the validity of the patent, and denies infringement. The history of the prior state of the art is found in the 65 patents which the defendant has offered in evidence, and the discussion of 18 of them by its expert, Cornelius D. Ehret. Three of these patents offered in evidence, however, are very important as bearing upon the prior art, and all three show that each contains a combination of the same elements as the patent in suit, accomplishing practically the same result. Devices similar to that of the complainant's, intended to automatically protect electric apparatus from the destructive effect of too great a current, had been in general use some time prior to the date of the patentee's invention. Wherever electric circuits are used either for lighting or motive power, and the current of electricity is apt to materially exceed that which the circuit is intended to carry, it is necessary to use some device of this character in order that the circuit may be automatically broken when the current exceeds that which the circuit is intended to carry, and, in order to accomplish this, a gap, at a convenient point in the circuit, is made in the conducting wire, the ends of which at the gap are provided with enlarged metallic blocks or plates called "terminals" or "contact terminals." These terminals are stationary, being mounted upon a base, usually of slate or marble. The gap between the terminals can be bridged, so as to restore the continuity of the circuit, by means of a movable conducting piece called a "switch" or "contact member." This switch is usually pivoted so that one or both of its ends may be swung away from the terminals to break the circuit either at one point or two, and is connected with a spring which normally tends to throw it open. The switch is provided with a lever, or other means whereby it may be closed manually against the tension of this spring, and also has a locking device whereby, when thus closed, it shall be caught and held in position. The automatic feature which enables these devices to disengage the lock and allow the switch to spring open when the current becomes too strong is based upon electro-magnetic action. Electro-magnetism is developed whenever a current of electricity passes through a coiled wire, the

space within the coil becoming a magnetic field, which will magnetize an iron core placed therein, or, even if there be no core, will attract a piece of iron so as to draw it into the coil. There are, of course, various forms of electro-magnets, but all are alike in principle, depending upon the circulation of an electric current around a body of magnetizable material, and all of them are characterized by a common feature, viz., that the magnetic attraction increases in accordance with an increase in the volume of the electric current. The magnet is provided with a movable piece called an "armature" or "plunger," which will be forcibly attracted towards it. In these automatic circuit breakers, then, the unlocking of the spring switch is effected by the movement of an armature or plunger, which trips the lock. The armature or plunger is weighted, so that it will not move until the strength of the electro-magnet reaches a predetermined point; and, as this strength is proportionate to the quantity or volume of the current, it is obvious that the device can be set to act only when any predetermined strength of current has been reached. Until this degree is attained, the armature or plunger of the magnet remains at rest, since its weight resists the pull, but, the instant the current passes the predetermined point, the necessary strength is imparted to the magnet, the armature or plunger flies toward it, and the lock is tripped, to permit the springing open of the switch. This method of operation has long been used. All the general principles are common property, and various forms for the individual elements, as well as various combinations of these elements to produce the desired result, were old in the art, and had been employed practically, as well as patented in numerous patents. By these devices the circuit was automatically broken when necessary, but in that operation there was danger of destroying or impairing the usefulness of the device, as it was found that, when a strong electric current is interrupted, an electric arc of considerable intensity springs across at the moment of rupture, and evolves intense heat, which may act destructively upon the material of the terminals or the switch itself. Ordinarily, the switches and terminals are made of copper, since that material has great conducting power for electricity, and affords but little resistance to the passage of the current. The heat of the arc, however, would be sufficient to partly melt and thus injure the faces of the copper terminals and switch, so that the contact thereafter would become less and less close, and the action would be impaired. To avoid this danger, it has long been customary to make the switch a twofold or double element, in which the main contact member was a copper bridge, but in which there was a supplemental piece, called a "shunt contact," formed of carbon—a material which is highly refractory, and which will bear the intense heat of the arc without destruction. The copper main contact terminals were correspondingly supplemented by carbon shunt terminals, with which the carbon shunt contact piece came in contact. As the arc does not occur until the moment of final rupture of the circuit, it was customary to separate the copper main member of the switch from its terminals whilst the carbon shunt piece of the switch was still in

contact with its carbon terminal, so that, before a destructive arc could be formed, the copper was at a safe distance, and the arc was limited to the region where the indestructible carbon contacts were situated. This feature is termed the "delayed break" at the shunt contact piece. Conversely, when the switch is being closed, an arc was liable to be formed at the instant of the first contact, and hence the devices were so organized as to make the first contact at the carbon shunt terminals, the copper main terminals not being brought into contact until afterwards. This feature is termed the "early closing" of the shunt contact.

At least three of the former patents, to wit, the Larson breaker, patented July 3, 1894, No. 522,527, Potter breaker, patented January 29, 1895, No. 533,083, and the Packard breaker, patented February 23, 1897, No. 577,447, contained all the elements suggested in the above description in various combinations, and can be summarized as follows: (1) A base, having a pair of stationary copper main contact terminals; (2) a stationary carbon shunt contact terminal; (3) a movable main member having a copper contact piece; (4) a movable shunt member having a carbon contact piece; (5) a spring normally tending to throw the main contact member and the shunt contact member into an open position; (6) means for effecting the delayed break and early closing at the shunt contact member; (7) a locking device to hold the said contact members in the closed position against the tension of the spring; (8) a tripping device for disengaging the lock; and (9) electro-magnetic mechanism for actuating the tripping device whenever the current reached a predetermined strength. These nine elements have been variously grouped in prior patents, and are found in combination in the patent in suit, for the purpose of obtaining the same result as they accomplished in other devices.

Claims 2 and 5, which it is alleged are infringed by defendant, are as follows:

"(2) In an automatic electric-circuit breaker, the combination with a base and stationary main and shunt contact-terminals located in approximately vertical alignment thereon, of a movable laminated contact member pivoted to said base, a movable shunt-contact member pivoted to said laminated contact member, toggle-levers for operating said movable members, means for locking the breaker in closed position, and a tripping device projecting into a magnetic circuit."

"(5) In a circuit breaker, the combination with main stationary contact-terminals and a stationary shunt-terminal located above the same, of a pivoted main contact member, a shunt-contact member pivoted to said main member at a distance from its axis of movement, means for yieldingly holding the movable shunt-contact in a position in advance of the plane of the faces of the main movable member when in open position, toggle-lever mechanism for closing the breaker, a latch and electromagnetically-actuated means for tripping the latch, said toggle-lever, latching and tripping mechanism being located below both the main and the shunt separable terminals."

In the second claim it will be noticed "a movable shunt-contact member" is "pivoted to the laminated contact member," and in the fifth claim "a shunt-contact member" is "pivoted to a main contact member," and this is the only new matter the patent contains.

The patent in suit was issued in 1899, containing all these nine old elements in a combination differing only as above indicated from prior combinations, in that the shunt contact piece, by means of a long supporting arm, is so pivoted to the main laminated contact member as to permit its independent action by the closing mechanism; in other words, the shunt contact member or piece is so pivoted to the main contact member as to secure the early closing and delayed break of the shunt contact member directly from the pivoted point by the actuating mechanism. This is the feature which distinguishes the patent in suit from the prior devices, and the patent must be restricted to this only new element. "The File Wrapper and Contents," which contains the history of the case through the Patent Office, show that the patentee, by the numerous rejections of claims and parts of claims by the department, and amendments substituted and finally accepted, received these letters patent solely because of the incorporation in the claims of this new feature, and this limitation is emphasized by the fact that all claims which did not contain it in the application were rejected, and only allowed when so amended. The complainant is therefore estopped from asserting any broader claim than that to which he agreed with the Patent Office. These rejections by the department were based upon the prior art, and the Packard, Larson, and Potter patents were cited against certain claims which originally did not contain it, and which were followed by limitations of these claims by inserting this new feature above mentioned, and then allowed. The first three claims containing this limitation were allowed at once, and four and five were only allowed after they had been amended to include it.

Where claims in letters patent for a new combination of old elements have been rejected by the Patent Office and acquiesced in by the patentee, and only subsequently allowed when so amended by the applicant as to contain a single new feature, the patent will be restricted to that new element, and the patentee cannot complain against other devices of a similar character, because they have used in combination other elements described and used in his patent, so long as this new feature has not been infringed. This point has been frequently considered under somewhat different state of facts in a number of cases. Following are some nearly in point: *Irwin v. Hasselman*, 97 Fed. 964, 38 C. C. A. 587; *McCarty v. Lehigh Valley Railroad Company*, 160 U. S. 110, 16 Sup. Ct. 240, 40 L. Ed. 358; *Morgan, etc., Co. v. Albany, etc., Co.*, 152 U. S. 425, 14 Sup. Ct. 627, 38 L. Ed. 500; *Knapp v. Morss*, 150 U. S. 221, 14 Sup. Ct. 81, 37 L. Ed. 1059; *Sargent v. Hall Safe & Lock Co.*, 114 U. S. 63, 5 Sup. Ct. 1021, 29 L. Ed. 67. The defendant's device contains the same nine old elements found in the Potter, the Larson, and the Packard patents, and the patent in suit, but it is different in arrangement from any of them, in that the early contact and delayed break is effected by two movable shunt terminals, which, when brought together in closing, tilt on their respective pivots so that the faces can adjust themselves in a close fit, the one sliding on the other for some distance, each one of them having a resilient mounting, so that

when they are opened they both spring in somewhat different positions from those which they occupy when closed. The defendant's device secures the early closing and delayed break by a shifting movement of both the shunt terminal and piece, while the complainant accomplishes this through a stationary shunt terminal and a moving shunt piece actuated by a long arm pivoted to the main contact member near the toggle joint.

Let a decree be drawn dismissing the bill, with costs.

CURTIS v. ATLAS CO.

(Circuit Court, D. New Jersey. March 11, 1905.)

PATENTS—INFRINGEMENT—TREAD FOR BICYCLE PEDALS.

The Curtis patent, No. 533,867, for a detachable rubber-faced foot-rest for bicycle pedals, claims 1 and 2, were not anticipated, and disclose invention. Claims 3 and 4 are void, as too indefinite and uncertain. Said claims 1 and 2 also held infringed by the device of the Wirtz patent, No. 679,043.

In Equity. Suit for infringement of letters patent, No. 533,867, for a velocipede treadle, granted to Albert B. Curtis February 12, 1895. On final hearing.

Southgate & Southgate, for complainant.

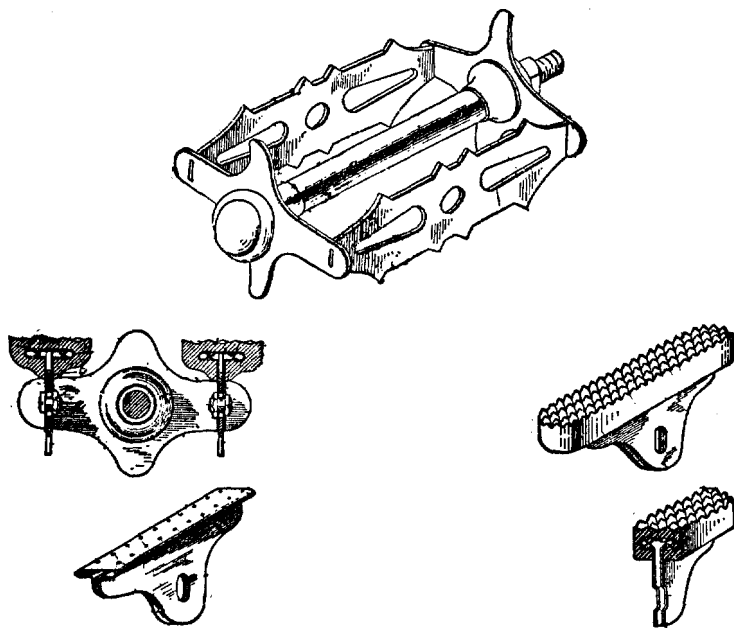
Theodore B. Booream, for defendant.

ARCHBALD, District Judge.¹ It is somewhat remarkable that with all the ingenuity and skill, inventive as well as mechanical, which has been brought to bear upon the manufacture of bicycles, so simple and convenient an appliance as the detachable rubber foot-rest devised by the complainant should not have been thought of before. The fact that it had not, and that it has gone into such extended use as was shown, not only proves that it has met a popular and hitherto unfilled demand, but is also persuasive that its discovery involved the exercise of real invention, and not simply the handy skill of the ordinary mechanic, as one might at first be inclined to believe. The invention displayed may not be of a high order, but it was, at least, sufficient to appreciate the need, and the means for meeting it acceptably, where others had failed, a circumstance which always has weight.

The object is to provide a readily applied and easily removable attachment for converting a so-called "rat-trap" or tooth-edged pedal into one with a rubber-faced tread, in order that the rider may have the benefit of either, on the same machine, at will. The idea is not new, there being several convertible, as well as detachable, devices in existence, at the time that this one was produced, having the same purpose in view; and the novelty of the complainant's invention is made to

¹ Specially assigned.

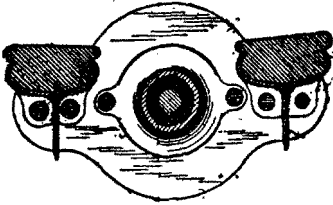
reside, in consequence, in the particular construction adopted. As shown by the accompanying diagrams, the device is made up of a T-shaped metal shell or frame, upon which an upper facing of corrugated rubber is set; the shell consisting of a flattened horizontal tubular body or core, and parallel vertical sides or holding plates, extending down at right angles therefrom, and so separated and arranged as to receive the serrated edge of the pedal plate between them; the rubber facing or cushion being cast upon and completely enveloping the core or body, to which it is anchored by means of holes or perforations in the metal, into which the rubber flows; and the whole appli-



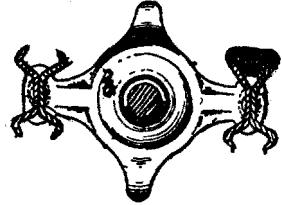
ance being fastened in place, when in use, by a screw-head bolt and nut, extending through corresponding eyes in the holding and pedal plates, provided for the purpose.

That this differs in principle and construction from anything which had gone before is plain. Confining our attention to bicycle pedals, which is the immediate art involved (although there is nothing in any other which need disturb us), convertible foot-rests, by which a rat-trap effect, or a cushion tread, upon the same pedal, is interchangeably secured, are to be found in the Jeffrey (1889), the Wise (British, 1892), the Allday (British, 1893), and the Shultz (1893); and detachable ones, in the Murray (1892), the Jeffrey (1888), the A. Perkins (1894), and the R. Perkins (1895). The conversion in the Jeffrey (1889) and the Allday is accomplished simply by turning the pedal upside down, one surface having a tooth or rat-trap edge, and the other a rubber tread or pad, the pedal being properly characterized as a compound reversi-

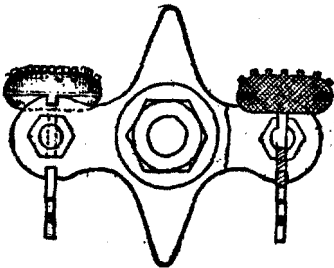
ble one. The same is true of the Shultz, although this may be classed as both detachable and reversible, the rubber strips, which cover over the serrated edges of the longitudinal troughs in which they are set to form an elastic tread, being removable when a rat-trap effect is desired; while in the Wise both constructions are present at the same face, the rat-trap teeth lying a little below the normal level of the



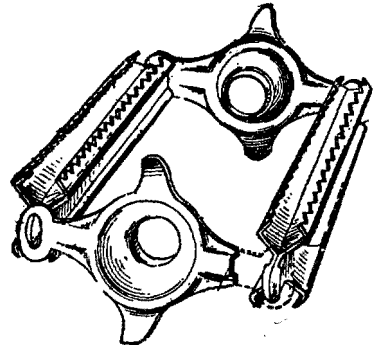
THE JEFFREY (1879)



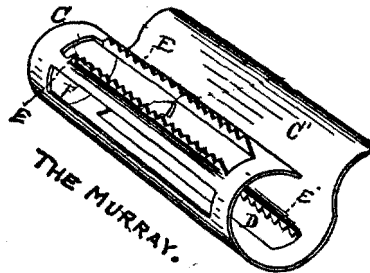
The Shultz.



THE ALLDAY.



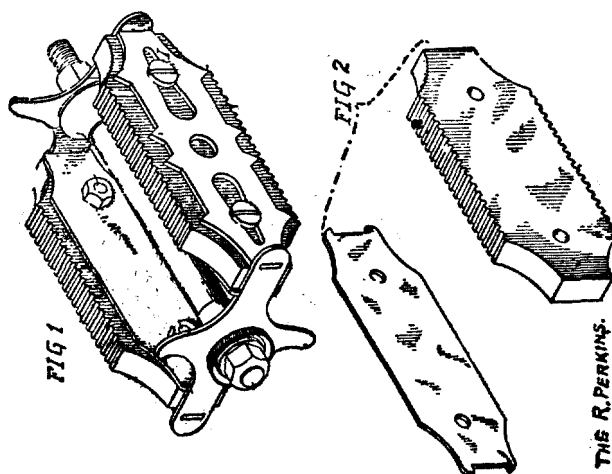
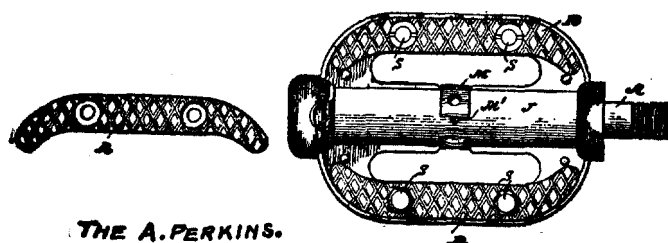
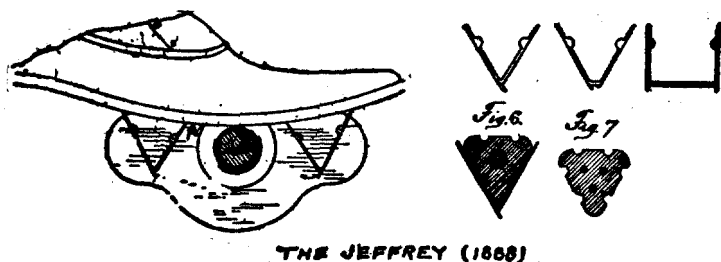
The Shultz.



THE MURRAY.

rubber, and being brought into play by an increased pressure of the foot of the rider, the elasticity of the rubber being designed to give way and enable the teeth to be engaged. These are all so far removed from anything to be found in the invention in suit as to call for nothing more than the notice so given them. Of the detachable devices, the Murray consists of a sheet-metal sleeve, in the form of a scroll, armed on its exposed surfaces with teeth, and so fashioned as to be capable of being slipped over the cylindrical bars which form the normal tread

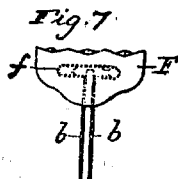
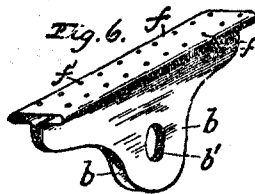
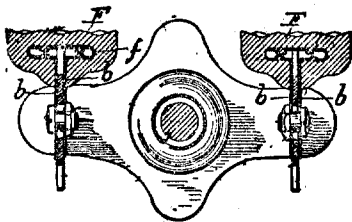
of the pedal on which it is designed to be used. In the Jeffrey (1888) the ordinary forms are also departed from, and pedals are provided, having V or polygonal shaped troughs upon their upper surface, into which removable rubber strips are set, which are held in place by ribs or corrugations extending along the sides of the troughs, and fitting



into corresponding recesses in the rubber; while the upper edges of the troughs are extended above the surface of the pedal and provided with teeth, so that, upon the removal of the rubber strips, a rat-trap edge is laid bare. The A. Perkins, also, has detachable flat rubber strips or pads, which are bolted to the surface of the pedal, and still further held in place by flanges on the outer edge of the pedal plates. Where it is desired that the pedal shall be convertible, these flanges

are given rat-trap teeth, which are brought into service by the removal of the pads. In the R. Perkins the usual metal pedal plates, with spurs or teeth of the ordinary rat-trap type, on both edges, are shown; the detachable device consisting of blocks of rubber, having corrugated wearing surfaces, which are secured by clamping plates and bolts against the inner face of the pedal plates, and, being wider than them, project above and beyond the rat-trap teeth upon the edges. This may be regarded as one of the most effective devices preceding that in suit, and in some respects approaching the nearest to it. But, like all the other detachable foot-rests which have been spoken of, it has to be fitted in size and construction to the particular form of pedal upon which it is to be used; and neither does it possess, any more than the rest, the unitary structure, which is a conspicuous point of merit in the one in hand. Differing in this, and other respects too obvious to require discussion, from anything which had gone before, the present invention is clearly new and valid.

The question of infringement is not so readily disposed of. It depends upon the construction to be given to the claims of the patent by which the invention is defined. There are four of these, and all of them are relied upon as follows:



"(1) In rat-trap and similar pedals for velocipedes, detachable foot-rests, adapted to be applied to the rat-trap plates, and having parallel holding plates projecting therefrom, adapted to be fitted to said rat-trap plates, and means for fastening said holding plates to the rat-trap plates, substantially as and for the purpose set forth.

"(2) In rat-trap and similar pedals, the detachable foot-rests, F, F, adapted to be applied to the rat-trap plates, in combination with an irregular shaped, metal-holding plate fastened thereto, by embedding a portion thereof in said foot-rest, and consisting of the central body, f, and parallel plates, b, b, projecting at right angles therefrom, and means for fastening said parallel plates to the rat-trap plates, substantially as and for the purpose set forth.

"(3) A detachable foot-rest for rat-trap pedals, having a clamp shaped to receive a rat-trap plate, and faced with rubber, and means for detachably securing said clamp to said plate, substantially as described.

"(4) A detachable foot-rest for rat-trap pedals, having a perforated metallic clamp adapted to receive a rat-trap plate, a rubber facing cast upon and extending through the perforations of the metallic clamp, and means for detachably securing said clamp to said plate, substantially as described."

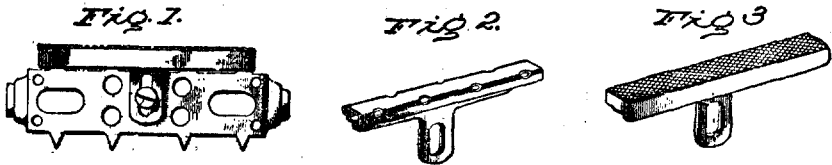
Of these claims, the third and fourth are altogether too indefinite and general to be sustained. The only structural elements suggested for the detachable foot-rest mentioned in the first of these (3) are (1)

"a clamp, shaped to receive a rat-trap plate, and faced with rubber"; and (2) "means for detachably securing said clamp to said plate." But no right is claimed, or indeed could be, to the broad idea of applying a detachable rubber foot-rest to cover over the teeth of a rat-trap pedal, and that is practically all that we have here. With all the legitimate aid that can be derived for it from the specifications, the device which is so put forward consists of nothing more than a so-called "clamp" (admittedly a misnomer), neither limited nor described (and therefore capable of indefinite extension), except as it is to be faced with rubber and shaped or fashioned to receive a rat-trap pedal plate; and means equally general and indefinite, for detachably securing the device in place. This goes far beyond anything for which the invention covered by the patent is supposed to stand, which admittedly contemplates a detachable foot-rest of very definite character and construction, secured in a specifically prescribed manner, upon which its claim to novelty unquestionably depends.

Neither is the fourth claim materially better. It differs from the other merely in the requirement that the so-called "clamp" shall be metallic and perforated, and that there shall be a rubber facing, extending through the perforations, cast upon it. These are details of construction adding something, it is true, and yet but little, the essential characteristics of the inventions, such as its upper tubular body and downwardly projecting parallel holding plates, arranged to receive and hold between them the outer edges of the rat-trap plates, being entirely omitted. Neither is this to be helped out by identifying the "clamp," which is spoken of, with the structural body, having the several parts referred to, which is described in the specifications. No such term there appears, nor is it appropriately applied to or suggested by anything which does. As already stated, it is a misnomer, if so intended, and there is nothing to warrant our carrying forward into the claim, under the guise of it, whatever may happen to be lacking there.

But no such objections can be made to the remaining claims, which are sufficiently expressive of the invention; and the only question is whether they have been infringed. The defendant's foot-rest is manufactured according to the Wirtz (1901) patent, and is substantially, in all respects, like that of the complainant, except that it has one, instead of two, holding plates, or, at least, that there is only one which extends below the body of the foot-rest, or is made use of in securing the device in place. Its exact construction is shown by the following diagrams taken from the patent, and is the same to all appearances as if one of the complainant's holding plates had been cut off at the rubber face, a transformation which can be in fact effected in a few minutes with a file. If two parallel holding plates, of equal length below the core or tubular body, both fitting over the rat-trap edge, and conjointly employed in fastening the foot-rest to the pedal plates, are essential to the complainant's invention, the defendants do not infringe. But otherwise they do. Undoubtedly parallel holding plates—in the plural—projecting downwards from the tubular core or body of the foot-rest are called for, but there is nothing

which requires that they should be of equal length, or that the foot-rest should be fastened to the pedal by means of both. So far as the former construction is concerned, whether we have regard to the terms of the claims or the function to be performed, it is sufficient if they both receive and hold between them the outer edges of the rat-trap plate, a condition which is fulfilled where one of them, as in the defendant's device, stops at the edge of and just before emerging from under the rubber face. A slot or space extending longitudinally between the two is thereby provided, which is adapted to receive and be fitted over the rat-trap plate to be covered, the holding plate which has not been shortened up in the way suggested being left to extend down a sufficient distance to be fastened to the pedal plate with a bolt. This is the whole principle of the invention, and, upon the most ordinary range of equivalents, must be regarded as structurally the same. It presents the not unusual case of a partial dispensing with one of two similar members, the function of both being equally well performed by the one which remains. In-



fringement is not to be escaped by any such expedient, as has been often held.

It is said, however, that the defendant's foot-rest with its single holding plate can be applied in many cases where the complainant's cannot, thus making it much more effective and serviceable; as, for instance, where the pedal plate, to which it is to be attached has an outwardly bulging, longitudinal ridge or boss, as is sometimes provided for the purpose of strengthening it; or, again, where the pedal plates are unusually long; or have simply a plain edge, without any serrations; in which case they do not fit into the slot provided for them in the complainant's device, which is compelled in consequence to ride upon them. Also that the defendant's rest can be clamped in pairs upon the opposite edges of the same pedal plate, giving a cushion tread on both; and that by dispensing with the second holding plate the rubber facing is enabled to be carried down over the edge, and into the interior of the metal shell or core, thus securing an elastic fit for the rat-trap teeth and preventing them from clicking. But assuming all this to be true, the result remains the same. These at the most constitute matters, not of distinction, but merely of advance or improvement, sufficient, it may be, to justify the patent which was granted upon them, but nevertheless leaving the one device dependent upon the other for the general underlying idea, for which it must therefore pay tribute.

Let a decree be drawn sustaining the first two claims of the patent, and finding them infringed, and referring the case to a master to take an account.

BERNARD, COLUMBUS & SUVIO MFG. CO. v. FERNO CO. et al.

(Circuit Court, E. D. New York. February 16, 1905.)

PATENTS—INFRINGEMENT—GAS-HEATER.

The Carter patent, No. 573,205, for a gas-heater, construed, and held not infringed.

In Equity. Suit for infringement of letters patent No. 573,205, for a gas-heater, granted to John W. Carter December 15, 1896. On final hearing.

Louis Hicks, for complainants.

Kenneson, Emley & Rubino (George E. Morse, of counsel), for defendants.

THOMAS, District Judge. The bill is filed to enjoin the defendants from infringing letters patent No. 573,205, issued December 15, 1896, and thereafter assigned to the complainants. The defense is noninfringement. The invention relates to improvements in gas-heaters. The claims are as follows:

"(1) A gas heating-stove consisting of an outer cup-shaped shell, provided with an ascending flue extending upward from its bottom, and open at both ends, and adapted to receive a gas-pipe; an inner cup-shaped shell, disposed in said outer shell, and united therewith at its upper edge, said inner shell being provided with a descending flue closed at its upper end, and surrounding said ascending flue, forming a mixing-space between them; a shallow mixing-chamber being formed at the lower part of the stove between said shells, into which chamber said descending flue opens; said outer shell being provided with jet-openings.

"(2) A gas heating-stove consisting of an outer cup-shaped shell, provided with an ascending flue extending upward from its bottom and open at both ends, and adapted to receive a gas-pipe; an inner cup-shaped shell, disposed in said outer shell, and united therewith at its upper edge; said inner shell being provided with a descending flue closed at its upper end, and surrounding said ascending flue, forming a mixing-space between them, a shallow mixing-chamber being formed at the lower part of the stove, between said shells, into which chamber said descending flue opens; said outer shell being provided with jet-openings, and a dome-shaped top fitting tightly over said cup-shaped shells."

The elements of claim 1 are (1) an "outer cup-shaped shell, provided with an ascending flue extending upward from its bottom, and open at both ends, and adapted to receive a gas-pipe"; (2) an "inner cup-shaped shell, disposed in said outer shell, and united therewith at its upper edge," "provided with a descending flue closed at its upper end, and surrounding said ascending flue, forming a mixing-space between them." The claim provides for two mixing-chambers—one between the inner walls of the descending flue and the outer walls of the ascending flue, and one between the inner and outer shell.

The defendants' structure shows all the parts mentioned in either claim, except as follows: What has been called the "ascending flue" penetrates the outer shell to the inner surface thereof, where it is fastened. It opens into the space between the inner and outer shell, but does not ascend into such space. What has been called the "descending flue," in the patent, in the inner shell, is replaced by a

dome-shaped upward extension of the inner shell, slightly over an inch in diameter, and spanning the mouth of the ascending flue. The vertical height of the dome above the shell is less than one-quarter of an inch. The defendants' structure shows no descending flue surrounding the ascending flue, except in the sense that the dome of the inner shell stands above the mouth of the ascending flue. Hence there is but one mixing-chamber in the defendants' device, to wit, that between the outer and inner shell, in which is included the slight space in the dome, and except that the air and gas is mixed in the ascending flue before it reaches the interior surface of the outer shell.

It is contended on the part of the complainants that the mixing space between the walls of the ascending and descending flues is not a part of the invention, and that it should be disregarded, or that the defendants' structure is equivalent to the complainants' structure, as defined in the claims. It is thought that this contention is untenable. The diagram accompanying the complainants' letters shows a recess or chamber extending upward from the inner shell, with the ascending tube penetrating the same for about two-thirds of the height of such descending flue, with the intention that the gas and air shall pass into this ascending flue, pass out thereof at the upper part of the descending flue, and thereafter pass between the walls of the two flues to the space between the two shells. Nothing corresponding to this figure is found in the defendants' structure. The specification describes the course of the air and gas, and states:

"By the arrangement of the cylindrical portion E', of the shell, E [meaning thereby the descending flue], which acts in the nature of a closed deflector, the gas-and-air mixture is compelled to pass first in outward and then in downward direction through the channel formed by the inner flue, D² [the ascending flue], of the outer shell and cylindrical portion E' [the descending flue], of the inner shell, so that the gas-and-air mixture is heated up in its course to the jet openings, d [in the outer shell], and the perfect combustion of the gas-and-air mixture in connection with the exterior air thereby obtained."

In the defendants' structure the gas and air at the interior surface of the outer shell pass immediately into the space between the two shells; being aided thereby by deflection from the wall of the interior shell, including the dome thereof. In other words, the ascending flue terminates or is cut off at the inner surface of the outer shell, and there is no mixing in the ascending flue beyond that point, nor between the walls of the ascending and descending flues, because there are no such walls above the outer shell. It is true that in the specification the inventor states that—

"The invention consists of a gas heating-stove applied to gas-burners, comprising an interior shell provided with a cylindrical central portion, a hemispherical upper shell provided with a suitable handle, [provided for exclusively in the second claim], and an exterior shell provided with a central flue open at the upper and lower ends, and with openings for the flame, * * * as will be fully described hereinafter and finally pointed out in the claims."

He further says:

"My improved gas heating-stove consists, preferably, of three main portions, namely, an exterior hemispherical lower shell, D; * * * an inte-

rior smaller shell, E, supported by the latter, and which is provided with a central cylindrical portion, E', which is open at the lower end and closed at the upper end; said closed end serving as a deflector for the gas-and-air mixture supplied to said central cylindrical portion."

The defendants' structure shows no such descending flue as the patent contemplates. It shows no flue ascending into the descending flue, "forming a mixing space between them," but simply uses for the purposes of a mixing-chamber the space between the two shells. Hence the gas is neither mixed in the ascending flue after the same passes inside the outer shell, nor is it mixed in the annular space between the two flues.

It is considered that it would be an unallowable reconstruction and amplification of the claim, as read in connection with the diagram and the definite statement of the course of the gas and air, to hold that the defendants' device involved the parts that the patentee has definitely claimed in his combination. Therefore no infringement has been shown, and the bill should be dismissed.

NATIONAL PHONOGRAPH CO. v. AMERICAN GRAPHOPHONE CO.
et al.

(Circuit Court, D. Connecticut. March 30, 1905.)

No. 1,166.

1. PATENTS—INJUNCTION—WHEN GRANTED.

Courts must refuse a preliminary injunction, on affidavits alone, against the conjoint use of two patents, one of which has expired by reason that it was originally taken out both at home and abroad, and its life expired with the term of the foreign patent, which was first taken out, and the other and broader of which has not been adjudicated in the courts as to its features of invention, upon a seriously contested hearing on the merits.

2. SAME—DISSOLUTION—DAMAGES.

The neglect to disclose to the court the fact of the expiration of one of the patents sued upon at the time of obtaining the restraining order is sufficient ground for giving actual damages to the defendant for injuries to its business caused thereby.

(Syllabus by the Court.)

In Equity. On motion for preliminary injunction, and counter motions to vacate indemnity bond and for other relief.

Dyer & Dyer, for complainant.

Philip Mauro and C. A. L. Massie, for defendants.

PLATT, District Judge. It is my impression that the license agreement of December 7, 1896, was intended to maintain the status quo ante of the parties thereto, to the extent that their special types of machines should remain distinct. A license under the earlier patent, No. 397,280, was positively refused and deliberately omitted. If I am wrong, it is inexplicable that the defendant failed to take advantage of claims 15, 16, 18, and 20 of patent No. 430,278, under which patent it claims to have held since the date of that contract an absolute right

to use every feature found in any of its claims; waiting patiently until the American patent became public property by reason of the expiration of foreign patents for the same construction. It appears to be generally conceded that the construction now adopted by the defendants is the better one, and mingles the types, which have in fact been heretofore kept distinct. It is also conceded that said construction is a Chinese copy of the improvements suggested by the claims of the later patent, which there has been an attempt to put in issue. Such a bargain, however, in its very nature, could not outlast the life of the patent; and, if its construction is open to the world, the defendants cannot be the only ones restricted from using it. The real question at issue is whether letters patent No. 397,280 so controls the situation that no one except the complainant is at liberty to use the special features involved in claims 15, 16, 18, and 20 of the expired patent, No. 430,278. This matter cannot be determined on affidavits. Indeed, it is not apparent that counsel for complainant can hope for such action, since they deemed it important to base their demand for relief upon a conjoint use by defendants of the claims of both patents. The order for preliminary injunction is refused.

It goes with the saying that, if the attention of the court at the ex parte hearing had been directed to the now admitted fact that the monopolistic grant of patent 430,278 had expired, neither a restraining order, nor a hearing upon preliminary injunction, would have been granted. The defendants not only demand that the indemnity bond shall be vacated, but that very drastic measures shall be taken toward the complainant. Reflections upon the situation created by the ex parte hearing have caused me very many unpleasant half hours. Now that it is again faced, and dispassionately examined, I am compelled to give the complainant and its counsel the benefit of the doubt. During my years in the profession I acquired a respect for the integrity and high character of the patent bar, and my acquaintance with its members since my present position has brought me into contact with so many of them, from so widely separated parts of the country, has intensified that respect, and esteem has been added thereunto in large measure. I am unable to accept the belief that a malicious motive inspired the action which was taken. The restraining order was almost instantly revoked, and it would seem that no considerable harm, except trouble and expense, can have befallen the defendants, especially when the present attitude of the court shall become publicly known. At best, however, the charge of carelessness against the complainant cannot be eliminated from the proceedings.

The indemnity bond may be vacated, and let the proper order be issued, directing the complainant to pay the defendants, within 30 days, the sum of \$500, as compensation for the damage and expense caused to defendants by procuring the issuance of the restraining order and the hearing on preliminary injunction.

The matter of contempt may remain in abeyance, awaiting the outcome of the above order.

RAILROAD TAX CASES.

(Circuit Court, E. D. Arkansas, W. D. April 1, 1905.)

1. STATES—ATTORNEY GENERAL—POWERS.

Under Const. Ark. art. 6, § 22, providing that the Attorney General shall perform such duties as may be prescribed by law, he has no powers except such as are given by the statutes of the state.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney General, §§ 5-7.]

2. SAME—TAXATION—ASSESSMENTS—APPEARANCE FOR STATE.

Kirby's Dig. art. 6, c. 62, defining the duties of the Attorney General, provides that he shall have authority to represent the state, in any court other than the Supreme Court, only in quo warranto proceedings and actions to prosecute suits against officers indebted to the state for moneys collected and unaccounted for. By other special acts he is also authorized to appear for the state in actions to recover back taxes and in anti-trust cases, etc.; and section 7182 declares that, whenever a cause is brought against a county assessor for the collection of public revenues, he shall be allowed reasonable fees of counsel, etc. *Held*, in a suit against the State Board of Railroad Commissioners to restrain the collection of taxes on assessments made by them, the Attorney General had no power to intervene on behalf of the state.

3. TAXATION—RAILROADS—RAILROAD COMMISSIONERS—ASSESSMENTS—POWERS.

Kirby's Dig. § 6954, provides that the Board of Railroad Commissioners authorized to assess railroad property for taxes shall hold their annual meetings on the first Monday in June in each year, and also declares that the Governor shall have the right to convene the board in special session at any time. *Held*, that the making of an assessment by such board at its meeting in June did not exhaust its power, but that the board was a continuous body, and therefore, after having made an assessment, it had the power to modify the same for the purpose of compromising litigation.

4. SAME—REVIEW.

The propriety of a modification of a railroad tax assessment by the Arkansas State Board of Railroad Commissioners for the purpose of compromising litigation, in the absence of fraud or other misconduct, is conclusive on the courts.

S. B. Johnson, Oscar Miles, E. B. Peirce, Rose, Hemingway & Rose, and Bridges & Woolridge, for railroad companies.

James P. Clarke, for state railroad commissioners.

R. L. Rogers, Atty. Gen., for the State.

TRIEBER, District Judge. In 1903, and again in 1904, a number of the railroad corporations of this state filed their bills in this court to restrain the Board of State Railroad Commissioners, which, under the laws of the state, is composed of the Governor, Secretary of State, and Auditor of State, from certifying the assessments made by them in those years against the property of the complainants. Separate bills were filed by each of the railroads in each year, but, as the allegations upon which the relief is sought in each case for each year are practically the same, the disposition of one of the cases of each year will dispose of all of them.

The relief in the bills filed in 1903 was sought upon the following grounds:

It was charged by the railroad companies that the attempted assessments were illegal and void for the following reasons:

First. Because the board proceeded to make the assessments without having been sworn as required by the statutes of the state.

Second. That the board proceeded to make the assessments without examining the lists and schedules of the description and value of the railroad property, as required by law, but made the assessments arbitrarily and in willful disregard of the rights of the companies.

Third. That the railroad companies were denied a hearing before the board in relation to the assessments of their property, in utter disregard of the rights guarantied to them by the Constitution and laws of the United States and state of Arkansas.

Fourth. That the meeting of the board at which the assessments were made on all the railroad and bridge companies of the state, to the number of 58, lasted only a half an hour, and the assessments were made upon resolutions introduced by two of the members, which read as follows:

"Resolved, that the Board of Railroad Assessment of Arkansas, after consideration of the former assessments of the railroad property operated in this state, has reached the conclusion that the present prosperous condition of the country, which has enhanced the value of railroad property, will justify a reasonable rise of the assessment of all leading lines of railway, and to this end the following valuation is fixed upon the mileage of the railroads enumerated in the list hereto attached, and the Secretary of State is ordered and directed to certify out to the various counties of the state the proportionate assessment based upon the figures here given."

To which resolution was attached a list of 58 railroad and bridge companies, opposite each of which was indicated its alleged former assessment and the assessment proposed by said resolution. By the proposed resolution the valuation was raised about $33\frac{1}{3}$ per cent. above what it had been assessed the year before.

Immediately after that resolution was introduced, another member of the board introduced the following resolution:

"Be it resolved by the Board of Railroad Assessment, that inasmuch as [naming several roads] have become trunk lines, and their earnings have greatly increased in value, and believing that these properties in justice should be raised to a level equal to the present assessment of the Iron Mountain Railroad, I therefore move that the assessment of said roads be raised, and that a general increase of assessment for taxation on all the roads, express, telegraph and sleeping car companies in this state be raised to a general level twenty per cent. above their past assessments. In my opinion, this is but just, in view of the present great prosperity of these roads, and right, and should be done. That the Secretary of State is hereby directed to certify to the clerks in the different counties through which these roads run the assessments as above made."

The last resolution was adopted, and assessments made on the roads in conformity therewith.

Fifth. That these assessments were very much in excess of the assessments made on other property in the state, although the Constitution of the state of Arkansas provides that all property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct; making the same equal and uniform throughout the state.

It is further alleged that the uniform rule throughout the state is to assess property, for the purpose of taxation, at about 40 per cent. of its real value, but that the valuation placed upon the property of the railroads by said board was practically its full value, and therefore much higher than other property in the state is assessed.

An injunction was prayed to restrain the board from certifying the assessments thus made by it to the clerks of the various counties through which the railroads run.

In the bills filed in 1904 the material allegations are that the board, at its meeting, assessed the railroad property at a much higher valuation than it had been assessed before; that it was made arbitrarily and in willful disregard of their rights, and for the fraudulent purpose of increasing the assessment, without reference to the value of its property for the purpose of taxation. It was charged that the property was assessed at more than its actual cash value, although other property in the state is uniformly assessed at the rate of 40 to 50 per cent. of its actual value; that the board, in arriving at the value of the railroads, undertook to value the entire railroad mileage of the roads, a very large part of which, and the most valuable part of it, is in other states, the roads being engaged in interstate transportation; that the board considered all the bonds and stocks of the entire railroad system, and apportioned it according to the mileage in this state as compared with the entire mileage of the system, regardless of the fact that a very large part of the property of the corporations was in other states, and was much more valuable than the part situated in this state, and that a very large part of the property of the railroad companies which was held in other states consisted of bonds and stocks of other railroads, which had been duly taxed by the proper authorities of the states where it was situated. They therefore prayed for injunctions as in the bills filed in 1903.

In the bills for both years the companies offered to pay taxes on a legal assessment, according to the values which controlled the assessment of all other property in the state.

The court granted temporary injunctions to restrain the defendants from certifying the assessments made by them in the years 1903 and 1904, respectively, but upon condition that the railroads pay the taxes on the assessments made by the board in 1902, which they admitted to be fair, and permitted the board to certify to the clerks of the various counties in which the property is situated the assessments made for the year 1902 as the basis upon which the roads should pay taxes until the final determination of these proceedings.

The cases have been pending in this court ever since, and now the Board of Railroad Commissioners have come into court, showing that at a meeting held by the board in pursuance of a call made by the Governor on the 29th day of March, 1905, for the purpose of compromising these suits, they made new assessments for the years 1903 and 1904 of the railroad property of the companies in this state, whereby a reasonable deduction was made, and the property assessed at certain sums, set out in the certified copy of their proceedings, and asking that the same be made a part of the record of the cases pending in this court; that the action of the board be approved by the court, and, with the con-

sent of the railroad companies, the complainants in the several actions, decrees be entered permitting the Secretary of State to certify to the clerks of the counties in which the property is situated these new assessments. The railroad companies appeared in court and consented that such decrees may be entered, and further agreed to pay the taxes on these new assessments, less the amounts paid by them on the assessments certified to the clerks of the counties under the terms of the orders of injunction granted in 1903 and 1904.

The Attorney General of the state asks leave to file an intervention on behalf of the state of Arkansas, and that the state be made a party defendant; protesting against any consent decrees or any action by the court permitting the assessments made by the board on the 29th day of March, 1905, to be considered. In his petition he charges that the board has no such power; that, when it made its assessments in the years 1903 and 1904, it exhausted its powers, and that thereafter it had no control or authority whatever over the matter; that the members of the board are only nominally defendants, but that the state is the real party in interest, and the only party concerned or to be affected by the result of this litigation. He further alleges that the assessments made during the years 1903 and 1904 are proper assessments, and were neither too high, nor in any manner illegal, but that, if they were too high, or if any injustice has been done to the railroad companies by reason of any unlawful acts of the board at that time, the court could determine it by its final decree at the hearing, but that no other body or board has any power to make any changes in the former assessments; and for this reason he objects, on behalf of the state, to any decree, except upon the evidence which may be taken by the parties to the action, and the state in its own behalf. Objections are made to the filing of this intervention on behalf of the complainants, as well as the Board of Railroad Commissioners, the defendants herein.

The Constitution of the state provides that the Attorney General shall perform such duties as may be prescribed by law. Article 6, § 22, Const. Ark. We must therefore turn to the statutes of the state to ascertain what duties the Legislature has seen proper to impose on that officer. Chapter 62, art. 6, of Kirby's Digest, defines his duties; and a careful reading will show that the only authority he possesses to represent the state in any court other than the Supreme Court is in quo warranto proceedings and actions to prosecute suits against officers indebted to the state by reason of moneys collected and not accounted for. By special acts he is also authorized to appear for the state in actions to recover back taxes, in anti-trust cases, and some others; but counsel has failed to call our attention to any statute, nor has the court been able to find any, making it the duty of the Attorney General, or authorizing him, to appear in trial courts on behalf of the officers of the state in proceedings of this nature. In the absence of a statute authorizing him to act or appear for the state, the Attorney General is powerless to do so. *A., T. & S. F. R. R. v. People*, 5 Colo. 63.

Section 7182 of Kirby's Digest provides:

"Whenever a cause has been or may hereafter be brought against any person holding the office of county collector, county assessor or clerk of the county court for performing or attempting to perform any duty or thing authorized

by any of the provisions of this act, or the laws of this state, for the collection of the public revenues, such collector, assessor or clerk shall be allowed and paid out of the county treasury reasonable fees of counsel and other expenses for defending such action or suit, and the amount of any damages or costs adjudged against him."

As the state board, in assessing railroad property, is in fact acting as the county assessor for every county in which railroad property is situated, there is no reason to doubt but that the provisions of this statute apply to it, and authorize it to employ special counsel without calling on the Attorney General for his services.

The Supreme Court of Indiana, in *C., C. & St. L. R. Co. v. Backus*, 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729, held that a statute conferring upon a state board the power to assess certain kinds of property—all other property being assessed by county officers—clothed the state board with all the powers of the county boards of assessors.

There being no statute authorizing the Attorney General to appear for the state in a trial court unless expressly requested to do so, and there being no statute authorizing him to enter the appearance of the state for the purpose of having it made a party defendant to an action pending, by what authority can he do so? The Constitution of the state expressly prohibits the state from ever being made a party defendant in any of her courts (article 5, § 19, Const.), and the eleventh amendment to the Constitution of the United States prohibits those courts from assuming jurisdiction of any action against the state. It may be that the state may waive this privilege so far as the courts of the United States are concerned, but it certainly cannot permit itself, in the face of the constitutional provision hereinbefore cited, to be sued as a defendant in its own courts.

But even if it be conceded that when there is a fund in court, or property in the custody of the court, to which the state claims title, it may for that purpose make itself a party to the action, as was done in *Clark v. Barnard*, 108 U. S. 436, 2 Sup. Ct. 878, 27 L. Ed. 780, still, before the Attorney General can take such a step, he must first be authorized by a statute of the state to do so; and, in the absence of such a statute, neither the Attorney General, nor any other state officer, can waive that privilege—one of the highest appertaining to a sovereign state. This was expressly decided by the Supreme Court of the United States in *Stanley v. Schwalby*, 162 U. S. 255-270, 16 Sup. Ct. 754, 40 L. Ed. 960, where it was held that to make the United States a party defendant in any court is in excess of any power vested by law in the Attorney General of the United States.

A case very much in point was decided by the Supreme Court of South Carolina, in *Ex parte Dunn*, 8 S. C. 207. In that case the Comptroller General of the state instituted an action to sequester the Savannah & Charleston Railroad to enforce a lien claimed by the state of South Carolina for bonds loaned to the railroad company, the interest of which was to be paid by the railroad company, but which it failed to do. Among other defenses, the defendants pleaded in bar that, in a former foreclosure proceeding against the same railroad company, the state, by its Attorney General, had made itself a party defendant to that suit, and submitted itself to the jurisdiction of the court; and

for this reason it was claimed it was bound by all the proceedings therein, and more especially the decree of the court. But the court, in overruling this plea, said:

"Unless the Constitution of a state recognizes its liability to suit in its own courts, it is protected by reason of its sovereign capacity from process issued by judicial authority, except as provided by the Constitution of the United States. The mere consent of an officer of the state, by appearing and answering in its name, cannot bind it by the judgment or decree which may be the result of the suit. The Attorney General, although a law officer of the state, in fact properly belongs to its executive department, and has no more power to control the state by his action in court than the Governor or Comptroller General. Indeed, when a state can be made a party in the Supreme Court of the United States, the process to that end must be served on the Governor. The legislative power, where, in its opinion, the interest of the state demands that it should be protected by a proper representation in a legal proceeding, may authorize any of its officers, or, indeed, any person in its behalf, and bind it by his action."

For these reasons, the petition for leave to intervene and make the state a party defendant must be denied.

This having been disposed of, the court would undoubtedly be justified in permitting the parties to the record to agree to a consent decree; but, in view of the importance to the people of the state of the issues involved in these cases, and the earnest and able argument of the learned Attorney General, made in the very commendable effort to discharge what he deems to be his duty as a public official, we deem it proper to dispose of the other matters submitted to the court by the parties.

It is claimed by the Attorney General that, when the board had made the assessments in 1903 and 1904, its powers as a board were exhausted, and, as a board, it became *functus officio*; that for this reason the action at the meeting held on March 29, 1905, was without warrant of law, and therefore absolutely void. In view of the fact that the statute provides that the Board of Railroad Commissioners shall hold their annual meetings on the first Monday in June in each year, and further provides that the Governor shall have the right to convene said board in special session at any time (section 6954, Kirby's Dig.), we are inclined to the opinion that making the assessment at the meeting held in June of each year does not exhaust its power, but that it is a continuous body, subject at all times to the call of the Governor for the transaction of such matters as are by law intrusted to it. If they cease to be a board after having made the assessment annually, why the necessity of providing that the Governor shall have the right to convene said board in special meetings at any time? The Legislature must have had some object in view when it enacted that provision. It may happen that the board had failed at its regular meeting to assess some railroad company, or by a mistake omitted a part of the property subject to taxation of one or more of the railroad companies; would not the Governor, under this provision of the law, have the power to reconvene the board in special meeting for the purpose of making such assessment? Or if it should appear that a great injustice had been done to some of the railroad companies, could not the board rectify it? Or supposing the assessment had been too low, or it was discovered that there was other prop-

erty belonging to a railroad company which should have been assessed, but by an oversight was omitted, would the board be powerless to correct that? Or if, upon final hearing, this court should dissolve the temporary injunctions granted in these cases, or if it should hold that the assessments were violative of some rights guarantied to these companies by the Constitution of the United States or the state of Arkansas, and for that reason the assessments should be reduced to a lower figure, would not the board be compelled to reconvene in special session, upon call of the Governor, for the purpose of certifying the assessments to the county clerks of the various counties, in order that they may be placed on the taxbooks, and the taxes thereon collected? Unless they possess this power, who could make the assessments? Certainly not the court.

In the case of *Hubbard v. Garfield*, 102 Mass. 75, the facts were these: The board of assessors for a given year struck off certain articles of property, and several years thereafter the board, composed of different individual members, restored these articles of property to the tax list. The contention was made that the board had exhausted its power during the year for which the property was listed originally, and that another board, composed of different members, had no power to reconvene and change that action. The court said:

"The intention of the law is to be judged of with reference to the nature of the proceedings which it affects, and the character given to them by previous legislation; and, with the aid thus derived, it is apparent that the assessors may add new names to the collector's list, as at least one legal mode of making the reassessment. The mode would be less open to objection when the addition is made during the year by the same assessors, and before the expiration of the collector's term of office. But the assessors constitute a tribunal with powers which imply a continued and uninterrupted existence, not limited to the individuals who at any given time compose it. And if this were otherwise, the law in question expressly gives the power of reassessment to the assessors for the time being. By these steps we arrive at the conclusion that the assessment made to the plaintiff was within the jurisdiction of the assessors of 1867, and that the warrant for its collection in the defendant's hands was regular on its face. If it be said that this construction gives to this class of town officers great power over the person and property of the citizen, the answer is that it is no more than must necessarily be had for the discharge of the important and difficult duties connected with taxation, and no more than has been exercised from the earliest times under existing laws. The security is to be found in the integrity of these officers, and not in a too strict construction of the statutes under which they act."

The same question was before the court in *Lemly v. Commissioners*, 85 N. C. 379, and the same conclusion reached.

Counsel for the board, in their petition, call upon the court for approval of the action of the board in making this compromise, but the court does not feel that it possesses such power. The lawmaking power of the state has seen proper to invest this board with the exclusive authority to assess the railroad property in the state. Every member of the board is elected by the people, and is responsible to them for the discharge of his duties. The grave questions involved in these suits, some of which have never been passed upon by any court of last resort, while as to others there is a great conflict between the various courts of last resort, no doubt make these actions proper ones for compromise. The fact that the members of the board are more familiar with the real

value of the property than any court can be, with no evidence before it, enables them to act intelligently on this subject; and as their actions in the premises have not been impugned by any one—there being no charge of fraud or other misconduct—we feel that the action of the board is conclusive on the courts, and for this reason we do not feel authorized to express any opinion as to the wisdom of the board's action. The presumption in which courts indulge is that every sworn officer will discharge his duty in conformity with his oath of office.

We are therefore of the opinion that decrees by consent of all the parties to the record in these cases, based upon the action of the board had on the 29th day of March, 1905, should be granted.

Similar case pending in the chancery court of Pulaski county, state of Arkansas, Hon. Jesse C. Hart, the chancellor of that court, sat with the District Judge; all cases pending in the two courts being heard at the same time. The conclusions reached in the foregoing opinion, as well as the reasons therefor, met the approval of the chancellor, and the opinion was by him adopted as the opinion of the chancery court.

BROWNSVILLE GLASS CO. v. APPERT GLASS CO. et al.

(Circuit Court, W. D. Pennsylvania. March 21, 1905.)

No. 1.

CONTRACTS—TRUSTS—ORGANIZATION.

Where a holding corporation was organized to control the patents and business of all the wire glass manufacturing companies, including defendant, and the latter received its proportion of the stock of the holding company as its share of the consideration for a transfer of patents, etc., and was entitled to be represented on the holding company's board of directors, the organization of such company, etc., constituted a "combination" within a contract by which plaintiff gave defendant a license to use certain patents in the manufacture of such glass, providing that if defendant should enter any trust, pool, combination, or trade arrangement with other manufacturers to control the output or regulate the prices of wire glass, plaintiff should be deemed beneficiary under such contract, combination, or trade arrangement.

In Equity.

John McCleave and Arthur O. Fording, for complainant.

Arthur J. Baldwin and Jas. R. Macfarlane, for Appert Glass Co. and Mississippi Glass Co.

BUFFINGTON, District Judge. This is a bill in equity, filed by the Brownsville Glass Company against the Appert Glass Company for an accounting under a contract. The Mississippi Wire Glass Company and the Mississippi Glass Company are also made parties respondent, but the controversy is wholly between the two companies first named. Prior to September 30, 1899, these two companies were competing in the manufacture and sale of wire glass. This article was made by imbedding a wire netting between two sheets of plate glass by patented processes. On that day the Brownsville Company by written contract executed by itself and all its stockholders, gave an exclusive license under

its patents, gave an option on all its stock, sold its plant and good will to the Appert Company, and stipulated, as did also all of its stockholders, that it and they would not engage in the manufacture of wire glass for five years. In consideration the Appert Company paid a present consideration of \$12,500, and bound itself to pay a semiannual percentage royalty on the gross value of all the Appert Company's sales of skylight, figured-rolled, and wire glass, in the manufacture of all of which it was then engaged. In pursuance of this contract the Brownsville Company went out of business, its plant was dismantled, and its stockholders and other skilled workmen went into the employ of the Appert Company. The Appert Company continued its operations, and in pursuance of the contract paid royalty to the Brownsville Company as follows: For the first half year, ending April 9, 1900, \$3,295.10; for the second half year, ending October 9, 1900, \$4,027.56; for the third half year, ending April 9, 1901, \$9,335.37. In addition to the Appert Company, three others, the Besto Glass Company, of Latrobe, Pa., the Mississippi Glass Company, of St. Louis, and the American Wire Glass Manufacturing Company, of Philadelphia, were in the spring of 1900 engaged in the manufacture of wire glass under patents. At that time, the Appert Company having given notice to the Besto Company it was infringing its patent, Mr. Dilworth, the president of the latter company, conceived the idea of getting the manufacturers together. The plan by which they did so was, as the latter says, an evolution. No written agreement was made between the parties, but their discussion finally culminated in the creation of a common holding company, which took assignments or control of all the patents of the consenting companies, to whom it issued stock in payment. The agreement, its purpose and effect, are stated by witnesses. Thus Mr. Dilworth says:

"The general plan of a deal of this kind is evolution. * * * It would be impossible for me now to go back and pick out step by step as it went along. * * * I was first brought in contact with Mr. Dulles by being notified that we had infringed a patent of the Appert Company. * * * The organization of such a company as the Mississippi Glass Company [the holding one] was first suggested some time in the late fall of 1900. * * * There were a great many meetings. There was a general plan upon which the negotiations were then agreed, the ownership of the patents absolutely by the new company for a stock consideration, and the stock to be issued to the parties owning the patents who sold them. * * * The final result of this series of negotiations was the formation of the Mississippi Wire Glass Company."

He was asked as to the reasons leading to such action and the purpose in view.

"We found that the business could be conducted to better advantage and more economically with one company than with several companies. * * * We had no fixed purpose except for the companies to own those patents, and the future of the business was an unsettled problem. It was the purpose to have the wire glass trade in the hands of the proposed wire glass company so far as we could by the ownership of these patents."

The purpose of the agreement he thus sums up:

"The purpose of the proposed deal was to form a company to purchase the patents of the wire glass companies; for the purpose of making money that way, by the sale of wire glass."

The effect he thus states:

"From the time when the Mississippi Wire Glass Company took over the patents owned or held by the Appert Glass Company, the Mississippi Glass Company, the Besto Glass Company, and the American Wire Glass Manufacturing Company, until within the last three months [testimony taken February 9, 1903], there has not been any other manufacturer of wire glass in the United States, to my knowledge, that I heard of, except in an experimental way by the Encaustic Tile Company. I don't know of any they have put on the market. Since the organization of the Mississippi Wire Glass Company there has been no wire glass sold to the trade in the United States by any other person or corporation than the Mississippi Wire Glass Company, except by the Brownsville Company, of Morgantown, who began their operations two or three months ago."

When asked as to the purpose of the formation of the Mississippi Wire Glass Company, Mr. Abbott said:

"It was organized with a view to consolidating the wire glass business, and possibly doing away with conflict in the matter of patents—rights under patents—and of effecting economies in the manufacture of that particular product."

As to its effect he states:

"I do not know of any other person or corporation in the United States that has made any wire glass for the trade, or sold any to the trade, aside from the Mississippi Glass Company and the Mississippi Wire Glass Company, between the time of the organization of the Mississippi Wire Glass Company and say the 1st of December last [1902]."

The scope of the arrangement between the parties was clearly well understood before their final meeting. Thus Mr. Baldwin, who was counsel in the negotiations for the Mississippi Wire Glass Company, the Appert Glass Company, and the Mississippi Glass Company, says:

"Contracts between the Mississippi Wire Glass Company and the Mississippi Glass Company were drawn some days prior to the meeting, and they were not changed. The contracts between the Appert Glass Company and the Mississippi Wire Glass Company were drawn by me some days prior, and were not changed. The same is true of the Besto Glass Company contract with the Mississippi Wire Glass Company. The contract between the Philadelphia parties and the Mississippi Wire Glass Company was changed. The contract with the clients of Mr. Ballard [the American Wire Glass Manufacturing Company] was changed so that the Mississippi Wire Glass Company received only a license for certain letters patent, and not an assignment; and also that the Mississippi Wire Glass Company paid a fixed royalty for the use of the patents."

Mr. Abbott, who attended the final meeting in Mr. Dilworth's place, says:

"So far as I am concerned, I had nothing whatever to do with the original negotiations. All I knew that Mr. Dilworth had decided that it would be to the advantage of the Besto Glass Company, in view of the competition that was offering, and possible complications as to patents under which we were operating, to accept the offer that had been made by the Mississippi Wire Glass Company to purchase our wire glass patents or the patents owned by the Besto Glass Company."

By the agreement between the Appert and Brownsville Companies it had been stipulated as follows:

"All of the patents owned by the Brownsville Glass Company, to-wit, letters patent of the United States No. ——— for the making of arabesque pattern glass, and all patents now applied for in the interest of the first party,

to-wit, application filed March 17, 1899, No. 709,405, for a process of manufacturing wire glass and all processes used by the Brownsville Glass Company, are to remain its property so far as they are its property at present; but the Appert Glass Company, its successors and assigns, shall have license to use all of such processes and to manufacture without limit under such patents during the said term of five years; and the royalty or bonus above provided for shall be deemed full compensation for the use of such patents and processes during the term of this contract; and the Brownsville Glass Company or the legal owners of such patents will execute to the Appert Glass Company, its successors and assigns, on its or their demand, such formal license as may be necessary and proper to carry this clause into effect. * * * If, at any time within the term of this contract, the Appert Glass Company, its successors or assigns, shall make any contract or agreement with any other manufacturer or manufacturers of skylight, figured-rolled or wire glass, or enter into any trust, pool, combination, or trade arrangement with such other manufacturer or manufacturers, the purpose and effect of which shall be directly or indirectly to regulate, control or apportion the output of any such product in the United States, or any part thereof, or to regulate or control the prices or sales thereof, then and in such case the Brownsville Glass Company shall be deemed to be in right and equity a beneficiary under such contract, agreement, trust, pool, combination or trade arrangement, so that in its accounts with the Brownsville Glass Company the Appert Glass Company shall be deemed to have manufactured and sold thereunder so much, and only so much, of the glass produced by parties hereto as shall be represented by the Appert Glass Company's share of profits under such contract or other arrangement."

The case turns on the question whether this arrangement, which was consummated by the formation of the Mississippi Wire Glass Company, was one embraced by the terms of the thirteenth article, or, in other words, did the Appert Glass Company thereby make any arrangement with any other manufacturer of wire glass, or enter any combination or trade arrangement with such other manufacturers, the purpose or effect of which shall be directly or indirectly to control such product in the United States? In taking up that question, we must not be misled by words and names. It is contended that the patent was sold to the Mississippi Wire Glass Company, and it was paid for in stock; but this is to lose sight of substance. It is true the patent was sold to the holding company, but the Appert Company, by such form of sale, became the owner of one-fourth of that company, held a directorship in it, and was entitled to participate in its profits. Thereafter the holding company issued licenses under its patents to the Mississippi Glass Company. What the contract between these two was, whether it provided for a fixed rental or a royalty on the wire glass manufactured, is not in evidence; but that in some way the holding company profited by the manufacture of glass under these patents, and thereby earned the profits to pay its dividends, is clear. That the transaction was a combination with other manufacturers, and that the Appert Company was, by these agencies, continuing in the glass business, and was not abandoning the business as stipulated by the sixteenth article, is shown not only by its ownership of the stock, but by the references to the transaction in the minutes of the Appert Company. Thus in the minutes of November 22, 1901, we find the following:

"The president acquainted the board of some negotiations with the Besto & Mississippi Glass Companies by which it was proposed that a company be

formed controlling all the wire glass patents issued to them and that the part of this Company would amount to 24½ per cent. of the capital of the wire glass company which would net a dividend to this company per year of at least \$25,000. This arrangement would also bring, when consummated, another in regard to skylight glass and the possibility was that this company would lease the factory to the Mississippi Glass Company, which would bring a good revenue to this company, say \$25,000. The president figured that the company would out of the arrangement be sure of getting \$50,000 a year clear revenue."

The meeting of December 18, 1900, shows:

"The president reported his negotiations with the proposed wire glass combination, saying that everything was going satisfactorily to him; the proposed percentages were 31 per cent. for the Mississippi Glass Company, 20 per cent. for the American Wire Glass Company, plus a guaranty of \$10,000 a year, 24½ per cent. for the Besto Glass Company, and 24½ per cent. for our company. The \$10,000 guaranty brought a good deal of discussion, although the president explained that the said guaranty would be paid by the Mississippi Glass Company, and in the event it was paid by the wire glass company then our company would receive 2 per cent. additional, so that we would receive 25½ per cent. and the Besto Company also 25½ per cent., thus giving both companies the practical control. This additional percentage, the president said, was well worth the \$10,000 per year guaranty. The directors, however, objected to agreeing to any such payment, and the president said it was imposed by Messrs. Elkin and Latta, the original owners of the Shuman patent, and on which they now receive \$10,000 a year royalties. This, these gentlemen did not want to lose and insisted on it before agreeing to anything. Then the president represented that he had agreed with Messrs. Dilworth and Humphreys to the first condition so that the combination took place on the first of the new year. The directors questioned the president in regard to what had been agreed as to organization, salaries, etc., etc., to which he answered in details. The president said that the payment of \$10,000 was demanded for until the expiration of the patent and not for the life of the company, otherwise it would not be considered. The directors recommended that a further explanation on this point should be had and a limitation fixed, or an option given for one or two years for buying the patent at a price fixed in advance. The president realized, he said, the difficulties involved in the equitable distribution of the four companies' rights, and asked the board to name a committee to assist him in his negotiations. No decision was taken, however, the directors saying that the president knew their objections to the proposed agreement and would await his report to the board on the final conclusions. The president stated that the wire glass combination would bring another, that of the skylight glass, and the leasing of the factory to the Mississippi Glass Company for a good rental which would net us thirty thousand a year, the rental to be with option to buy. On motion, seconded, it was resolved, that the plans of the president regarding the leasing of the factory were desirable and authorized him to rent it at a remunerative advantage to our company."

That of January 30, 1900, shows the Appert Company was looking to the profits in the holding company as the source from which its own dividends would be paid. Thus:

"The president reported in detail the negotiations with the proposed new wire glass company, and that they, so far, were progressing satisfactorily; that our counsel had framed the charter and by-laws for the new company, which will be at the capital of \$1,500,000, and will be organized under the laws of the state of New Jersey; that the company will begin business on the 15th day of February, 1901. * * * The president then read the proposed lease of our factory to the Mississippi Glass Company, drawn by our attorneys, and made statements which demonstrated the advantage for this company to rent its factory, which rental, with the share of profit in the new wire glass company, would insure the payment of the interest on the preferred stock of the company, instead of risking, in running the factory, a reduction in the price

of rough and ribbed glass which would risk profits to the stockholders. The president said that the rental of the factory would bring \$25,000 yearly, without including the expense for insurance, taxes, etc., etc., but that the Mississippi Glass Company would make enlargements and that such enlargements would become our property at the expiration of the lease; with the lease the option to buy the plant for \$150,000 would have to be given."

In our judgment, it is clear the Appert Company did enter into an agreement with other manufacturers of wire glass of the character mentioned in the thirteenth article. Was it a combination? That is defined by the Century Dictionary as "the union or association of two or more persons or parties for the attainment of some common end." That such was the case here is clear. That a common end was sought, and that such common end was accomplished by the medium of a holding company, is apparent. As Mr. Dilworth very frankly says: "I was not present at the final meeting, but, as the company was formed, I take it for granted there was some agreement immediately before the formation of the company." In the first place, wire glass was a patented article, or rather was made by processes covered by patents. Now, when the owners combined those controlling patents in a common company, it requires no arguments to convince the business mind that these manufacturers had made a most effective combination with each other, the purpose and effect of which was to regulate and control sale and price. The new company was but the instrument by which that end was accomplished. The constituent companies were, through ownership of the holding company's stock, and their severally apportioned directors, its owner. The holding company was but the agent through which they carried out their purpose of combining their interests and continuing their several competitive businesses in one combined harmonious whole. And in that business each constituent company retained and received its share of the profits through the medium of a proportionate ownership of its stock. The mere fact that the combination of interests took the form of a corporation, and the patents were sold to it, is not important, for the test is, what was the ultimate object in view, not the means by which it was done. If these patents had been vested in one or more trustees to hold for the benefit of the patent-owning companies, no one could say that such companies had not agreed or combined for a common purpose. Now that the holding agency here took the form of a corporation, instead of a trusteeship by individuals, does not change or affect the ultimate purpose. In one case the constituent companies exercise ownership and control as beneficiaries under a trust; in the other through the medium of agreed-upon percentages of stock in a common company. After careful consideration, we are of opinion this combination came within the letter and the spirit of the thirteenth section of this contract. The contract of the Appert Company resulted in putting the Brownsville Company out of business. The sixteenth clause was evidently inserted for the benefit of the latter company, and was in a general way intended to allow it to enter business in case the Appert Company went out of business. But this contingency did not arise. While the Appert Company ceased manufacturing, it did not go out of business, but retained its interest by the agency of stock ownership in a common holding company. It

now seeks to use the forfeiture provisions to escape liability for this royalty. So far as the Appert Company is concerned, it is clear that one of the offices it had in view in using the agency of a common holding company to carry out its purposes of effecting a combination with other manufacturers was to escape liability for this royalty. This we are of opinion it cannot do.

A decree for an accounting may be prepared.

PARKER v. VANDERBILT et al.

(Circuit Court, W. D. North Carolina. March 27, 1905.)

1. **FEDERAL COURTS—REMOVAL OF CAUSES—PREJUDICE OF INHABITANTS.**

The statute authorizing removal of a cause from a state to federal court at any time before trial, where defendant is a nonresident and cannot obtain justice in the state court on account of prejudice or local influence, does not require that the removal petition shall be filed at the term at which the case first stood for trial.

[Ed. Note.—Prejudice or local influence ground for removal of cause to federal court, see note to *P. Schwenk & Co. v. Strang*, 8 C. C. A. 95.]

2. **SAME—PETITION—NONRESIDENCE—ALLEGATION.**

A petition for removal of a cause from a state to a federal court on account of prejudice or local influence, alleging that defendant was at the time of the commencement of the suit, and still is, a citizen of a state other than that in which the suit was begun, and of no other state, was sufficient to show that he was a nonresident of the state where sued.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, §§ 181-183.

Averments of citizenship to show jurisdiction of federal courts, see notes to *Shipp v. Williams*, 10 C. C. A. 261; *Mason v. Dullaghan*, 27 C. C. A. 303.]

3. **SAME—JOINT DEFENDANTS.**

Under the statute providing that "any defendant," being a nonresident and a citizen of any state, who makes it appear to the satisfaction of the court that he cannot obtain justice in the state court where the action is pending, or in any court to which he may have the right to remove his case, on account of prejudice or local influence, is entitled to have the same removed to the federal court, the right of a defendant so to remove is not affected by the fact that a codefendant is a resident and citizen of the state where the suit was brought.

4. **SAME—VERIFICATION.**

Where a removal petition on the ground of prejudice or local influence was supported by affidavits of parties who averred that they were thoroughly conversant with the facts alleged in the petition, it was immaterial that the petition was not verified by petitioner, but by his duly authorized agent.

5. **SAME—CHANGE OF VENUE.**

Where, under the laws of a state in which a nonresident was sued, a change of venue for prejudice or local influence was wholly within the discretion of the trial judge, such defendant was not required to show that he could not obtain justice in the counties of the state to which the cause might be removed by the state court, in order to entitle him to remove the cause to the federal court on such ground.

6. **SAME—BURDEN OF PROOF.**

A cause having been removed to the federal court on evidence sufficient to satisfy it at the time of the removal that defendant could not obtain a fair and impartial trial in the state court, on account of local preju-

dice against him, the burden of proof, on a motion to remand, was on plaintiff to show that such local prejudice did not exist.

7. SAME—LOCAL PREJUDICE—EVIDENCE.

Evidence reviewed, and *held* sufficient to sustain the removal of a cause from a state to a federal court by a nonresident defendant on the ground of local prejudice.

At Law. On motion to remand.

H. B. Stevens, Zebulon Weaver, and F. A. Sondley, for plaintiff.
Merrimon & Merrimon, for defendants.

PRITCHARD, Circuit Judge. This case was removed from the superior court of Buncombe county to the Circuit Court of the United States, on account of prejudice and local influence, on September 19, 1904. The plaintiff made a motion to remand same to the state court on the 11th day of March, 1904, upon the ground that the defendant Brantly was at the time of the institution of the suit a resident of North Carolina; also that the petition was not properly verified, and did not contain facts sufficient to justify a removal, and for other reasons which are fully discussed in the opinion.

It is contended by counsel for plaintiff that the application for removal from the state court was not made in apt time. The statute under which this case was removed provides that the case may be removed at any time before trial. This must be construed to mean that the petition should be filed before the machinery which is provided by the state court for the trial of causes is put in motion. Any other construction would do violence to the plain language of the act. It was clearly the intention of Congress that a nonresident defendant should be given the right to file his petition for removal at any time before the first trial of the case in the state court.

It is further contended by the plaintiff that it was held by the Supreme Court in the case of *Fisk v. Henarie*, 142 U. S. 459, 12 Sup. Ct. 207, 35 L. Ed. 1080, that the language "at any time before the trial" of the suit means that the petition should be filed at or before the term at which the case could first be tried, and before the trial thereof. There is nothing in that case which is in conflict with the views the court entertains in regard to the construction that should be given the words "at any time before the trial thereof."

In the case of *City of Detroit v. Detroit City Ry. Co.* (C. C.) 54 Fed. 10, Judge Taft, in discussing this question, among other things, said:

"In our opinion, however, the decision of the Supreme Court in *Fisk v. Henarie* is not to be given the meaning contended for by counsel for the complainant. In that case the cause was removed from a state court to a federal court under the act of 1888 after it had been three times tried in the state court. The contention on the part of the removing defendants was that the words in this act, 'at any time before the trial thereof,' used in regard to removal on the ground of prejudice or local influence, were, in effect, 'at any time before the final trial thereof,' and were to be given the same meaning as the words of the act of July 27, 1866, and the act of March 2, 1867, 'at any time before the trial or final hearing of the suit,' under which language it had often been ruled that it was not too late to apply for a removal after trials which had been set aside by the trial court or by an appellate court.

The chief justice, in giving the opinion of the court, refers to the omission of the word 'final' in the acts of 1887 and 1888, and points out that in this respect the language is like that of the act of 1875, in which the words are 'before or at the term at which said cause could be first tried and before the trial thereof.' The chief justice says: "This has been construed to mean the first term at which the cause is in law triable—the first term at which the cause would stand for trial if the parties had taken the usual steps as to pleadings and other preparations; and it has also been decided that there cannot be a removal after a hearing on a demurrer to the complaint because it does not state facts sufficient to constitute a cause of action." After quoting the language of the act of 1887, carried into the act of 1888, the chief justice continues: "In view of the repeated decisions of this court in exposition of the acts of 1866 and 1867 and 1875, it is not to be doubted that Congress, recognizing the interpretation placed on the word "final" in the connection in which it was used in the prior acts, and the settled construction of the act of 1875, deliberately changed the language "at any time before the final hearing or trial of the suit," or "at any time before the trial or final hearing of the cause," to read "at any time before the trial thereof," as in the act of 1875, which required the petition to be filed before or at the term at which the cause could be first tried, and before the trial thereof. The attempt was manifest to restrain the volume of litigation pouring into the federal courts, and return to the standard of the judiciary act, and to effect this in part by resorting to the language used in the act of 1875, as its meaning had been determined by judicial interpretation. This is more obvious in view of the fact that the act of March 3, 1887, was evidently intended to restrain the jurisdiction of the circuit court, as we have heretofore held." Two members of the court—Mr. Justice Field and Mr. Justice Harlan—dissented. In their opinion, the language 'any time before the trial' meant the same as in the acts of 1866 and 1867; that is, 'at any time before the final trial.' The question at issue in the case, therefore, was whether the trial referred to in the act was a final trial or a first trial. A majority of the court held that, because the words 'before the trial thereof' had been used in the act of 1875 in connection with words which left no doubt that there they meant the first trial, therefore the same words in the act of 1887 must be taken to have the same meaning. We do not understand from the opinion, however, that the majority of the court intended to incorporate bodily into the acts of 1887 and 1888, from the act of 1875, the words 'before or at the term at which said cause could be first tried.' It is not apparent on what grounds this could be done. The act of 1875 fixed the time for removal, not only before the first actual trial, but also before or within the first term when a trial was possible. The Supreme Court holds that the words 'before the trial thereof,' in the act of 1887, were taken from the act of 1875. This being the case, the omission in the act of 1887 of the words limiting the period of removal to that before or within the term of possible trial which appear in the act of 1875 would seem to clearly indicate the congressional intention not to impose such a limitation in the subsequent act. The case before the Supreme Court did not require the construction contended for, and, for the reasons stated, we do not feel authorized to attribute such a view to that court until some further expression from it on the subject. The words 'at any time before the trial' should be given their ordinary meaning, i. e., 'at any time before the first trial thereof'; and up to the time of that first trial, whether that occur at one term or another, the right of removal under the local prejudice clause remains. It follows that this cause was removed in time."

It was manifestly the intention of Congress to extend to a defendant who was a nonresident the right to have his case removed to the federal court at any time before the trial thereof, provided that it should be made to appear that he could not obtain justice in the state court on account of prejudice or local influence. To say that this clause of the act means that he should only have the right to file his petition at the term at which the case first stood for trial would defeat the very purpose for which the act in question was passed.

It is insisted that, although diversity of citizenship is alleged in the petition, there is no allegation to the effect that the defendant is a nonresident. The petition states that the defendant was at the time of the commencement of this suit, and still is, a citizen of New York, and of no other state. The statement that defendant is a citizen of New York, and of no other state, is sufficient to show that he is a nonresident of North Carolina. In *Martin v. B. & O. R. Co.*, 151 U. S. 676, 14 Sup. Ct. 534, 38 L. Ed. 311, it is said, "in order to be a nonresident within the meaning of this statute, the defendant must be a citizen of another state."

The plaintiff further contends that, inasmuch as the defendant Brantly is admitted to be a resident and citizen of North Carolina, this suit is not of such a character as to give his codefendant the right to remove it on the ground of prejudice and local influence. The statute provides that "any defendant," being a nonresident and citizen of another state, who makes it appear to the satisfaction of the court that he cannot obtain justice in the state court where the action is pending, or to any court to which he may have the right to remove his case on account of prejudice or local influence, is entitled to have the same removed to the federal court. The right of removal on account of prejudice or local influence is based on different grounds from that of removal on account of diverse citizenship. When it is sought to remove a case on account of diverse citizenship it is only necessary to show that fact, and that the jurisdictional amount is involved, in order to secure a removal of the case. Where a resident of the state where the suit is brought has been joined, the right of removal then depends on the question as to whether there is a separable controversy between the parties. Where the right of removal is based on the ground of prejudice or local influence, it must not only appear that the defendant is a nonresident, and that the jurisdictional amount is involved, but it must also appear that the defendant cannot secure a fair and impartial trial in the state court, on account of prejudice or local influence; and, when it is made to appear that prejudice or local influence exists, then any defendant is guaranteed the right of removal, by the express language of the statute, even though a resident defendant may be joined with him in the same action. *Haire v. R. Co.* (C. C.) 57 Fed. 322.

It is also contended that the petition on which this case was removed was not properly verified; that it should have been verified by the plaintiff, and not by his agent. This position is untenable. In the first place, it is not necessary that the petition should be verified by any one, provided it is supported by the affidavit or the oral testimony of some one who is familiar with the facts stated therein. The petition is verified by the duly constituted agent of the defendant, and is supported by the affidavits of parties who say that they are thoroughly conversant with the facts which are alleged in the petition. The court is therefore of the opinion that the defendant has complied with the statute in so far as the filing of the petition is concerned. *Sweeney v. Coffin*, 1 Dill. 73, Fed. Cas. No. 13,686; *Osgood v. Chic., D. & V. R. Co.*, 6 Biss. 330, Fed. Cas. No. 10,604; *Hauser v. Clayton*, 3 Woods,

273, Fed. Cas. No. 6,739; Connor v. Scott, 4 Dill. 242, Fed. Cas. No. 3,119; Black's Dill. on Removal of Causes, § 179.

It is also contended that the defendant is required to show that he cannot obtain justice in the counties to which this case might be removed by the state court. This would be true if the defendant had the right, under the laws of the state, to have his case removed to any of the contiguous counties for trial, but no such right exists. The statute of the state leaves the question as to whether there shall be a change of venue to the discretion of the judge of such court. Therefore the defendant does not have such a right as contemplated by the statute to have his case tried in a county other than the one in which the suit was instituted. Such being the law of the state in regard to a change of venue, the defendant is not required to show that he cannot obtain justice in the counties to which his case might be removed by the state court. Robison v. Hardy (C. C.) 38 Fed. 49; Rike v. Floyd (C. C.) 42 Fed. 247; Smith v. Lumber Co. (C. C.) 46 Fed. 819; Crosby Lumber Co. v. Smith, 51 Fed. 63, 2 C. C. A. 97; City of Tacoma v. Wright (C. C.) 84 Fed. 836.

The case having been removed to this court upon evidence sufficient to satisfy the court at the time of such removal that the defendant could not obtain a fair and impartial trial in the state court, on account of local prejudice against him, it devolves on the plaintiff to show by sufficient proof that such local prejudice does not exist. The plaintiff has filed the affidavits of different persons, in which it is stated that no local prejudice exists against the defendant, which raises the issue, does such local prejudice exist, as alleged in the petition?

Among other things, the plaintiff offers the affidavit of Marcus Erwin, clerk of the superior court of Buncombe county, in which he states that he is thoroughly conversant with the sentiment of that county, and that he is satisfied that the defendant can obtain a fair and impartial trial in said county. The plaintiff also offers the affidavits of A. H. Felmet, J. B. Cain, and J. W. McElroy, whose testimony is similar in most respects to that of the witness Erwin. This testimony is offered for the purpose of rebutting the testimony of those who have testified in behalf of the defendant. The court is therefore called upon to find, as a fact, whether local prejudice exists against the defendant in such county to such an extent as to prevent him from securing a fair and impartial hearing in the state court. The evidence of the witnesses who testified as to the existence of local prejudice is positive in its character. These witnesses testify as to certain facts which come within their knowledge, and upon which their testimony is based. It is therefore necessary for the court to determine whether the facts and circumstances relied upon by the defendant are sufficient to justify the conclusion that local prejudice exists against him. After a careful consideration of the testimony offered by the defendant, the court is of opinion that local prejudice exists to such an extent as to prevent him from obtaining a fair and impartial trial in the state court.

The next question which presents itself for solution is whether the evidence offered by the plaintiff is sufficient to overcome that of the defendant, or at least to create a doubt in the mind of the court as to

the sufficiency of the evidence upon which the case was removed from the state court. The petition, which is verified, alleges as a fact that on account of prejudice the defendant cannot obtain justice in Buncombe county. Dr. Swope, in his affidavit, states, of his own knowledge, that local prejudice exists against the defendant and in favor of the plaintiff, and that he believes, in consequence of such prejudice, the defendant cannot obtain a fair and impartial trial in the state court. J. Hardy Lee states that he knows the condition of affairs in Buncombe county, and that the defendant cannot obtain justice, on account of local prejudice. He says that he has talked to several persons about the subject, and that they have expressed the opinion that the defendant cannot obtain a fair and impartial trial in Buncombe county. Dr. Schenck's affidavit is to the same effect. All of the testimony offered by the defendant is positive in its character. Much of the evidence offered by the plaintiff is based on information and belief. The plaintiff insists that it is shown that there are thousands of citizens in the county of Buncombe, who, if called upon to serve as jurors in this case, would give the defendant a fair and impartial trial. This contention is undoubtedly true, but at the same time it does not show that there is no local prejudice against the defendant in the county. The court is well acquainted with the people of Buncombe county, and is satisfied that, as a whole, they are as fair and impartial in their dealings with their fellow men as the people of any other section of the United States. But while such is the case, it does not necessarily mean that there may not be prejudice against the defendant in the particular community in which he resides, for the reasons stated by the petitioner, as well as those who have testified in his behalf. The plaintiff's evidence, in the main, is negative in its character, and is not sufficient to justify the court in remanding this case. While this is true, at the same time a trial of the case in this court will not inconvenience the plaintiff, inasmuch as it can be heard here one month later than it would, had it remained in the state court, and will be tried in the same city, by a jury selected from the county of Buncombe and other counties of the district.

Certain persons seek to create an impression that the federal court is a foreign court, and, as such, is hostile to the interest of the people of the state. There is absolutely no foundation for such contention. The federal courts belong to the people of the state, as well as the state courts, and were created for the express purpose of affording citizens of the various states facilities by which they might have their controversies in cases like the one at bar speedily and satisfactorily determined. Such prejudice is due, in the main, to the enforcement of the internal revenue laws, enacted just after the war, at a time when these laws were unpopular, and a great deal of political prejudice existed on account of their enforcement. But that feeling has entirely passed away, and to-day a great majority of the people of the state are as friendly to the courts of the United States as they are to the courts of the state.

No defendant who is a nonresident should be compelled to try his case in the state court when it is made to satisfactorily appear that he cannot obtain a fair and impartial trial in that court, in view of the

fact that his case can be tried in another forum, which possesses every facility for giving both plaintiff and defendant a fair and impartial trial—a court which is presided over by a resident of the state, and before a jury selected by a jury commission, the members of which are also residents of the state, and belong to different political parties, and who are charged with selecting true and lawful men, regardless of local or political influence.

ALICE E. MINING CO. v. BLANDEN et al.

(Circuit Court, N. D. Iowa, C. D. April 15, 1905.)

No. 268.

1. EXECUTORS—CLAIMS—ABANDONMENT—RIGHTS OF CREDITOR—FEDERAL COURTS.

A nonresident creditor may establish his claim in the courts of the United States against the personal representatives of his deceased debtor, the requisite amount and diversity of citizenship appearing, notwithstanding the laws of the state of the debtor's residence in terms limit the right to establish such claims to proceedings in the proper probate courts.

2. SAME—WHAT LAW GOVERNS.

In proceedings in the federal courts for the establishment of a claim by a nonresident creditor against his debtor's estate, the law of the state of the debtor's residence will be applied.

3. SAME—LIMITATIONS.

Code Iowa, §§ 3447, 3451, provide that actions on written contracts shall be brought within 10 years after the cause of action accrues, and declare that the delivery of the original notice to the sheriff of the proper county for service, or actual service by another, shall be the commencement of the action. Section 3278 et seq. provides that, if a decedent leaves a will, it shall be opened and read by the clerk, and a day fixed in term time for proving it; that, if the person nominated as executor refuses to accept or neglects to qualify within ten days, the office shall be vacant; that when, for any cause, general administration or probate cannot be immediately granted, special administrators may be appointed to preserve the estate, without authority to allow claims, and, on granting full administration, the powers of special administrators shall cease, and the business be transferred to the general administrator or executor; that the executors first appointed and qualified shall within 10 days publish notice of their appointment, and that claims shall be filed with the clerk, and 10 days' notice of hearing at some regular term of court served on one of the executors as required for commencing ordinary actions; and that all claims of the fourth class, which shall not be filed and allowed, or, if filed, and notice thereof is not served within 12 months after the giving of notice, shall be barred. Testator died April 21, 1904, and his will was proved August 24th following—the earliest date possible. Plaintiff, the holder of two notes due, respectively, August 15, 1894, and August 15, 1895, brought suit thereon against defendants, as special administrators, August 6, 1904, and, after their appointment as general administrators, served them with notice on October 14th. They appeared generally on November 1st, and were substituted as parties defendant on November 25th. *Held*, that since there was no time after testator's death that plaintiff could have sooner procured administration and brought action to prove his claim, the note due August 15, 1894, was not barred.

On Demurrer to the Petition.

August 6, 1904, the plaintiff filed its petition in this court, in two counts, against Chas. G. Blanden, a citizen of Illinois, and J. W. Campbell, a citizen of Iowa, as special administrators of the estate of Leander Blanden, deceased, as defendants, from the allegations of which, as subsequently amended, it appears that the plaintiff is a corporation organized under the laws of Kentucky; that Leander Blanden, a citizen of Iowa, residing in Webster county, therein, died testate in that county April 21, 1904; that by his will the deceased appointed said Chas. G. Blanden and J. W. Campbell as executors thereof; that on April 25, 1904, the said Chas. G. Blanden and J. W. Campbell were duly appointed by the proper probate court, and qualified, as special administrators of the estate of said deceased, to preserve the property thereof, under the orders of said court, until the will could be proven, the executors qualified, and general administration upon the estate granted; that long prior to the filing of said petition the said Leander Blanden, together with one W. A. Jones, made to the plaintiff his two promissory notes, each for the sum of \$4,675.22, bearing 6 per cent. interest, and due, respectively, August 15, 1894, and August 15, 1895; and that there was due upon said notes, respectively, \$7,468.72 and \$7,177.72, together with 6 per cent. interest from July 29, 1904, no part of which had been paid. Judgment is asked against the defendants, as special administrators of said estate, for the amount of said notes and interest, and that the same be established as a claim against the estate of said deceased. On the filing of said petition, summons was duly issued by the clerk of this court against the defendants, as such special administrators, requiring them to appear and answer the petition, which summons was delivered to the marshal for service on said August 6th, and the same was duly served by him that day upon the defendant J. W. Campbell in Webster county, Iowa. October 14, 1904, the plaintiff filed an amendment to the petition, and as supplemental thereto, in which it is alleged that on August 8, 1904, the plaintiff filed in the district court of said Webster county, as a court of probate, a claim against the estate of said deceased, founded upon the said two promissory notes; that the will of said Leander Blanden, deceased, had been duly proven and admitted to probate in said Webster county August 24, 1904; that the executors named therein duly qualified as such September 1, 1904, and were then acting as such; and it was asked that said executors be substituted as parties defendant to this action in lieu of the special administrators, and that plaintiff have judgment against said executors for the amount of said notes, and that the same be established as a claim against the estate of said deceased. Notice of the filing of such petition was duly served upon the defendants, as such executors, on said October 14th, and they appeared by counsel November 1st following, and resisted being substituted as defendants to the action. November 25th the court ordered that said executors be substituted as defendants in the action in lieu of the special administrators, without prejudice to their right to present or plead any defense they might have to the causes of action alleged in the petition and amendment thereto. The defendants, as executors of the will of said deceased, thereupon demurred to the petition as amended upon the grounds, in substance, (1) that the action against them as executors was not commenced until October 14, 1904, and that more than 10 years had then elapsed since August 15, 1894, when the cause of action upon the first of the notes described in the petition accrued, and that the court acquired no jurisdiction of defendants as such executors until said October 14, 1904; (2) that the special administrators against whom the action was first commenced had no power or authority to allow claims against said estate, and that the commencement of the action against them was without authority of law, and ineffective to prevent the running of the statute of limitations upon the notes sued upon; (3) that the court is without jurisdiction of the subject-matter of the action, or of the defendants as executors of the will of said deceased, for that since the probate of the will, and the appointment and qualification of the defendants as executors thereof, no claim has been filed in the district court of Webster county as a court of probate, and that no claim can be considered as filed against the estate until there come into existence parties having authority to act on such claims. It is conceded by

counsel for the defendants that the first term of court after the death of said Leander Blanden at which his will could be proven convened in said Webster county August 24, 1904.

Dale & Harvison and F. A. Grosenbaugh, for plaintiff.
Wright & Nugent, for defendants.

REED, District Judge (after making the foregoing statement). The demurrer challenges the right of the plaintiff to recover upon the grounds (1) that this court is without jurisdiction of the subject-matter of the action, because the plaintiff has not filed its claim against the estate of the deceased, in the proper probate court of Webster county, since the will was proved and the executors qualified; and (2) that the note due August 15, 1894, is barred by the statute of limitations.

That a nonresident creditor may establish his claim or debt in the courts of the United States against the personal representatives of his deceased debtor, the requisite amount and diversity of citizenship appearing, is well settled, notwithstanding that the laws of the state of the debtor's residence relative to the settlement and administration of estates of deceased persons in terms limit the right to establish such claims to proceedings in the proper probate courts of the state. *Suydam v. Broadnax*, 14 Pet. 67, 10 L. Ed. 357; *Union Bank v. Vaiden*, 18 How. 503, 15 L. Ed. 472; *Clark v. Bever*, 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88; *Security Trust Co. v. Bank*, 187 U. S. 227, 23 Sup. Ct. 52, 47 L. Ed. 147. In the exercise of such jurisdiction, the courts of the United States administer the law of the state of the debtor's residence under the same rules that control local tribunals in the adjustment of claims against the debtor's estate. *Aspden v. Nixon*, 4 How. 494, 11 L. Ed. 1059; *Walker v. Walker*, 9 Wall. 745, 19 L. Ed. 814; *Byers v. McAuley*, 149 U. S. 615, 13 Sup. Ct. 906, 37 L. Ed. 867; *Security Trust Co. v. Bank*, 187 U. S. 227, 23 Sup. Ct. 52, 47 L. Ed. 147. As the jurisdiction of the federal courts depends upon the Constitution and laws of the United States, such jurisdiction cannot be limited or restricted by state legislation, if any, which may require that claims against the debtor's estate shall be filed in the local probate court before action thereon can be brought in the United States courts. The objections to the jurisdiction of the court are therefore untenable.

The question of the statute of limitations is the principal one involved, and that is to be determined by the laws of Iowa. It appears that the notes sued upon were due, respectively, August 15, 1894, and August 15, 1895; that Gen. Blanden died testate April 21, 1904; that the earliest date thereafter upon which his will could be proven was August 24, 1904; that it was proven on that date; that the executors therein named duly qualified September 1, 1904, and, as such executors, were first served with notice or summons October 14th, appeared generally to the action November 1st, and were substituted as parties defendant by order of the court November 25th following.

The statutes of Iowa provide that actions upon written contracts shall be brought within 10 years after the cause of action accrues; that the delivery of the original notice to the sheriff of the proper county, with intent that it be served immediately, or the actual service of such notice

by another person, is the commencement of the action; that the time during which the defendant is a nonresident of the state shall not be included in computing any of the periods of limitations. Code 1897, §§ 3447, 3451. The statutes for the settlement of estates of deceased persons provide:

"If no executors are named in the will of a deceased person, or if those named fail to qualify and act, the court admitting it to probate shall appoint one or more to carry it into effect. After the will is produced, the clerk shall open and read the same, and a day shall be fixed by the court or clerk for proving it, which shall be during a term of court. If a person nominated as executor refuses to accept the trust, or neglects to appear within ten days after his appointment and give bond, the office shall be vacant; and in case of a vacancy, letters of administration with the will annexed may be granted to some other person. In other cases, where an executor is not appointed by will, administration shall be granted (1) to the husband or wife of the deceased; (2) to his next of kin; (3) to his creditors; (4) to any other person whom the court may select. To each of the above named classes in succession a period of twenty days, commencing with the burial of the deceased, is allowed within which to apply for administration. When from any cause, general administration or probate of a will cannot be immediately granted, one or more special administrators may be appointed, to collect and preserve the property of the deceased, but they shall take no steps in relation to the allowance of claims against the estate, and upon the granting of full administration the powers of special administration shall cease, and all the business be transferred to the general administrator or executor. The executors or administrators first appointed and qualified for the settlement of the estate shall, within ten days, publish such notice of their appointment as the court or clerk may direct. Claims against the estate shall be clearly stated, sworn to, and filed with the clerk, and ten days' notice of the hearing thereof—which shall be at some regular term of the court—served on one of the executors or administrators in the manner required for commencing ordinary actions. Demands against the estate shall be payable in the following order: (1) Debts entitled to preference under the laws of the United States; (2) public rates and taxes; (3) claims filed within six months after the first publication or posting of the notice given by the executors or administrators of their appointment; (4) all other debts. All claims of the fourth of the above classes, not filed and allowed, or if filed and notice thereof, as hereinbefore provided, is not served within twelve months after the giving of the notice aforesaid, will be barred, unless peculiar circumstances entitle the claimant to equitable relief." Code 1897, § 3278 et seq.

The statute of limitations does not, in terms, provide that the death of a debtor after a cause of action against him has accrued shall suspend the running thereof; and in support of the demurrer the rule is invoked that, when the period of limitations has once commenced to run, it will not be suspended, except where the statute itself so provides. That such is the general rule may be conceded, but there are exceptions to it. Statutes of limitations are based upon the presumption that one having a legal claim will not delay enforcing it beyond a reasonable time, if he has the power to bring suit upon it. Such reasonable time is therefore fixed and allowed. But the basis of the presumption is gone whenever the right or ability to resort to the courts or to bring the action does not exist. In such cases the creditor has not the time within which to bring his suit that the statute has given him, and the time that he is so prevented from suing upon his claim will not be included in computing the period of limitation. *Hanger v. Abbott*, 6 Wall. 532, 18 L. Ed. 939; *U. S. v. Willey*, 11 Wall. 508, 20 L. Ed. 211; *Braun v. Sauerwein*, 10 Wall. 218, 19 L. Ed. 895. In the fore-

going and other cases the creditor was prevented from suing either because the courts were closed by reason of war or by operation of law, but in *Bauserman v. Blunt*, 147 U. S. 652, 13 Sup. Ct. 466, 37 L. Ed. 316, it was held that the rule was applicable where the creditor was prevented from suing by reason of the death of his debtor (no administration upon his estate having been granted), and the creditor, by reason of the local law, was prevented from procuring the appointment of such administrator for a specified time; and it was held that during such time the running of the statute of limitations was arrested, though the statute itself did not so provide.

Whether or not the death of the debtor after the period of limitation has begun to run, and before it has expired, will suspend its running in favor of his personal representatives, when they have not been and could not be appointed until after the full period of limitation had run—the statute not so providing—has not been directly determined by the Supreme Court of Iowa. In *Wood on Limitations* (3d Ed.) pp. 9, 10, it is said that such facts would not suspend the running of the statute. Among the citations in support of the text are several in which the person deceased was the creditor or one entitled to sue, and the delay was in the appointment of his personal representatives; and some are cases against heirs of a deceased debtor to subject property to the payment of debts after the settlement of the estate in probate, or where the time in which administration might be granted had elapsed. Such cases are not in point here, as their determination depends upon other principles. The general statute of limitations of the state of Kansas, as well as that for the settlement of the estates of deceased persons, is substantially the same as those of the state of Iowa. The Supreme Court of that state has repeatedly held that the death of the debtor arrests the running of the statute until an administrator of the estate has been or can be appointed. *Toby v. Allen*, 3 Kan. 399; *Hanson v. Towle*, 19 Kan. 273; *Nelson v. Herkel*, 30 Kan. 456, 2 Pac. 110; *Mills v. Mills*, 39 Kan. 455, 18 Pac. 521.

In *Bauserman v. Charlott*, 46 Kan. 480, 26 Pac. 1051, the question arose as to the length of time the statute would be so suspended, and the court says:

"The precise question is, if, under the prior decisions of this court, the death of the debtor operates to suspend the statute of limitations, is the statute indefinitely suspended? Clearly, a creditor ought not to gain any advantage by his own laches or by his own delay. When a party knows that he has a cause of action, it is his own fault if he does not avail himself of those means which the law provides for prosecuting his claim, or instituting such proceedings as the law regards sufficient to preserve it. *Amy v. Watertown*, 130 U. S. 325, 9 Sup. Ct. 537, 32 L. Ed. 953; *Tynan v. Walker*, 35 Cal. 634, 95 Am. Dec. 152. In a case where some act is to be done, or condition precedent to be performed, by a party, to entitle him to his right to sue, and no definite time is fixed in which the act is to be done or condition performed, he must exercise reasonable diligence to do the one or perform the other, or he will be barred by the statute of limitations; otherwise it would be in his power to defeat the law by his own negligence and wrong. * * * Therefore, if the plaintiff below had availed himself of those means which the law provides for prosecuting his claim, he could have taken action as soon as 50 days had elapsed after the death of his alleged debtor. If a creditor would save his debt from the statute bar, he should take out administration himself. *Granger's Adm'r v. Granger*, 6 Ohio, 35."

This case is approved in *Bauserman v. Blunt*, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316; the Supreme Court saying:

"That decision was evidently deliberately considered and carefully stated, with the purpose of finally putting at rest a question on which some doubt had existed. It is supported by satisfactory reason, and is in accord with well-settled principles, and there is no previous adjudication of that court to the contrary. In every point of view, therefore, it should be accepted by this court as conclusively settling that the operation of the statute of limitations of Kansas is suspended after the death of the debtor for the 50 days only, during which the creditor could not apply for the appointment of an administrator, or, at most, for a reasonable time after the expiration of the 50 days."

In *Savage v. Scott*, 45 Iowa, 130, it is held by the Supreme Court of Iowa that, upon the death of the debtor, claims which might be enforced by personal action against him become the subject of proceedings prescribed by law against his administrators or executors, and that the personal representative takes the place of the deceased debtor. This being true, the right of action is necessarily suspended until the appointment of such administrators or executors; and any claim that might have been enforced against a debtor at the time of his death may be enforced against his executor or administrator, within the time prescribed by law therefor, in any court having jurisdiction thereof. The time so prescribed is a period of limitations, as to debts owing by the debtor at the time of his death, distinct and separate from that fixed by the general statute of limitations, is not operative until the death of the debtor, and then supersedes the general statute of limitations, and stops the running thereof, as to such debts. Such time may shorten or it may extend the period fixed by the general statute of limitations as to such debts, and all thereof that are not barred at the time of the death of the debtor may be proven against his executors or administrators within the time fixed therefor, and will not be barred until the expiration of such time.

The death of Gen. Blanden, April 21, 1904, prevented a personal action against him thereafter upon either of the notes declared upon in the petition, and neither of them was then barred by the statute of limitations. By his will he named the defendants as executors thereof. Until that will was proven, general administration of his estate could not be granted. Code, §§ 3278, 3297; *Long v. Burnell*, 13 Iowa, 28, 81 Am. Dec. 40; *Pickering v. Weiting*, 47 Iowa, 242. The earliest date at which it could be proven was August 24, 1904, and it was proven on that date. The executors named in the will had 10 days thereafter in which to qualify. They did so qualify September 1, 1904, within such 10 days. There was no time between the death of the debtor and the qualification of the executors that plaintiff could have procured the appointment of other executors or administrators, and during such time it could not bring an action against any one in any court to enforce its claim unless it could do so against the special administrator. It does not appear when the executors gave notice of their appointment as such, but it could not have been before they were appointed. After such notice was given, creditors have one year in which to file their claims with the clerk of the probate court, and serve notice thereof on the ex-

ecutors, before such claims are barred under the statute for the settlement of the estates of deceased persons. October 14, 1904, the plaintiff petitioned for substitution of the executors as parties defendant to the action, and notice was served upon them that day; they entered their appearance to the action November 1st, and were substituted as defendants by order of the court November 25, 1904—all of which was within the year after the proof of the will and the qualification of the executors.

The conclusion is that an action against the executors upon either of the notes was not barred October 14, 1904. As to the note maturing August 15, 1895, the 10 years, even, have not yet run. It is unnecessary, therefore, to determine the effect of the commencement of the action against the special administrators.

The demurrer is overruled.

BEARDEN et al. v. BENNER.

(Circuit Court, S. D. Georgia, W. D. March 1, 1905.)

1. MARRIAGE SETTLEMENTS—RECORD—STATE LAW.

Code Ga. 1895, § 2483, provides that every marriage contract and every voluntary settlement made by the husband on the wife must be recorded within three months after execution, in order to make it effective as against purchasers and creditors without notice; that, if the contract or settlement is made in another state, and the parties subsequently move within the state, the record must be made within three months after the removal; and, if the settled property be within the state, and the parties reside in another, the record must be made in the county where the property is within the time specified. *Held*, that such section did not require the record of an antenuptial contract between a woman who was a resident and a man who was a nonresident, by which the latter attempted to release certain supposed rights in her property located within the state.

2. SAME—ANTENUPTIAL CONTRACTS—CONSTRUCTION.

An antenuptial contract provided that the husband agreed that all property acquired by his wife should be and remain her separate property, free from his debts, and at her death should vest in her children, if any, living, otherwise it should go to the husband if he survived her, unless she provided a different disposition by will; that the rents and profits of such property should be controlled and managed by the husband for the mutual support of both husband and wife and their children; and that the property might be conveyed for reinvestment by their uniting in the execution of deeds for the same. *Held*, that such contract was merely a recognition of the wife's rights as they then existed, and did not amount to a conveyance by the wife of any interest to the remaindermen.

3. SAME—CONVEYANCES—PARTIES—JOINDER.

Where an antenuptial contract between a husband and wife provided that the wife's separate property might be thereafter conveyed by deed in which both joined, and the husband induced the wife to separately convey the property to a bona fide purchaser without notice of such antenuptial contract, for full value, and the husband was present at the execution of the deed, he was bound in equity to join therein, and could therefore be compelled to do so for the purpose of perfecting the purchaser's title.

See 120 Fed. 690.

James L. Anderson and Walter J. Grace, for complainants.
Washington Dessau, Nathaniel E. Harris, Walter A. Harris, and
Pope S. Hill, for respondent.

SPEER, District Judge. While the title to realty involved in this case has been controverted upon pleadings of varying character in the state court, in this court at equity, and again at law, it is now for determination upon pleadings about which there is no dispute, and upon the evidence taken. We have had the final hearing in equity.

The complainants, all sui juris, are the grandchildren of Charles A. Ells, Sr., and the children of his daughter Elizabeth M., who had become the wife of William Morgan Bearden. It appears that Charles A. Ells, Sr., had two children who were beneficiaries of his will. Item 9 thereof made for them the following provision:

"I give and devise to my said two children Elizabeth M. and Charles A. my storehouse and lot on Mulberry street fronting the Lanier House in Macon aforesaid known as Ells Saloon being part of lot No. 6 in square No. 22, in the plan of said city, to be held by them jointly as long as it is for their interest then to be sold and the proceeds to be equally divided between them."

The property thus devised constitutes the premises in dispute in the controversy before the court. Shortly after the probate of this will an antenuptial contract was made between Elizabeth M. Ells and William Morgan Bearden. From this it appears William Morgan Bearden, of the state of Tennessee, in consideration of a marriage about to be solemnized with Elizabeth M. Ells, did

"Covenant, grant and agree that all the property, rights and interests in property of whatsoever nature now vesting in, or hereafter to be acquired by, the said Elizabeth M. Ells, shall be and remain the separate property of the said Elizabeth M. Ells, free from the payment of any debt, default or contract of her husband, during her natural life; and the same at her death to vest in and become the property of such child or children as she may then have living; and should she die without leaving any child or children then the said property to go to the said party of the first part (that is to say William Morgan Bearden) absolutely if her surviving, provided the said Elizabeth M. shall depart this life without making a different disposition of the same by will, which, it is agreed she may at any time do during her life should she so desire. And should she survive the party of the first part and die without then leaving child or children then said property to go to such of her next of kin as would take the same by the laws of this State she dying unmarried. And it is further covenanted and agreed that whilst both the parties hereto remain in life the rents, issues and profits of said property, or so much thereof as may be necessary, shall be controlled and managed by the party of the first part for their mutual support and maintenance and for the support, maintenance and education of the child or children of the marriage. And it is further agreed that should it at any time be deemed advisable by the said parties during their marriage to sell any part of said property for the purpose of reinvesting the proceeds thereof in other like property that the same may be done by their uniting together in the execution of the deed or deeds of conveyance of the same."

This was signed by the contracting parties. The marriage was consummated, and the complainants are the children thereof. In the meantime it became necessary or desirable that William Morgan, and his wife, Elizabeth M., should sell this property. The brother of the wife, Charles A. Ells, having a joint half interest, consented. The

property was sold to the respondent, John H. Benner. The purchase price was \$12,000. The deed was executed on the 25th day of November, 1889. It was signed by Mrs. Bearden, née Ells, but was not signed by her husband. He, however, was present, and assented thereto. He took charge of one-half of the proceeds, that being the share of his wife. A part of this he lost in speculation, and a large part he invested in real property and other ventures at Chattanooga, Tenn., where he had now removed with his family. It appears from the evidence that the purchaser had caused no examination of the title on his own account, but he was aware of the fact that Mrs. Bearden, in order to secure a loan on this property, had previously applied to a bank in Macon. He was also aware that she had in writing represented her title to be perfect and free from incumbrance of any character. He knew that the title, examined in behalf of the bank, had been approved by a well-known attorney of the city. He had read Mrs. Bearden's statement with regard to her title. This is in evidence. It is in the handwriting of her husband, William Morgan Bearden, and is signed by her. It also appears that the attorney who examined the record on behalf of the bank had missed the record of the marriage settlement above mentioned. The record, it is true, was incorrect as to the names of the contracting parties. While signed by both of them, in the body of the instrument as recorded it purported to be made by William Morgan, and not by William Morgan Bearden, the word "Bearden" being omitted therefrom. For this reason it is possible, perhaps, that the instrument escaped attention. It does not, however, appear that this record is very significant. The law of Georgia on this subject since 1847 (Code 1895, § 2483) is as follows:

"Every marriage contract and every voluntary settlement made by the husband on the wife, whether in execution of marriage articles or not, must be recorded in the office of the clerk of the superior court of the county of the residence of the husband, within three months after the execution thereof. On failure to comply with this provision such contract or settlement shall not be of any force or effect against a purchaser, or creditor, or surety, who, bona fide and without notice, may become such before the actual recording of the same. If such contract or settlement is made in another state, and the parties subsequently move into this state, the record must be made within three months from such removal. If the settled property be in this state, and the parties reside in another, then the record must be made in the county where the property is, and within the time specified above."

From this it does not appear that there is any provision for the record of a marriage settlement made between a woman who is a resident of this state and a man who is a resident of another state. The law itself was enacted before the common-law marital right to the wife's property was denied by statute. Besides, this was not a voluntary settlement made by the husband on the wife. The law of Georgia which was enacted the previous year (Act 1866, Code 1895, § 2474) had at length made the wife's property her own separate estate. Bearden had nothing to settle on his wife. In the opinion of the court, then, this registration does not make obligatory the record of this particular marriage settlement. It was superfluous, and is therefore, in our judgment, not constructive notice to a bona fide purchaser for value,

who had no actual notice. It is not contended that Mr. Benner, who paid a consideration so large for the property in this case, had any actual notice of this antenuptial arrangement. It follows that the equities of the respondent are of that class which receive, wherever possible, the favorable consideration of a court of equity. While it may be true, as contended, that the children did not receive all the benefits possible from the proceeds of their mother's interest in the premises in dispute, this was probably ascribable to the fact that the marriage contract placed the control of her interest in her husband and their father. That they received large benefits is undeniable. That they were deprived of anything is not the fault of Mr. Benner, the respondent. And even if their title was stronger than it is, they would seem equitably estopped from insisting that he should be deprived of the property which he in good faith and with entire integrity bought and paid for, when his money had been so largely expended on their account.

But, was the record of this marriage settlement valid, can it be that by virtue of its provisions these complainants should prevail upon the assertion of their title. We think not. There are in this antenuptial arrangement no apt and apposite words conveying the interest of Elizabeth M. Ells. She merely assents to a conveyance by her husband, and, as we have seen, he had, under the law of Georgia, nothing to convey save his distributive share in her estate in case she died intestate. He simply stipulates that the property shall be and remain the separate property of Elizabeth M. Ells. That right the law had already given her. He stipulates that it should be free from the payment of his debts, etc. From this obligation by the same law she was already exonerated. He stipulates that the property at her death should vest in and become the property of such child or children as she may then have living. But such child or children would take each its or their share in the absence of such a stipulation, and Bearden, by his conveyance, does not strengthen such inheritable right already existing. It is said that this clause might exclude the children of a deceased child. That is true, but the contention is purely academic, for no such child of a deceased child is before the court, or in existence. The agreement also provides that, if she should die without leaving any child or children, the property should go to the party of the first part, namely, William Morgan Bearden, absolutely, if he should then be in life. But this condition the facts also show did not exist, and, besides, the instrument gave her express power of making a different disposition by will. From these recitals it does not appear that this instrument amounts to any valid conveyance by Mrs. Bearden to the alleged remaindermen who are the complainants before the court. The conveyance is from Bearden, and, as we have seen, he had nothing to convey. His act was, in effect, simply a recognition of the law and the rights of the parties as they already existed, and the contract, as far as we have stated it, was to all practical intent wholly unilateral.

Great stress is laid upon the next clause, which is as follows:

"And it is further agreed that should it at any time be deemed advisable by the said parties during their marriage to sell any part of said property

for the purpose of reinvesting the proceeds thereof in other like property. that the same may be done by their uniting together in the execution of the deed or deeds of conveyance of the same."

While the complainants base their principal contention on this clause of the marriage settlement, it is yet conceded by them that, had Bearden united in the deed, the title of the respondent would be unassailable. In our view of this contention, it is not too late to perfect this partially exercised power on his part, and it follows that it is in the power of the court to compel Bearden now to do what in contemplation of equity he ought to have done at the time the wife, at his instance and request, signed the conveyance to Benner. He was present aiding and abetting in the sale. He received the money, and he re-invested it. It is true that she had given him the power to unite in the deed on the face of the papers, if we concede that the marriage settlement conveyed any title out of her. His signature was requisite to the technical completeness of the instrument. Such was his power, and, in view of the evidence, such was also his duty; and it is, in our judgment, clearly competent for this court by its decree to conclusively deny the relief sought by the complainants, or to make the title of the respondent complete, if that should be preferred, by compelling the execution by Bearden of the power intrusted to him, and which, for some purpose, it seems he only partially performed.

Much authority might be cited in support of all these contentions, and there is much else in the case which might be discussed; but it would seem superfluous. The rights of the respondent are based upon the soundest principles of equity and good conscience.

A decree will be rendered in accordance with this finding.

In re KAUFMAN.

(District Court, E. D. New York. March 8, 1905.)

1. **BANKRUPTCY—DISCHARGE—RELEASE FROM PARTNERSHIP DEBTS.**

A member of a partnership, adjudged a bankrupt individually on his own petition, who scheduled as liabilities the debts of the firm, is released by a discharge from individual liability thereon, since they were provable against his estate.

2. **SAME—POWER OF COURT—AMENDMENT OF DISCHARGE.**

A court of bankruptcy has power, after the term at which a discharge was granted, to amend the same, and to permit the amendment of the petition and the petition for discharge, when necessary, to correctly set out more specifically the character of the debts scheduled and provable, and upon which the discharge operated.

In Bankruptcy. On application for amendment of discharge.

Kenneson, Emley & Rubino, for bankrupt.

H. Linsly Johnson, for Phelps, Dodge & Co.

THOMAS, District Judge. On April 27, 1900, Otto Kaufman filed a petition in this court, wherein he prayed "that he may be adjudged by the court to be a bankrupt," and on such date he was duly adjudicat-

ed a bankrupt. With such petition he filed schedules, in which were stated creditors, of whom the greater part represented indebtedness contracted by him and Simon Hirsh as partners. His schedules show no real estate, no personal property except clothing, and a life insurance policy of \$3,000, in which his wife is stated to be the beneficiary, and state that the petitioner "has no books, other than salesbooks, bill-books, and that one Mr. Stewart, an attorney at 309 Broadway, New York City, Manhattan borough, has a debit ledger belonging to the business, in which your petitioner was partner with one Simon Hirsh." In Schedule A, among the unsecured creditors, there appears the following: "Phelps, Dodge & Co., Cliff Street, New York City," debt contracted "1896, New York, N. Y., judgments City Court of New York, December 17, 1896, and January 6, 1897, \$2,367.98." It is scheduled under the heading, "Merchandise Contracted with Simon Hirsh as Partner." Oelberman, Dommerich & Co. are also scheduled as creditors for a merchandise debt contracted by the petitioner with Simon Hirsh as partner. Notice of the first meeting of creditors was duly sent to all scheduled individual and firm creditors, and due publication thereof was had, and firm creditors, many in number, proved their claims against the bankrupt; but Phelps, Dodge & Co. did not prove their claim, although they had due notice of all the bankruptcy proceedings. At the first meeting of the creditors, on May 18, 1900, the bankrupt was examined. Later Oelberman, Dommerich & Co., having proved their claim, objected to the bankrupt's discharge; and, upon a hearing on the specification interposed by them, the bankrupt was examined at considerable length, largely respecting the assets of the firm of which he had been a member, inasmuch as the specifications in opposition to the discharge chiefly related to the affairs of such firm, and the suppression of the assets of such firm. Phelps, Dodge & Co. had due notice of the application for a discharge. Upon due proceedings had, the bankrupt was on November 30, 1901, discharged from all debts and claims which are made provable by the bankruptcy acts against his estate, and which existed on the 27th day of April, 1900, on which date the petition for adjudication was filed by him, except such debts as are excepted by law from the operation of a discharge in bankruptcy. After a year from the date of such discharge, the bankrupt, pursuant to the provisions of section 1268 of the New York Code of Civil Procedure, applied to the various courts where judgments had been obtained against him on said debts, to have the same canceled by reason of the discharge, and such proceedings were had that all the judgments, except the two obtained by Phelps, Dodge & Co., were canceled. On November 5, 1904, the bankrupt applied to the city court of the city of New York, where the judgments of Phelps, Dodge & Co. had been obtained, for the cancellation of such judgments. Phelps, Dodge & Co. resisted such motion; and the court, as is alleged, declined to order the cancellation of their judgments, upon the ground that the discharge obtained in a court of bankruptcy only discharged the bankrupt from his individual debts, and not from firm debts. This order was affirmed upon appeal.

The bankrupt now moves for an order permitting him to amend his petition for discharge, in that:

"I pray that I may be decreed by the court to have a full discharge from all debts provable against my estate under the bankruptcy acts, except such debts as are excepted by law from such discharge, and that I may have discharge not only from all individual debts provable against my estate, but also of debts incurred by me as partner with Simon Hirsh, in so far as I am liable on the said partnership debts."

And that his petition for discharge, verified April 21, 1901, be amended by adding thereto the following:

"Your petitioner seeks a discharge from all debts which may be provable against his estate, consisting not only of individual, but debts contracted as a member of the firm composed of himself and Simon Hirsh, and doing business under the name of City Metal Works, except such debts as are excepted by law from a discharge."

And that the order permitting the said amendment allow the same as of the original date of such several petitions.

The history above given shows that the bankrupt, as an individual, petitioned this court to be adjudicated a bankrupt, and to be discharged as such; that he was discharged as such individual, although he scheduled all his firm indebtedness. Although the schedules do not show that he scheduled any property of the firm, if such there were, he now asks that the record be amended so as to discharge him, as an individual, from any liability on account of the debts of the firm. It will be observed that he does not ask that the firm be discharged from any liability, or that he be relieved, on proper action taken by the firm, an assignee, receiver, or trustee thereof, from any liability for assets of the firm which he may have. The judgment obtained against him was a personal judgment against himself and his partner on account of the indebtedness contracted by him and his partner in the course of partnership business. Both the indebtedness and the judgment subjected to its payment the assets of the firm, and the individual property of each debtor against whom the judgment was recovered. Therefore Kaufman was a judgment debtor, first, as a partner of the firm; second, as an individual. The petition in bankruptcy was not for the purpose of procuring the administration of the assets of the firm, as a distinct entity, nor for the purpose of procuring the discharge of the firm as such; but it was for the purpose of administering the personal assets of a person, who was a partner, and for the discharge of such person from all debts against him as an individual, however such debts were created. He tendered his personal assets not only to his individual creditors, but to his several partnership creditors, and underwent searching examination for the purpose of determining whether he, as an individual, had had or retained in his possession any property belonging to himself individually or to the partnership which should be applied to the payment of any class of debts. It was found that he had no personal assets, and that he had no partnership assets, nor were there any for which, as an individual, he was accountable. Chapter 3, § 5, subd. "g," of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424]), provides, "The court may permit the proof of the claim of the partnership estate against the in-

dividual estates. * * *” This permitted Phelps, Dodge & Co., if they had any claim against the individual estate of Kaufman, growing out of partnership relations, to prove such claim; and upon the failure of such creditors, who became such on account of partnership relations, to make claim against the estate of the individual bankrupt, their right to collect their judgment against such bankrupt was foreclosed by the due discharge of the bankrupt as an individual. Hence Phelps, Dodge & Co., as the owners of a judgment which Kaufman, as an individual, and his individual estate, were liable to pay, should have presented such claim against the individual bankrupt; and, in default thereof, they are debarred from thereafter claiming that the estate of the individual, or the individual himself, is liable for the payment of the judgment. If now Phelps, Dodge & Co. should attempt to collect their judgment from property of the firm, if there be such, or Hirsh, provided he has not been released from such judgment, they have full power to do so; but, should such judgment creditors attempt to collect the judgment from the individual property of the bankrupt, they would be estopped by the discharge. The proceedings are now sufficient to grant this protection, but, if it be necessary that the present rights be more specifically stated, no creditor may justly object if the petition be amended so as to pray that the bankrupt be discharged—

“From all debts provable against my individual estate under the bankruptcy acts, except such debts as are excepted by law from such discharge, and that I may have discharge not only from all individual debts provable against my individual estate, but also from all debts incurred by me as partner with Simon Hirsh, in so far as I individually am liable on the said partnership debts.”

And that the petition for discharge be amended so as to provide:

“Your petitioner seeks a discharge from all debts which may be provable against his individual estate, consisting not only of individual debts, but also debts contracted as a member of the firm composed of myself and Simon Hirsh, and doing business under the name of City Metal Works, except such debts as are excepted by law from a discharge.”

Thereupon the discharge would operate only for the protection of his individual estate, and could not be invoked as against the partnership of which he was a member. The order of discharge would provide for his discharge, as an individual, from any individual responsibility growing out of the partnership liability. This is not an application to set aside the discharge for the purpose of inserting a creditor in the schedules, as appeared in *Re Hawk*, 114 Fed. 916, 52 C. C. A. 536. It is not an application for the purpose of bringing in the partnership, and having it adjudicated a bankrupt, and its affairs administered, as was attempted in the *Matter of Mercur*, 8 Am. Bankr. R. 275, 116 Fed. 655, affirmed in 122 Fed. 384, 58 C. C. A. 472, 10 Am. Bankr. R. 505. The amendment cuts off no rights of Phelps, Dodge & Co.—for instance, the right to prove their claim. They had full opportunity to prove such claim against the bankrupt as an individual, which they neglected to do; and, although the time for proving the claim is now past, yet the fault is with the creditors who ignored their opportunity to reach the personal assets of the individual, if they so desired.

It is objected that, the term having passed, this court has no power to amend the judgment. That such power exists, has been adjudged. In *re Ives*, 113 Fed. 911, 51 C. C. A. 541, 7 Am. Bankr. R. 692 (decided below [D. C.] 111 Fed. 495, 6 Am. Bankr. R. 653); In *re Lemmon & Gale Co.*, 7 Am. Bankr. R. 291, 112 Fed. 300, 50 C. C. A. 247; In *re Mercur*, 116 Fed. 655, 8 Am. Bankr. R. 275, affirmed in 122 Fed. 384, 58 C. C. A. 472, 10 Am. Bankr. R. 505; *Matter of Henschel*, 114 Fed. 968, 8 Am. Bankr. R. 201; *Sandusky v. National Bank*, 23 Wall. 289, 23 L. Ed. 155. Contra, In *re Hawk*, affirmed on appeal on other grounds, 114 Fed. 916, 52 C. C. A. 536.

As already stated, the fact that a year has passed is not injurious to the creditors opposing this motion, inasmuch as they had ample opportunity to prove their claim, and nothing in the amendment affects it. In this the case is distinguishable from *In re Hawk*, *supra*. Therefore the present motion is granted, so far as to permit the amendments to the extent above stated, but not for the purpose of allowing the discharge of the firm.

UNITED STATES v. WANAMAKER.

(Circuit Court, E. D. Pennsylvania. January 28, 1905.)

No. 74.

CUSTOMS DUTIES—PING-PONG BALLS—TOYS.

Held, that ping-pong balls, which were sometimes sold as toys before the game of ping-pong was invented, and which have been occasionally sold for the same purpose since the game went out of vogue, but which, when imported, were not intended to be used chiefly as toys, but in the game of ping-pong, are not dutiable as "toys," under paragraph 418, Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1674].

On Application for Review of a Decision of the Board of United States General Appraisers.

John C. Swartley and J. Whitaker Thompson, for the United States,
Wm. L. Nevin, for defendant.

J. B. McPHERSON, District Judge. In April and May, 1902, John Wanamaker imported certain merchandise into the port of Philadelphia, which was invoiced and imported as "ping-pong balls." They were small white balls, of celluloid, about 1½ inches in diameter; and the question for decision is whether they should be classified as toys, or as a finished article, "of which collodion or any compound of pyroxylin is the component material of chief value." If they are toys, they should be classified under paragraph 418 of the tariff act of July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1674].

"418. Dolls, dolls' heads, toy marbles, of whatever materials composed, and all other toys not composed of rubber, china, porcelain, parian, bisque, earthen or stone ware, and not specially provided for in this act, 35 per centum ad valorem."

If the other classification is correct, however, the rate of duty is fixed by paragraph 17, Schedule A, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1628]:

"17. Collodion and all compounds of pyroxylin, whether known as celluloid or by any other name, fifty cents per pound; rolled or in sheets, unpolished, and not made up into articles, sixty cents per pound; if in finished or partly finished articles, and articles of which collodion or any compound of pyroxylin is the component material of chief value, sixty-five cents per pound and 25 per centum ad valorem."

The collector assessed the duty under paragraph 17, and against this action the importer duly protested. The record contains a special report to the collector by a local appraiser at the port of Philadelphia, declaring that the balls were made from celluloid, and were finished articles of collodion. The board of General Appraisers heard also the testimony of a witness who said that the articles were used in playing the game of ping-pong, and that both children and grown persons took part in the play. The board, relying upon G. A. 1,644, and an unpublished decision rendered in April, 1903, reversed the collector in June of that year, and held the merchandise to be toys. Thereupon the collector presented the pending petition for review, and further testimony has been taken concerning the use of such balls at the time of importation, as well as before and since that date.

The same question was raised in *United States v. Strauss* (C. C.) 128 Fed. 473, where ping-pong balls were decided to be toys by the Circuit Court for the Southern District of New York; but that decision was reversed a few days ago by the Court of Appeals for the Second Circuit, in an opinion published in 136 Fed. 185, of which a copy is now in my hands. The following extract will disclose the ground of the decision:

"No evidence was taken, either before the board or in the Circuit Court. The argument in the court below was confined to the question whether, in the absence of any evidence upon a question of fact, the Board of General Appraisers had the power to reverse the finding of fact by the collector.

"It is unnecessary to consider how far this argument might be applicable in a case where the collector had acted upon the evidence of witnesses produced before him. It has no relevancy to the question at issue in the case at bar, where the only evidence consisted in the articles themselves. The collector, the board, the court below, and this court are all equally entitled to avail themselves of such information as may be derived from an inspection of the articles in connection with the facts of common knowledge and experience of which judicial notice may be taken. Here it does not even appear that the Board of General Appraisers based their decision either upon inspection of these specific articles, or upon the facts of which they were entitled to take judicial notice. It appears from their opinion that they found the articles to be toys because they 'are of the same general character as those passed upon in' certain prior decisions. Said decisions are not incorporated in the record, and this court is without information as to whether the former conclusions were reached upon the hearing of testimony or upon inspection of the articles, or otherwise. We are unable to concur in the conclusion of the board that these articles are toys. A toy is defined as follows:

"'An article constructed for the amusement of children; a plaything, as a doll or Noah's ark; hence any trifling or amusing object; any bauble or knickknack; trinket; trifle.' Standard Dictionary.

"We cannot close our eyes to the fact that the game of ping-pong is ordinarily played on a table which is of such a height that it would be difficult for children to play the game; that it is a game indulged in by adults, and

one which requires a degree of skill not ordinarily possessed by children; and that ping-pong balls are sold in stores where athletic goods, such as footballs and baseballs, tennis and golf balls, are sold. The fact that small boys indulge in games of baseball and football does not serve to bring the balls within the category of toys. These ping-pong balls are imported and sold to be used in a game of skill played by adults."

The present case differs from *United States v. Strauss* in the fact that, while no evidence was offered there at any stage of the proceedings, several witnesses have testified here, and their testimony must be considered. I shall not discuss it in detail, but content myself by saying that it does not oblige me to come to a different conclusion from that which was reached in the Court of Appeals for the Second Circuit. It showed that such balls as these were sometimes sold as toys before the game of ping-pong was invented, and that since the game has gone out of vogue they are sold occasionally for the same purpose; but the fact is undoubted that, when the importation was made, the balls were not intended chiefly to be sold as toys, but to be used in the game, and this predominant use determines their character for present purposes. *Cadwalader v. Wanamaker*, 149 U. S. 539, 13 Sup. Ct. 979, 983, 37 L. Ed. 837. I do not think much significance is to be attached to the fact that they may be bought in some toy stores, as well as in stores where athletic goods are sold. If the testimony is to be considered as leaving the predominant use in doubt—and that is the best that can be said for it, although it is not my own opinion—the Circuit Court should not resolve the doubt against the positive decision of the Court of Appeals.

The decision of the Board of General Appraisers is reversed, and the classification of the collector is affirmed.

KURTZ, STUBOECK & CO. v. UNITED STATES.

C. SCHMITZ & CO. v. SAME.

(Circuit Court, S. D. New York. December 16, 1904.)

Nos. 3,499, 3,500.

CUSTOMS DUTIES—CLASSIFICATION—STRAW LACE.

Straw lace sewed with thread which constitutes a substantial element of its cost, and without which the material could not be held together or be a merchantable article, is not within the provision in paragraph 409, Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673], for lace composed "wholly" of straw, but is dutiable as a manufacture in chief value of straw, under paragraph 449 of said act (30 Stat. 193 [U. S. Comp. St. 1901, p. 1673]).

On Application for Review of Decisions of the Board of United States General Appraisers.

The decisions in question affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by Kurtz, Stuboeck & Co. and C. Schmitz & Co. Note G. A. 4,687, T. D. 22,124.

Albert Comstock, for importers.

Charles Duane Baker, Asst. U. S. Atty.

PLATT, District Judge. The merchandise in question consists of certain straw lace, stitched or sewed together with a cotton thread; the cotton thread constituting a substantial element of the cost thereof, and, as shown by the evidence, without which the so-called plait or lace could not be held together or be a merchantable article. It further appears from the evidence returned by the Board of Appraisers, and from that taken before the referee in the Circuit Court, that the straw was in its natural form and structure, and formed the component material of chief value in the merchandise. The straw lace was therefore dutiable under the provisions of paragraph 449 of the act of 1897, as classified by the collector, and not as a "braid, plait or lace, composed wholly of straw," under paragraph 409 of said act, as claimed by the importers, as the cotton thread interwoven in the lace was a necessary and a component element in its structure, and without which it would not be a commercial article.

The decision of the Board of General Appraisers is affirmed.

THE ASBURY PARK.

(District Court, S. D. New York. March 13, 1905.)

SHIPPING—STEAMBOAT CAUSING DANGEROUS SWELL—LIABILITY FOR DAMAGE TO BOAT IN TOW.

A steamboat navigating New York Bay at a high rate of speed *held* in fault for creating a dangerous swell, and liable for the resulting injury to a canal boat laden with coal, forming one of a flotilla in tow, which was knocked by the swell against other boats in the tow, loosening the planking at her bow, from which cause she afterward sank, with her cargo. The canal boat also *held* in fault for the neglect of her master to advise the master of the towing tug of her condition, which might have prevented her loss.

In Admiralty.

Carpenter, Park & Symmers, for Western Ins. Co.

Martin A. Ryan, for Tracy and others.

De Forest Bros. and Robert D. Benedict, for respondent.

ADAMS, District Judge. The first of the above entitled actions was brought by the Western Assurance Company of Toronto against the steamboat Asbury Park, to recover from the latter the insurance paid the owners on a loss of about 345 tons of coal, laden on the canal boat Tornado, alleged to have been sunk in the East River, on the 23rd day of May, 1904, through the effect of swells created by the Asbury Park, when passing the flotilla of boats of which the Tornado was one, in the bay opposite Liberty Island. The second action was brought by Michael Tracy and another, the owners of the Tornado, to recover the damages they suffered by reason of the sinking. The libels allege negligence on the part of the Asbury Park in creating swells as she passed the tow.

The answers deny any negligence on the part of the steamboat and allege the accident was caused by the unseaworthy condition of the boat, in connection with the incompetency of the master.

It appears that the tow was made up in three tiers, 4 boats in the head tier, 4 in the next and 2 in the last. The Tornado was on the starboard side of the first tier. The tow was in charge of the tug Anthracite, with the tugs Virginia Jackson and Robert Burnett as helpers. The tow left Port Johnson about 7.30 o'clock A. M. destined for points in the East River. The Tornado was bound for Astoria. The tow reached the vicinity of Liberty Island between 10 and 11 o'clock in the morning and there encountered the steamboat bound from Rector Street, New York, for the Highlands.

The Asbury Park left her pier at the foot of Rector Street at 1 minute after 10 o'clock A. M. under a slow bell, and after going a short distance, her headway was increased to full speed. She proceeded with some care, slowing twice before she reached the vicinity of this tow and again on account of it, reducing her speed temporarily, it is claimed, to about 10 knots per hour. Nevertheless she made her run to the Highlands, a distance of 18 knots in an hour and five minutes.

The steamboat passed the tow at a distance, variously estimated at from 700 to 1500 feet. The effect of her swells was to cause the boats in the tow to pitch and toss and pound against each other for several minutes, causing such damage to the Tornado that she subsequently became in a sinking condition. The claimant urges that as it does not appear that any other boat than the Tornado was seriously injured, it must be inferred that she was weak and unable to withstand the ordinary perils of navigation in New York harbor. There was no testimony, however, to sustain the contention that she was in such a condition. On the contrary, it appears, that although she was 15 years old, she was in fairly good order and would have carried her cargo safely if she had not been subjected to an extraordinary peril. Even if the vessels were 1500 feet away, as contended by the claimant of the Asbury Park, she still would be liable if her swells caused damage to the canal boat. The Majestic, 48 Fed. 730, 1 C. C. A. 78.

The claimant contends, however, that if it should be found that the swells of the steamboat did the original damage, which the libellants' testimony shows was an injury to some planks in the bow, a foot or two above the water line, still the steamboat is not liable because it clearly appears that the sinking of the boat, several hours afterwards, was due to the carelessness and lack of attention of her master. The Steam Tug Gen. Geo. G. Meade, 8 Ben. 481, Fed. Cas. No. 5,312, is cited by claimant. There a boat was lost through the refusal of her master to be towed to a place of safety. The tug was exonerated, but the distinction between that case and the one under consideration is, that there no liability existed upon the part of the tug for the original cause of the loss, because, although the boat struck a pier, which could have been prevented by the exercise of diligence on the tug's part, still the contact being one of the effects which the boat should have been strong enough to resist, it was held that the tug was not liable and that no negligence could be imputed to her after the master of the boat refused to be towed to a place of safety and all proper efforts were made by the tug to reach the boat's destination, where the master desired she should be taken.

As found above, there was in this case a liability on the Asbury Park's part for creating dangerous swells to a reasonably seaworthy boat, but there can, I think, be no question that the master of the boat failed to seasonably notify the tug of her damaged condition. It does not appear that the tug knew of it until just previous to the sinking, when the tug's master observed that the boat was settling by the head more than she should have done and asked the boat's master to sound her. This, it is testified, the latter refused to do and went down into his cabin. The tug master asked the master of another boat in the tow, then well up the East River, to sound the boat, which, after demurring because of there being a master on the boat, he did and found 2 feet of water in her. The tug master in the meantime returned to the deck and commenced pumping and the tug's siphon was also put into operation but notwithstanding such efforts to save her, she suddenly sank in 5 or 6 minutes. If the tug's master had been advised in time, there can be no doubt that the sinking could have been avoided and that in such way the boat contributed to the loss.

It seems to me that the proper disposition of the case, is to hold both of the boats in fault. The libellant the Western Assurance Company is entitled to recover its full damages. The libellants Tracy are entitled to recover half damages from the Asbury Park. A commissioner will determine whether or not there was a total loss of the boat and cargo, and adjust the damages accordingly. This method of disposing of the case is not altogether satisfactory, as it makes no provision for the recovery of the boat's damages from the swells, but doubtless *rusticum judicium* of this character is the nearest approach to justice that the circumstances will admit of. If desired, the Insurance Company's pleadings may be amended in conformity herewith.

Decree accordingly, with an order of reference.

IN re EXCELSIOR COAL CO.

(District Court, E. D. New York. February 3, 1905.)

SHIPPING—PROCEEDING FOR LIMITATION OF LIABILITY—COSTS.

In a proceeding for limitation of liability, where there is an appraisal, and a stipulation for value given, the petitioner is entitled to a single docket fee, and may deduct from the fund the expenses of administration, but this may not include the cost of procuring the stipulation, nor the expense of giving the same, nor of the appraisal; each person claiming damages, and recovering the same, is entitled to a separate proctor's fee, payable herein by the stipulators for costs, and not out of the fund.

In Admiralty.

Carpenter, Park & Symmers, for petitioners.

Edward H. Rogers and Jacob B. Ullman (J. P. Kirlin, of counsel), for Anderson et al.

THOMAS, District Judge. The following conclusions are reached:

1. Each separate person claiming damages, and recovering the same, is entitled to a separate proctor's fee, payable by the stipulators for costs, and not out of the fund.

2. The petitioner may deduct from the fund the expenses of administration, but this may not include the costs and expenses of giving the stipulation for value, nor the appraisal on which the same was based, nor should the expense of procuring the stipulation be taxed.

3. The petitioner will recover but one docket fee.

BALL & SOCKET FASTENER CO. v. PATENT BUTTON CO.

(Circuit Court, D. Connecticut. March 16, 1905.)

No. 1,169.

PRELIMINARY INJUNCTION—GROUNDS.

In a suit to compel the assignment of patents under a contract, where, on the showing made, there is a reasonable probability that complainant may succeed on the merits, he is entitled to a preliminary injunction to maintain the status quo until a final hearing.

In Equity. On motion for preliminary injunction.

John R. Bennett and Donald Campbell, for complainant.

John K. Beach and Samuel H. Fisher, for defendant.

PLATT, District Judge. The question for final determination will be whether two patents to White, Nos. 691,222 and 692,953, shall be assigned to complainant by virtue of the contract of January 22, 1887. That matter may well await its day in court. We are now concerned with one single question, i. e., whether the defendant shall retain the unclouded title to those patents until the main contention shall be settled. If there is a reasonable likelihood that the complainant may win on the merits at the end, it is quite proper that, in the circumstances as they exist, the status quo should be preserved. Not being satisfied by the affidavits that such course may not be at last adopted, the order asked for and argued at the hearing may be entered.

TOWN OF NAHANT v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. March 20, 1905.)

No. 529.

1. EMINENT DOMAIN—CONDEMNATION OF LAND BY UNITED STATES—RULE OF COMPENSATION.

The United States, in proceedings to condemn land for governmental purposes, exercises its own right of eminent domain, subject to the limitation of the federal Constitution that private property shall not be taken for public use without just compensation, and does not proceed under the right of the state; and the right to compensation and its measure may be different from that in a state condemnation proceeding with respect to property which had previously been appropriated to public or municipal uses under the laws of the state.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 19-23, 131.]

2. SAME.

An act of a state Legislature, like the one in question, authorizing the condemnation of property within the state by the United States for fortification purposes operates merely as a formal assent to the exercise by the general government of its own right of eminent domain, and does not entitle the United States to stand upon the local law as to the rule of damages, where property taken by the state for a second public use is connected with a prior public use authorized by the state.

3. SAME—PROPERTY OF MUNICIPAL CORPORATION—RIGHT TO COMPENSATION.

In proceedings by the United States to condemn land within the boundaries shown by a plat for fortification purposes, together with all roads, ways, and avenues, and all buildings and structures thereon, and all interests therein, the constitutional rule of just compensation entitles a municipal corporation to be compensated for physical structures and improvements which, under the laws of state, it has, by means of taxation, placed or acquired on the lands or streets taken, for the use of its inhabitants or the local public, such as water or sewer pipes, curbing, or the like, of which it is deprived by the taking of the property by the general government.

In Error to the District Court of the United States for the District of Massachusetts.

For opinion below, see 128 Fed. 185.

James R. Dunbar and William Hoag, for plaintiff in error.

William H. Garland, Asst. U. S. Atty.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. This is a proceeding instituted by the United States for condemnation of certain land at Nahant needed by the general government for fortifications and coast defenses, together with all roads, ways, and avenues included in the description of land, as well as all buildings and structures. The petition of the United States contains a prayer for notice to certain parties of interest expressly named, and a general prayer for notice to all parties interested in the lands described, and parts thereof, and rights therein, and for an appraisement and valuation by a jury of the land and ways and interests therein, and any buildings

standing on said land, including all damages sustained by the owner or owners thereof.

Following the prayer of the petition, the District Court ordered notice to the parties of interest named, and to any and all other persons, corporations, and associations who may be interested in the lands described in the petition, or any parts thereof or rights therein, and that they and each of them appear before the court, and show cause why the petition should not be granted as prayed for.

The order further directed the marshal to serve a copy of the petition upon parties of interest expressly named, and to give notice to all persons, corporations, or associations interested, by publication, and the return shows that notice was in fact given in accordance with the order. Subsequently, but seasonably, the town of Nahant, in which the property is situated, filed its application for leave to be admitted as a party, and for leave to file its answer to the petition, that it might recover from the United States fair damages for the taking of its property.

In pursuance of its purpose to be heard and recover fair damages, the town filed its answer, in which it claimed interests in the condemned property, consisting of easements and rights of way over which it had built, at great expense, macadamized, crushed stone, and graveled streets, and under which, and in lands not streets, it had built and laid sewers and sewer pipes. The answer further sets forth that the town had built and laid water pipes, and that the taking of the land and the streets by the petitioner, and cutting off the sewers, stop the drainage of the land outside the land condemned, and would compel the town to build and maintain a new and expensive system of drainage. The answer concludes with a prayer that the jury may appraise the damages by reason of the taking of the land, its easements and improvements, including streets, sewers, and water pipes, for which compensation was demanded from the petitioner.

After service, and before trial, an agreement as to values and damages was duly entered into between the government and certain of the parties of interest, and subsequently a jury was duly impaneled, to which the cause was committed. At the trial it was admitted that no plan had been filed in the office of the Secretary of State of Massachusetts, as required by the act of May 6, 1902 (Laws 1902, p. 289, c. 373), and that certain taxes were assessed upon the land in question on the 1st day of May, 1902; and the town claimed as an element of damage, or as an interest to be appraised and valued, a lien for the amount of the taxes assessed upon land condemned.

To state the substance of the town's claim for compensation, it offered to prove that within the territory condemned certain streets had been located and constructed by the town; that in such streets there were water pipes belonging to the town, connecting with and forming a part of its system, and that the taking by the United States would compel the town to construct other lines for the purpose of carrying water to its inhabitants, and for the purpose of completing the town water system; and that in such streets there were certain sewers, the property of the town, and part of its sewer

system, discharging through an outlet into the ocean, which were taken by the government, and that the sewers taken cared for the sewage of other portions of the town not taken; and that the taking of the sewers condemned would make it necessary to construct new sewers, and construct a new outlet or outlets for the sewerage system of the town.

The court excluded all such evidence as irrelevant and incompetent, and ruled that the town was not entitled to damages either on account of taxes, or because of the taking of the land in which the water pipes and sewers were laid, and the town excepted. No questions were submitted to the jury as to the interests of the town, and the jury rendered verdicts condemning the land described in the petition, and awarded damages to the owners of the fee, but none to the town; and a decree of condemnation was entered, covering the land described, together with all roads, ways, and avenues included in the description of the land, with all buildings and structures on the described premises; and the decree further recites that the land taken is shown upon a plan annexed to the petition.

It results, therefore, that we are confronted with the question whether the claim and offer of the town disclosed any interest in the property taken and condemned, for which it was entitled to compensation.

The petition in this case was filed April 29, 1902, and sets forth that the proceeding was instituted by the Attorney General of the United States, upon the application of the Secretary of War, in accordance with an act of Congress approved August 1, 1888, c. 728, § 1, 25 Stat. 357 [U. S. Comp. St. 1901, p. 2516], entitled "An act to authorize condemnation of land for sites of public buildings, and for other purposes." In the following May there was passed in the state of Massachusetts an act entitled "An act to approve the acquisition by the United States of a tract of land in the town of Nahant." Chapter 373, p. 289, Acts 1902. It is now contended by the United States that this proceeding for condemnation is so far authorized by the Massachusetts statute as to entitle the United States to stand upon the Massachusetts law as to the rule of damages where property taken for a second and different public use is connected with a prior public use authorized by the state, and that the rule of the local law is controlling.

We do not accept such view. The Massachusetts act was merely a recognition of the inherent power of the central government to exercise its own right of eminent domain, and a consent which amounts to a waiver of its jurisdiction under certain expressed limitations, and of all objection, if any, which the commonwealth might assert as a state upon consideration of its prior grants or delegations of quasi public power to municipal or other corporate interests. By the terms of the Massachusetts statute, it was an act to approve of and consent to the acquirement by the United States, through purchase or by condemnation, of land within its territory for purposes of national defense, reserving concurrent jurisdiction with the United States in and over the area to be acquired, only so far that all civil and criminal process issuing under authority of the

commonwealth might be executed on the land so acquired. The act does not employ any express words of grant, nor does it contain any expression indicating a purpose to transfer property, municipal or otherwise, to the United States, without compensation. The manifest and only purpose of the state was to acquiesce in the idea that the general government might acquire by purchase, or in its inherent right, through condemnation, under its own constitutional limitations—its own safeguards and proceedings—territory within the limits of Massachusetts for purposes of national defense.

In the case of *Kohl et al. v. United States*, 91 U. S. 367, 23 L. Ed. 449, where it was contended that the Circuit Court had no jurisdiction over a proceeding brought by the United States for condemnation of property within a state, and that the condemnation provided for by act of Congress meant condemnation by the state government in the exercise of its power of eminent domain, and that, if the state grant of power was accepted by the United States, it must be exercised in the mode and by the tribunal the state had prescribed, it was broadly, distinctly, and emphatically asserted that the principle of the right of eminent domain exists in the government of the United States as an inherent, necessary, and independent attribute of sovereignty; that the power of the United States in such respect is complete, and without any limitation that it shall be exercised in the manner prescribed for condemnation by a state; and that a proceeding in the United States court for condemnation for necessary public and federal uses is one by the United States government in its own right, and by virtue of its own eminent domain. See, also, *United States v. Gettysburg Electric Railway*, 160 U. S. 668, 679, 16 Sup. Ct. 427, 40 L. Ed. 576.

The United States, in the exercise of such inherent and paramount right of eminent domain, is under its own limitation and injunction in respect to questions relating to just compensation for property taken in its own right; and this results from the fifth amendment to the federal Constitution, which declares that private property shall not "be taken for public use without just compensation."

What would be just compensation for property taken by the general government in its exercise of the right to condemn property used for a prior federal public purpose, under its prior grant or franchise, might not be just compensation for property taken with which it had theretofore had no connection, and to which it therefore sustains the relation of an entire stranger to the title and to the property condemned.

Again, what would be just compensation in a condemnation proceeding by a state, where property had been dedicated to a prior public use under the exercise of a franchise granted by a state, might not be just compensation where property and rights are taken by the general government, in an independent proceeding, in the exercise of its own original and inherent right of eminent domain, to take property and rights upon just compensation. This would perhaps depend upon whether the general government, through the consent or grant of the state, and under the doctrine of subrogation, has succeeded to all the rights which would inure to the state in

case of its condemnation of property created in connection with an existing easement or franchise which the state had previously granted.

We do not, however, deem it necessary to inquire as to the status of the local law in respect to the rule of compensation where the state condemns property for a second public use which was created and dedicated to the prior public use in connection with a franchise previously granted by the state. If the right rests with the state of Massachusetts to condemn without compensation, for another and a different public use, property in the nature of structures created and used by municipal corporations in the exercise of a public easement or franchise like that in question, granted through the general law of a state, there is nothing in the act warranting the conclusion that the state intended to transfer any such right to the United States. It results, therefore, as we have said, that the general government is proceeding in this case in its own right of eminent domain, under the limitations of the Constitution, to secure property for a public and paramount purpose upon just compensation; the state, through its statute of approval and consent, having simply acquiesced in the idea that it may so proceed.

The situation, so far as the municipality is concerned, is this: The town of Nahant, under general laws of the state, exercised the municipal right to build streets for the accommodation of public travel, and to construct water and sewer systems for the comfort and protection of the local public. So far as lands within ways dedicated to public use and travel are concerned, it is not seriously contended in argument that the municipality had any title thereto which it can set up for purposes of compensation. Therefore we need not deal with any possible question in that respect. It is contended, however, that property in structures, such as pipes and other material connected with sewer and water systems, and in artificial structures in connection with streets, may become the subject of municipal property, and thus stands differently.

Even if it be true, which we doubt, that a structure like the Brooklyn Bridge (a public way resting at each end upon land dedicated by a municipality, under the laws of a state, to a public purpose) can be taken by the state, together with the land, for a second and different public use, without compensation, and if it be true that the general government (a different entity or sovereign) may, under its own condemnatory proceedings, take land dedicated to a public state use, for a second though a different and federal public use, without compensation, it would still be difficult to see how the proposition of federal constitutional just compensation can be sustained upon that ground, and to the extent that the general government may, for its own use in connection with fortifications, warships, or other federal defensive purposes, take the bridge (the iron, the steel, the granite, and other material in the artificial structure), which belong to the municipality, and may be worth millions of dollars, without any compensation or indemnity to the municipal entity which paid for it, and to which it belongs.

The act of Congress and the allegations in the pleadings contem-

plate just compensation for buildings and other structures as well as land.

The act of Congress authorizes condemnation of real estate by the United States, under judicial process, for public buildings or for other public uses. The petition directs itself against certain lands located in Nahant, particularly described by metes and bounds, and asks for condemnation thereof, "together with all roads, ways, and avenues included in the foregoing description, with all buildings and structures upon the described premises, all of which land taken is shown upon a plan annexed to this petition, entitled, 'Plan of the United States Reservation, Nahant, Massachusetts,' and to which reference is to be had for a more particular description of lands taken hereby." The petition then proceeds to ask, upon due notice to all the parties interested in the lands and parts thereof and rights therein, and after each and all parties interested have been heard, for "a faithful and impartial appraisal and valuation of said lands and ways, and interests therein, and any buildings standing on said lands, including all damages sustained by the owner or owners thereof."

It seems clear, therefore, that all structures in and upon the territory described, and all interests therein, have been taken; and this results from the fact that the petition, in pursuance of the high exercise of the paramount federal right of eminent domain, directs itself, without reservation or qualification, against the territory described upon a plan, and all ways, avenues, buildings, and structures which the petition alleges have been taken; and the decree, as well, directs itself against the territory, "together with all roads, ways, and avenues included in the foregoing description, with all buildings and structures upon the described premises, all of which land is shown upon a plan," etc., and the decree proceeds to condemn, without reservation, all such interests, and with apt words to vest the fee in the United States for its use forever.

The authorities, we think, sustain the text of Lewis on Eminent Domain in respect to what constitutes a taking of property—that, whenever lawful rights of an individual to the possession, use, or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is *pro tanto* taken. Beyond question, the authorities sustain the proposition as well that, where the right to take property is exercised as a paramount right, under the doctrine of eminent domain, and under apt proceedings, which at once and without qualification or reservation take hold of the body of the estate, and leave open for adjustment and ascertainment the question of just compensation only, such taking constitutes a taking of the entire property, within the meaning of the law.

We think the statute and the proceedings reasonably and fairly contemplate constitutional just compensation for all property interests taken or destroyed. The right to compensation is an incident of the power to take, and, as said in *Monongahela Navigation Company v. United States*, 148 U. S. 312, 326, 13 Sup. Ct. 622, 37 L. Ed. 463, the just compensation provided for by the Constitution means

emphatically a full and perfect equivalent for the property taken, and, in *United States v. Gettysburg Electric Railway*, 160 U. S. 668, 680, 16 Sup. Ct. 427, 40 L. Ed. 576, the full value of the property taken is to be paid.

We do not deem it necessary to engage in an extended discussion of questions relating to municipal ownership in property, or to enter upon a discussion of the confused state of the authorities in respect to the question of compensation when property already used for a public purpose is taken for a broader or another distinct public use by the sovereignty creating the franchise upon which the first public use was predicated. It is quite sufficient to say that the older authorities as to the reserved right of the state to condemn country roads for state use without compensation are at least obsolete so far as having application to municipal property rights under the recent extraordinary growth of municipal properties in modern times, and under modern legislative enactment. There is a broad distinction between rural highways and urban streets. *Lewis on Eminent Domain*, § 91c, and notes.

The question of the reserved right of the state to alter, amend, and withdraw its franchises or easements, and the effect of the exercise of such right upon property based thereon, received discussion in section 68 of *Dillon's Municipal Corporations* (4th Ed.), and notes thereto; and in section 71, and elsewhere, the subject of the legislative power over public and private property of municipalities.

Quite aside, however, from the extent of the right, or the limitations upon the right, of a state, under its reserved power, to devote private and public municipal property to a second public use, the weight of modern authority is altogether in favor of the proposition that structural properties created or acquired through the exercise of municipal functions in connection with a franchise or easement granted by the state will not be taken, even by such sovereignty, for a distinct and different public use, without compensation.

Speaking generally, the authorities sustaining the doctrine of a dedication to a second public use without compensation have reference to the rights of the original landowner, who has once been paid full compensation for the land taken for public purposes. This distinction should always be borne in mind, and it is difficult to see how, in principle, such authorities apply to the situation of a municipality which has not once been paid for its property dedicated to a public use, or to a situation where a municipality, through burdens of taxation resting upon its units, has created or acquired, in its own distinct municipal right, tangible property and structures which it holds as trustee for the beneficial use of its inhabitants and the local public. There would seem to be no reason why such property should not be treated, at least for purposes of constitutional just compensation, as private municipal property. The burden of its property creations, through taxation, rests upon the units of the local municipality. Property creations and existence are necessary incidents of municipal government. There is no just reason, under such circumstances, for saying that because of the ordinarily accepted legal fiction that structural property attaches to the legal title to the

realty, and because the municipality holds the legal right to use the land, rather than the legal title to the land, the municipal trustee of the body politic which paid for the structural property should not have just compensation from a distinct and independent entity which takes it, not as owner of the land, but under arbitrary right, and for a purpose entirely different than that for which the property was originally designed and paid for, and to which it was originally dedicated. As between parties like these, where the entity taking the property is in a legal sense a stranger to the municipal right, it is difficult to see any difference in principle between municipal property consisting of flagstones, granite curbings, and lamp-posts, or other things which would be necessary and valuable for use in connection with the street system of a municipality, and municipal property consisting of waterworks, elaborate sewer pipes, or electric lighting systems, furnishing water or light upon money rates to individual users, or free to the inhabitants of the municipality, except the burden which results from taxation.

The situation in the case we are considering does not require an analysis of the many authorities in respect to municipal ownership and municipal right of compensation where condemnation is made by a state for a second public use, and our general observations in that respect only bear upon the question whether the state of Massachusetts undertook to transfer to the United States its right, if any, to take for a second use property of the character in question without compensation. In determining the question whether the state of Massachusetts, through its legislative act of 1902, to which we have referred, undertook to transfer to the United States any supposed right to condemn without compensation property resting upon its franchise, it must be borne in mind that corporate, charter, and contract rights are protected by the Constitution of the United States as property (*West River Bridge Company v. Dix*, 6 How. 507, 12 L. Ed. 535)—a doctrine fully recognized by the courts of Massachusetts (*Boston Water Power Company v. Boston & Worcester Railway Company*, 23 Pick. 360; *Central Bridge Corporation v. Lowell*, 4 Gray, 474) as well as by the courts of the United States (*Monongahela Navigation Company v. United States*, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463). It may be stated as an unquestioned rule that the right to take property already devoted to public use cannot rest in doubtful construction. The right must be given in express terms or by necessary implication. *Boston Water Company v. Boston & Worcester Railway Company*, 23 Pick. 360, 398; *Inhabitants of Springfield v. Connecticut River Railway*, 4 Cush. 63, 71, 72.

There is nothing in the terms of the Massachusetts act which makes the United States its successor in respect to the control of the state over its municipal or other franchises, or in respect to its right to take tangible property of municipal corporations, and the whole situation is such as to make it unreasonable that rights of successorship in that respect should result by implication. In the case of *Monongahela Navigation Company v. United States*, 148 U. S. 312, 344, 13 Sup. Ct. 622, 633, 37 L. Ed. 463, to which we have referred, Mr. Justice Brewer, after referring to the Dartmouth College Case

as establishing the doctrine that rights created by an act of incorporation cannot be set aside by either party to it, says:

"The state has never assumed to exercise any rights reserved in the charter. * * * So far as the state is concerned, all its grants and franchises remain unchallenged and undisturbed in the possession of the navigation company. The state has never transferred, even if it were possible for it to do so, its reserved rights to the United States government; and the latter is proceeding, not as the assignee, successor in interest, or otherwise of the state, but by virtue of its own inherent supreme power. * * * Our conclusions are that the navigation company rightfully placed this lock and dam in the Monongahela river; that, with the ownership of the tangible property legally held in that place, it has a franchise to receive tolls for its use; that such franchise was as much a vested right of property as the ownership of the tangible property; that the right of the national government, under its grant of power to regulate commerce, to condemn and appropriate this lock and dam belonging to the navigation company, is subject to the limitations imposed by the fifth amendment—that private property shall not be taken for public uses without just compensation."

True, in that case the corporation was not a municipal corporation; still, in a municipal situation like the one before us, where the town is not claiming right to compensation for the land or the easement dedicated to the public under state authority—a phase of the situation which we do not consider—we are unable to see why the reasoning of the Monongahela Case does not apply with full force to the rights of a municipality in respect to tangible property which it is entitled under the state law to acquire and hold, and to the natural and reasonable consequences which may result from a taking by the United States.

This proceeding is one, as already said, in which the United States stands upon its inherent and independent right to take property for necessary public purposes under the constitutional limitation of just compensation. *United States v. Gettysburg Electric Railway Company*, 160 U. S. 668, 675, 16 Sup. Ct. 427, 40 L. Ed. 576; *Monongahela Navigation Company v. United States*, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463; *Barron v. City of Baltimore*, 7 Pet. 243, 8 L. Ed. 672.

In his work on *Municipal Corporations* (4th Ed., §§ 66, 67, and notes), Judge Dillon observed that municipal corporations, as ordinarily constituted, possess a double character—the one, governmental, legislative, or public; the other, in a sense, proprietary or private—and over its civil, political, or governmental powers the authority of the Legislature is, in the nature of things, supreme and without limitation, unless the limitation is found in the Constitution of the particular state. But in its proprietary or private character, the theory is that the powers are supposed not to be conferred primarily or chiefly from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct personality or corporate individual; and as to such powers, and to property acquired thereunder, the corporation is to be regarded *quo ad hoc* as a private corporation. Again, at section 68, that property acquired and owned by a municipal corporation by legislative consent is not subject to an unlimited power of the Legislature over it, is conso-

nant with natural justice. The need of having property and property rights is one of the main reasons why municipal corporations are created. Under the Roman law, as declared by Savigny (*Jural Relations*, § 85), "Property capacity is the essential quality of a juristical person." While under the state authorities there is some confusion as to the extent to which this doctrine is accepted, the great weight of authority, as will be seen by reference to the authorities collected in the notes to which I have referred, sustains the principle of the necessary municipal right of holding property.

Again, according to Judge Dillon's text (section 68), "If a municipal corporation, as representing a distinct community, be regarded as a legal person, the Legislature, in effect, says to it, 'You may at your own expense acquire property;'" and in *County of Richmond v. County of Lawrence*, 12 Ill. 1, 8, Judge Trumbull, in speaking of public municipal corporations, says, "The corporation is to be regarded as a private company. A grant may be made to a public corporation for purposes of private advantage, and, although the public may also derive a common benefit therefrom, yet the corporation stands on the same footing, as respects such grant, as would any body of persons upon whom like privileges were conferred;" and in *Montpelier v. East Montpelier*, 29 Vt. 12, 19, 67 Am. Dec. 748, that "towns, and other public corporations may have private rights and interests vested in them under their charters, and as to those rights they are to be regarded and protected the same as if they were the rights and interests of individuals or of private corporations."

The theory of property rights of municipalities is fully recognized by the Supreme Court in *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380, as well as in *Mt. Hope Cemetery v. Boston*, 158 Mass. 509, 511, 33 N. E. 695, 35 Am. St. Rep. 515, which was a case where the double character of cities and towns was considered; and the court in the latter case, after stating the local doctrine of the power of the Legislature in respect to property held in agency of the state government for strictly public purposes, declared that:

"By a quite general concurrence of opinion, however, this legislative power of control is not universal, and does not extend to property acquired by a city or town for special purposes not deemed strictly and exclusively public and political, but in respect to which a city or town is deemed rather to have a right of private ownership, of which it cannot be deprived against its will, save by the right of eminent domain, with payment of compensation. This distinction we deem to be well founded, but no exact or full enumeration can be made of the kinds of property which will fall within it, because in different states similar kinds of property may be held under different laws, and with different duties and obligations, so that a kind of property might in one state be held strictly for public uses, while in another state it might not be. But the general doctrine that cities and towns may have a private ownership of property, which cannot be wholly controlled by the state government, though the uses of it may be in part for the benefit of the community as a community, and not merely as individuals, is now well established in most of the jurisdictions where the question has arisen."

As between a town and a state, the right of compensation for acquired property might depend in some cases upon the authority of the local municipality to hold property for a given purpose, and in

other cases upon the question whether the town holds the property as the agent of the state, for strictly public or state purposes; but, however that may be, and without elaborating further these questions, which we deem in a sense immaterial in a case like the one before us, where the municipality was authorized by the state law to raise money from the local municipal body to construct ways and construct water and sewer systems, all in a sense public, though primarily for the benefit of the local municipal community, and where the municipality has acquired property for such purposes, we have no doubt of its right to recover just compensation therefor, when taken under the right of eminent domain by a power other and higher than the state.

This case, as we have already said, comes to us upon offers of proof and upon a general ruling. Upon propositions so general and unsubstantial as offers of proof, we do not feel called upon to define all the rules which may govern in respect to damages, or to describe the mode of ascertaining the measure of damages required by the constitutional provision in respect to just compensation; nor could we understandingly do so, under propositions so general, if we were disposed to. We cannot enter upon a field so broad and indefinite as that opened by general offers of proof, for the purpose of determining all possible questions involved. Upon actual trial and upon actual proofs and distinct rulings, the situation would naturally be simplified, and the questions may be presented in one aspect or another; and we cannot now anticipate what questions would become material in the actual trial, if one is had. The general view now presented may then be changed in substantial respects. The only question for us to decide, in the present aspect of the case, is whether the municipality of Nahant had an interest in the property condemned, which it was entitled to have appraised, and for which it was entitled to have compensation. Our conclusion is that it had such an interest, and our decision does not go beyond the general question presented. We may, however, make general reference, without decision, to some of the questions discussed. If we were to undertake to anticipate and determine all possible questions upon these general offers of proof, we should have to consider the view expressed by Mr. Justice Brewer in the *Monongahela Navigation Company Case*, 148 U. S. 312, 326, 13 Sup. Ct. 622, 626, 37 L. Ed. 463, that the constitutional combination of the two words "just compensation" means a full and perfect equivalent for the property taken, and that the just compensation is for the property, and not to the owner, which, according to the view of the Supreme Court in that case, takes a situation like this from the rule which permits benefits to the owner to be deducted from the values in ascertaining the measure of damage to which he is entitled.

We do not look upon this case as one in which counsel for the town are seriously contending for compensation for the state franchise in respect to the municipal interests within the territory condemned. It will probably be found that the great majority of cases which hold that the value of the franchise right is to be considered upon the question of compensation, like *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846, *Great Falls Mfg. Co. v. Garland*, 124 U. S. 581, 8 Sup. Ct. 631, 31 L. Ed. 527, and

the Monongahela Navigation Company Case, 148 U. S. 343, 13 Sup. Ct. 622, 37 L. Ed. 463, have reference to a franchise granted to a corporation only quasi public—one where the right relates to a situation into which the public interest enters somewhat, but which chiefly involves an enterprise for remunerative results to the corporation.

Ordinarily structures and certain kinds of fixtures are compensated for by appraising them as a part of the realty. This is probably universally true where land is taken from the owner for public purposes. We have no doubt, however, upon principles of natural justice and of right, that a municipality should be compensated upon an appraisal of its tangible property resting upon and under land which it does not own, but with which its property is connected in the exercise of a public franchise for public purposes; and, assuming this to be so, in estimating its value all the capabilities of the property, and all the uses to which it may be applied or to which it is adapted, are to be considered. 2 Lewis on Eminent Domain, 1048; Smith on Modern Law of Municipal Corporations, 719.

The petition prays for an impartial appraisal of property taken, including "all damages sustained by the owner or owners thereof." Still, in view of the general character of the claim of the town for indemnity for the interruption to its water and sewer systems which results from taking a part thereof, we do not feel called upon to determine whether, in arriving at just compensation, or, in other words, whether, in making the municipality whole by returning an equivalent for what has been taken, just compensation for property actually taken is to be ascertained by reference to its capabilities and uses in connection with the part not taken, or (Lewis on Eminent Domain, §§ 471, 471a) by ascertaining the difference between the value of the whole property before the taking and the value of the remainder after the taking, or by ascertaining the value of the part taken, together with the damage resulting to the parts of the system outside of the territory taken, by reason of the interruption or severance.

We do not think the claim or the offer of proof sufficiently definite to justify us in assuming to decide which rule should be applied. It is said in Lewis on Eminent Domain (section 464) that, "when part is taken, just compensation includes damages to the remainder. Upon this point there is entire unanimity of opinion. 'The constitutional provision cannot be carried out, in its letter and spirit, by anything short of a just compensation for all the direct damages to the owner.'" To these propositions there are gathered many authorities in the notes contained in the second edition of that work. Dillon says, "Regard must be had to the condition as to the shape, use, and convenience in which the residue of the property will be left" (Dillon on Municipal Corporations, vol. 2, § 624), while Mr. Justice Peckham, speaking for the Supreme Court, leaves the question in this way:

"As to the effect of the taking upon the land remaining, that is more a question of the amount of compensation. If the part taken by the government is essential to enable the railroad corporation to perform its functions, or if the value of the amount remaining is impaired, such facts might enter into the question of the amount of compensation to be awarded." United States

v. Gettysburg Electric Ry., 160 U. S. 668, 685, 16 Sup. Ct. 427, 431, 40 L. Ed. 576.

See, also, Cooley's Constitutional Limitations, 697, 700, and notes (6th Ed.). United States v. Alexander, 148 U. S. 186, 13 Sup. Ct. 529, 37 L. Ed. 415; United States v. Truesdell, 148 U. S. 196, 13 Sup. Ct. 532, 37 L. Ed. 419; Great Falls Mfg. Co. v. Garland, 124 U. S. 581, 8 Sup. Ct. 631, 31 L. Ed. 527; Pumpelly v. Green Bay Co., 80 U. S. 166, 177, 178, 20 L. Ed. 557; Laflin v. Chicago, W. & N. R. Co. (C. C.) 33 Fed. 415; 18 American Digest (Cent. Ed.) col. 1277, § 365, and numerous cases there cited.

We do not decide upon which view this cause should be submitted to the jury. Perhaps either would be correct. Any view which would give the town just compensation for its property taken would answer the requirement of the Constitution. It is possible that a verdict based upon the value of the structures and materials and other tangible properties of the town actually taken, together with a special verdict for the damage resulting to parts of property not taken, might solve the situation.

As we hold that the federal proceeding takes hold of the situation *ex proprio vigore*, and without regard to the state statute or the will of the state (*Monongahela Navigation Co. v. U. S.*, 148 U. S. 312, 341, 13 Sup. Ct. 622, 37 L. Ed. 463), we have no occasion to consider the question based upon the failure of the government to file a copy of the plan of the premises taken as required by section 4 of the Massachusetts act of May 6, 1902; and as we hold that the property was taken by the act of the United States in its own right under its high prerogative of sovereignty and by virtue of its own proceeding, which antedated the assessment of the taxes in question, there is no occasion to consider that aspect of the case.

The decree of the District Court is so far opened as to permit further proceedings not inconsistent with the opinion of this court passed down this day, to the end that the town of Nahant may have just compensation for its property taken.

HAYDEN v. FRANKLIN LIFE INS. CO.

(Circuit Court of Appeals, Eighth Circuit, March 27, 1905.)

No. 2,075.

1. BENEFIT INSURANCE—EVIDENCE—ARTICLES OF ASSOCIATION AND BY-LAWS.

In an action on a policy of insurance issued under the assessment plan, it is competent for either party to introduce in evidence the articles of association and by-laws of the company in determining the obligations and rights of the parties.

2. SAME—POLICY CONTRACT ON THE ASSESSMENT PLAN.

Although the policy, under the head of "Insurance Plan," gives a table of quarterly payments to be made by the assured opposite designated age periods, varying therewith, it does not fix upon it the character of an ordinary life policy contract at a level premium at the time of entry, so as to subject the policy, after default by the assured, to the provisions of the nonforfeiture law of Missouri, where the policy contains the further

provision that "should the Emergency Reserve Fund, or any part thereof, be used as aforesaid, its impairment may be made good by an assessment in addition to the regular Mortuary Call." Such stipulation brings the policy within the designation of one under the assessment plan, as defined by section 7901, Rev. St. Mo. 1899.

3. SAME—EFFECT OF REINSURANCE CONTRACT.

Where a Missouri insurance company issues its policy under the assessment plan conformably to the state statute, and afterwards makes a contract of reinsurance with an Illinois life insurance company, approved by the Superintendent of Insurance of the former state, and the reinsuring company, in writing, assumed the outstanding policy in suit, according to its terms and conditions, and the assured thereafter pays to the reinsurer one or more quarterly premiums, as theretofore to the original assurer, the reinsuring company cannot be held, as under an ordinary life insurance contract, on the level premium plan, notwithstanding the consideration expressed in the reinsurance contract between the companies does not contain the word "assessments."

4. SAME—NET VALUE OF POLICY AT TIME OF FORFEITURE.

A policy of insurance on the assessment plan, where the assured let the policy lapse by refusal and failure, after notice, to pay the quarterly stipulated premium and a call to meet the impairment of the emergency reserve fund, such policy does not have such net value as to bring the policy within the nonforfeiture law of the state. And such policy having expressly provided "that if any premium or any assessment called in accordance with said Insurance Plan shall not be paid on or before the day named in the notice for payment thereof, the contract shall be null and void and of no effect," such default prevents a recovery by the beneficiary under the policy.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

The statute of Missouri (article 3, c. 119, Rev. St. 1899) in force at the time of the incorporation of the Merchants' Life Association authorized the organization of insurance companies on what is popularly known as the "assessment plan." Section 7901 declares that: "Every contract whereby a benefit is to accrue to a person or persons named therein, upon the death or physical disability of a person also named therein, the payment of which said benefit is in any manner or degree dependent upon the collection of an assessment upon persons holding similar contracts, shall be deemed a contract of insurance upon the assessment plan, and the business involving the issuance of such contracts shall be carried on in this state only by duly organized corporations which shall be subject to the provisions and requirements of this article." Section 7905 of said article declares that insurance companies so organized shall provide for the accumulation of an emergency fund, which shall be not less than the proceeds of one death assessment on all policy or certificate holders, "which fund, together with the income thereon, shall be a trust fund for the payment of death claims or other benefits provided for in said policies or certificates, and shall be invested, etc. * * * If, in any period of six months, the death rate of any such corporation shall be in excess of the annual rate of mortality as shown by the American life tables, it shall be lawful for such corporation to draw out any portion of said securities necessary to meet such excess," etc. Section 7906 recognizes the right of foreign companies to do "insurance on the assessment plan" by complying with certain conditions of the statute.

The Merchants' Life Association was organized under this statute in 1890. Its charter provided, *inter alia*, that "the purpose for which said company is organized is to carry on a life insurance business on the assessment plan. * * * The fund with which to pay death losses is to be accumulated by assessments on policy holders. * * * An emergency fund shall be accumulated, etc. * * * Assessments upon policy holders in addition to providing

for such emergency fund shall also be for the purpose of paying death losses, etc." The by-laws adopted by the association gave to the executive committee power to levy all premiums and assessments. They provided that all policy holders, and none others, should be members of the association, and at all meetings each member should be entitled to one vote. The aim of the association was to furnish life indemnity, at cost, on the plan hereinafter set forth. They provided that a mortuary call, payable quarterly or annually, to provide a mortuary fund for the payment of death claims, should be according to the following rates at entry: (giving a table of increasing quarterly and annual rates.) They further provided that an emergency reserve fund, to meet death claims in excess of the mortuary fund, should be raised in the same way and time by the payment of 25 per cent. of such mortuary call; and this, together with \$3 for annual expenses, should constitute the premium rates for each \$1,000 of insurance. Should the emergency fund, or any part thereof, be used as aforesaid, its impairment shall be made good by an assessment in addition to the regular mortuary call. Article 6, § 1, required regular assessment notices to be served. In case of the impairment of the emergency reserve fund from any cause, the same shall be made good by an assessment against each member of the association according to the rates of the mortuary call. Section 2 declared that "if any policy holder shall fail to pay the amount of his or her premium or assessment, the policy shall lapse."

On November 22, 1892, David J. Hayden, a resident of St. Louis, Mo., made application for insurance in said Merchants' Life Association, and a certificate in the sum of \$5,000 was issued to him. The policy expressed to be issued "in consideration of all premiums and assessments, as stated in the Insurance Plan endorsed hereon"; and provided that, "if any premium or any assessment called in accordance with said Insurance Plan, shall not be paid on or before the day named in the notice for the payment thereof," the policy should become null and void. The policy also contained this provision: "The Mortuary Call payable quarterly or annually to provide a Mortuary Fund for the payment of death claims shall be according to the following rates at entry." This is followed by a table of entry rates, both quarterly and annually, increasing annually from the ages of 20 to 55; which table is then followed by this provision:

"An Emergency Reserve Fund to meet death-claims in excess of the Mortuary Fund, shall be provided in the same way and at the same time by the payment of 25 per cent of said Mortuary Call; and these, together with three dollars for Annual Expenses, shall constitute the premium rates for each one thousand dollars insurance.

"Should the Emergency Reserve Fund, or any part thereof, be used as aforesaid, its impairment shall be made good by an assessment in addition to the regular Mortuary Call."

The assured made the payment required of him by the policy up to June, 1899, when the defendant in error, the Franklin Life Insurance Company, a corporation of Illinois, reinsured the Merchants' Life Association, being authorized thereto by section 7904, Rev. St. Mo. 1899, which provides that: "No corporation of this state, organized or doing business under the provisions of this article, shall transfer its risks to or re-insure them in any other corporation, unless the contract of transfer or re-insurance is first submitted to and approved by a two-thirds vote of a meeting of the insured, called to consider the same, of which meeting a written or printed notice shall be mailed to each policy or certificate holder, at least ten days before the day fixed for said meeting; and in case said transfer or re-insurance shall be approved, every policy or certificate-holder of said corporation who shall file with the secretary thereof, within five days after said meeting, written notice of his preference to be transferred to some other corporation than that named in the contract, shall be accorded all the rights and privileges in aid of such transfer as would have been accorded under the terms of said contract had he been transferred to the corporation named therein; but no such transfer shall be valid until the terms and conditions shall have been fully submitted to the superintendent of the insurance department, and have been approved by him." This contract of reinsurance was approved by the

State Superintendent of Insurance. The contract of insurance between the two insurance companies was evidenced as follows: On the 18th day of May, 1899, the Franklin Life Insurance Company submitted a written proposition to the Merchants' Life Association, so much of which as is material to this controversy is as follows:

"May 18th, 1899.

"To the Merchants' Life Association—Gentlemen: We make you the following proposition of reinsurance:

"In consideration of the transfer to us of all your money securities, assets, and property of every kind, together with all your books and records, the value of said assets being shown by Exhibits of Assets hereto attached, and of the transfer to us of all your outstanding policies, with all premiums due or to become due thereon, and with your recommendation that the policy holders continue their insurance with us and on the complete substitution (so far as lies in your power) of this company in place and stead of the Merchants' Life Association we will:

"First, Assume outstanding policy contracts, as shown by the two exhibits of policies in force, of date May 13, 1899, hereto attached and all obligations to policy and beneficiaries, thereunder," etc.

On the 19th day of May, 1899, the said Franklin Life Insurance Company sent to the Merchants' Life Association an explanatory note stating: "Referring to the proposition made by us to your association under date of May 18th, 1899, and especially in reference to the clause of the first paragraph relating to 'the transfer to us of all your outstanding policies,' we desire to say that we mean thereby that your officers and directors shall use their best efforts and influence to induce your policy holders to transfer their insurance to our company." It was stipulated between the two companies that a period of 20 days from May 20, 1899, be extended to the policy holders for the expression of a desire to be reinsured in some other company than said Franklin Life Insurance Company, as provided they may do by law. On the 12th day of June, 1899, the Franklin Life Insurance Company, in writing, assumed, "under and according to the terms and conditions thereof, policy or certificate No. 1140, issued by the Merchants' Life Association of the United States Nov. 22nd, 1892, to David J. Hayden of Saint Louis, Mo., for \$5,000 payable to Mary F. Hayden and Annie E. Hayden, or the survivor of them, sisters of the insured." Thereafter, on June 15, 1899, the insured paid to the said Franklin Life Insurance Company the payment due on that day, and also on September 15, 1899. The insured thereafter failed and refused to make any further payments, though duly notified, up to the time of his death, which occurred on the 28th day of June, 1901.

This suit was brought by the plaintiff in error, as the beneficiary under the policy, to recover thereon the sum of \$5,000 against defendant in error, on the theory that the policy in question was of the nature of an ordinary life insurance policy on the level premium plan, fixed at the date of entry, and that what is known as the "Nonforfeiture Law" of Missouri applies to the policy, which provides that: "No policies of insurance on life hereafter issued by any life insurance company shall, after the payment upon it of three annual premiums, be forfeited or become void by reason of non-payment of premiums thereof, but it shall be subject to the following rules of computation, to-wit: The net value of the policy, when the premium becomes due and is not paid, shall be computed upon the American Experience Table of Mortality, with four and one-half per cent interest, and * * * three-fourths of such net value shall be taken as a net single premium for temporary insurance for the full amount written in the policy, and the term for which said temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium and the assumption of mortality and interest aforesaid"—the claim being that the policy possessed a net value at the time of the death of the assured to extend it beyond that period. The answer, *inter alia*, alleged that the policy lapsed on the 26th day of November, 1899, and denied that it had any net value sufficient to carry it for the period of 5 years and 184 days, as claimed in the petition. It alleged that the Merchants' Life Association

was a mutual association, organized under the statutes of the state of Missouri on the assessment plan, and that only members of said association should be policy holders. It then pleaded the constitution and by-laws, as hereinbefore set out. It alleged that the policy was indorsed as an insurance plan, and set out the provisions respecting the rates specified for mortuary calls, the rates at the age of entry, and alleged that the rates were increased each year after entry; that in October, 1899, the emergency reserve fund became impaired by reason of its use for the purpose of meeting death claims in excess of the mortuary fund; that on the 26th day of October of that year the defendant made a special assessment to cover said impairment, amounting to \$55.20 against said assured; that due notice thereof was given to him, said assessment becoming due on the 26th of November, 1899; that his failure and refusal to pay said assessment caused said policy to lapse; that the regular quarterly assessment thereon of \$25.30 became payable December 15, 1899, of which due notice was given to the assured November 13, 1899; that his failure to pay said assessment on or before December 15, 1899, forfeited said policy; that the net single premium for temporary insurance for the full amount of said policy from the date of lapse to the date of death was in excess of the net value of the policy, and that said assured was asked to restore said policy by making payment of said assessment, which he refused to do. The plaintiff tendered the general issue in the reply. The testimony of actuaries, as insurance experts, was introduced on the question as to whether or not said policy had any net value at the time of the death of the assured. The parties submitted a written stipulation as to certain facts involved, which concludes as follows: "It is agreed between the parties that the primary question for determination is whether upon the foregoing facts the non-forfeiture law of Missouri is applicable to this case; that if not applicable defendant is entitled to judgment; that if said statute is applicable then the further question is to be determined whether the policy in suit has any net value under such statute and what that value is, and whether three-fourths of such net value was sufficient to carry said policy under the provisions of said non-forfeiture statute from the date when said policy lapsed to the date of the death of said David J. Hayden. If said non-forfeiture law is applicable and said policy had such net value, that three-fourths thereof would under the statute continue said policy in force from the date of lapse until the date of death, then the plaintiff is entitled to judgment, unless the court finds for defendant on the second defense pleaded in the amended answer. If the policy had no net value, or if three-fourths thereof was insufficient to carry said policy from date of lapse to date of death, then defendant is entitled to judgment, and on the question of the character of the policy and its value, either party is entitled to introduce evidence." At the conclusion of the evidence, under direction of the court, the jury returned a verdict for the defendant. To reverse the judgment entered thereon, the plaintiff below prosecutes this writ of error.

F. H. Sullivan (P. T. Barrett, George M. Block, and Charles Erd, on the brief), for plaintiff in error.

James C. Jones (Jones, Jones & Hocker, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge, after stating the case as above, delivered the opinion of the court.

The first error assigned by the plaintiff is predicated on the action of the trial court in admitting in evidence the articles of association and by-laws of the Merchants' Life Association. The objections to the former are that they are not parts of the contract of insurance, and the defendant's liability is to be determined by the terms of the original

policy, which does not refer to the charter. A like objection was interposed to the admission in evidence of the by-laws.

The principal cases cited in support of these objections are *McDonald v. Life Ass'n*, 154 Mo. 628, 55 S. W. 999, *Elliott v. Life Ass'n*, 76 Mo. App. 566, and *Taylor v. Aetna Insurance Company*, 13 Gray (Mass.) 438.

In the *McDonald Case* the insurance company, an Iowa corporation, being authorized to do business on the "assessment plan" in the state of Missouri, in order to show that the policy in suit was issued on the assessment plan, offered in evidence its articles of incorporation and by-laws. Of this the court said:

"The policy did not refer in any manner to the articles of incorporation or to the by-laws, and hence they constitute no part of the contract. *Elliott v. Ins. Co.*, 76 Mo. App. 566. Nor were they pleaded in any manner, and therefore they were inadmissible."

The case of *Elliott v. Insurance Company*, cited by the Supreme Court, does not set out in detail the policy in question. It is inferable, however, from the recitations in the opinion, that there was nothing on the face of the policy or the reverse side thereof to indicate that it was other than an ordinary life insurance policy. The articles of association and by-laws were excluded on the ground that the contract of insurance did not make them a part of the contract, and they were not referred to therein.

This ruling, evidently, was based upon what was said by Metcalf, J., in *Taylor v. Aetna Life Insurance Company*, 13 Gray, 434, 438. The policy in question in that case was an ordinary life insurance contract. On the question of proofs of loss, in order to show that the contract of insurance had not been complied with, the defendant put in evidence a pamphlet issued by the insurance company, usually delivered to its policy holders, which required that a certificate of death should be furnished from the attending physician. This was excluded, on the ground that the policy did not embody or refer to any by-law, requisition, or understanding of the defendant's as to the character of proof required of the death of the assured. "He is bound only by the policy itself; that is, to furnish 'due proof' of the death. If the defendants would have bound the plaintiff by their by-laws, etc., they should have made the policy, in terms, subject to those by-laws, or in some way have made them a part of the contract contained in the policy." Citing *Kingsley v. New England Mutual Fire Insurance Company*, 8 Cush. 393, 403.

The policy under review here, after referring on the reverse side to the mortuary call, payable quarterly or annually, to provide a mortuary fund for the payment of death claims, etc., expressly provides that "should the Emergency Reserve Fund, or any part thereof, be used as aforesaid, its impairment shall be made good by an assessment in addition to the regular Mortuary Call." This of itself was sufficient to advise the policy holder that he was amenable to an assessment in addition to the regular mortuary call, which characterized its policy as being on the "assessment plan." As the manner of making such assessments was not pointed out on the face of the policy, and such assessments in their very nature being mutual among the associated members,

the law refers the policy holder to the articles of association and by-laws as incident to such policy contracts. It is the generally recognized rule of law in respect of all mutual insurance companies that the charter and by-laws are a part of the insurance contract, and as binding upon the assured as the conditions of the policy itself. To them the constituent members must measurably look to discover their duties and obligations. 3 Am. & Eng. Enc. of Law (2d Ed.) 1081; 16 Am. & Eng. Enc. of Law, 867. Hence it has come to be regarded as the general American rule that the provisions of the stipulated articles and by-laws of such associations are elements of the contract of insurance. As said by the Supreme Court of Indiana, in *Supreme Lodge v. Knight*, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409:

"They are factors that cannot be disregarded. That they have this effect, all who become members of the association must know. A person who enters an association must acquaint himself with its laws, for they contribute to the admeasurement of his rights, his duties, and his liabilities. It is not one by-law or some by-laws of which the member must take notice, for he must take notice of all which affect his rights or interests."

In *Simeral v. Dubuque Mutual, etc.*, 18 Iowa, 319-322, the court said:

"This policy was issued by a 'mutual insurance company,' and the assured, becoming a member by virtue of his insurance, was bound to know the articles of association and by-laws thereof."

The Supreme Court of Georgia, in *Barbot v. Mutual Reserve Fund Life Association (Ga.)* 28 S. E. 498, 503, said:

"This being a mutual association controlled by its members, and each bearing his share of the burdens for the benefit of the whole membership, the contract of a member is different from an ordinary life insurance policy. The latter is held to be the contract which determines the rights of the company and the insured, and to be the whole of the contract; but inasmuch as both the benefits and the burdens in a mutual society are to be equal and bearing on all its members alike, it is well settled that the certificate of membership is only a part of the written evidence of the contract, and that in such a society the charter or constitution and by-laws in force at the time of the admission of a member are terms of an executory contract, and that by entering the society the member assents to all such terms, and that they each become a part of the contract of insurance, whether they are incorporated in or referred to by the certificate of membership or not."

See, also, *May on Insurance*, § 552; *Supreme Commandery v. Ainsworth*, 71 Ala. 436, 443, 46 Am. Rep. 332; *Bliss on Life Insurance*, § 426, et seq.; *May v. New York Safety Reserve Fund Soc.*, 13 N. Y. St. Rep. 66; *In re Equitable Reserve Fund Life Association*, 131 N. Y. 354, 368, 30 N. E. 114; *Sulz v. Mutual Reserve Fund Life Association*, 145 N. Y. 563-568, 40 N. E. 242, 28 L. R. A. 379; *Woodfin v. Insurance Company*, 51 N. C. 558.

Counsel for plaintiff in error in their brief say:

"The original contract of insurance, while providing for fixed and level premiums, also provided for future assessments at uncertain times and in uncertain amounts."

This of itself is a concession, in contemplation of law, that the insurance company was a mutual association on the "assessment plan."

The next contention on behalf of plaintiff in error is that the stipulat-

ed quarterly payments, under the head of "Insurance Plan" on the policy, were intended to remain at the level amount specified opposite the age of the assured at the time he entered the association, and that they were so different from assessments the association was authorized to make when any deficiency existed rendering them necessary as to bring the policy within what is known as the "Nonforfeiture Law" of the state of Missouri. On the other hand, the contention of defendant's counsel is that the specified quarterly payments aforesaid "might be increased, as the member's age increased, to the amount shown in the table opposite each succeeding age"; in other words, that the association was authorized to collect from the assured payments varying and increasing in amount from year to year. It is not deemed essential to a correct determination of this case to decide the relative force of these contentions. The policy itself, as already stated, provides that "should the Emergency Reserve Fund, or any part thereof, be used as aforesaid, its impairment shall be made good by an assessment in addition to the regular Mortuary Call." And counsel for plaintiff in error in his argument; in effect, concedes that, under the policy issued by the Merchants' Life Association, the company had the right, conditioned upon any impairment of the fund, or if the experience of the association justified it, to levy any assessment upon the policy holders for such amounts as its mortuary experience demonstrated to be requisite. Such is the express provision of the charter. All this being conceded, as it must be, the stipulated payments at definite divisional age periods do not have the effect to designate it as an ordinary life policy on the level premium plan, and to destroy its quality as a policy on the "assessment plan." The statute itself, under which the insurance company was organized, so speaks. It declares (section 7901) that every contract whereby a benefit is to accrue to a person upon the death of the person named therein, "the payment of which said benefit is in any manner or degree dependent upon the collection of an assessment upon persons holding similar contracts, shall be deemed a contract of insurance upon the assessment plan."

This view of such a policy was taken by Judge Adams in *Haydel v. Mutual Reserve Fund Life Association* (C. C.) 98 Fed. 200. While the policy under consideration there was not wholly similar to this, it was sufficiently so to present, in terms, the like contention made respecting the effect of a definitely reserved premium payable at specified age designations. In determining whether or not the policy was on the assessment plan, he said:

"It is assessment insurance where the benefit to be paid is dependent upon the collection of such assessments as may be necessary for paying the amounts insured. In other words, it is assessment insurance if payments to be made by the insured are not fixed—unalterably fixed—by the contract. On the contrary, an old-line policy is a contract where the amount to be paid by the insured is fixed, the premiums to be paid are unalterable, and the liability incurred by the defendant company is also fixed, definite, and unchangeable."

On review of this case (104 Fed. 718, 44 C. C. A. 169), Judge Thayer, speaking for the court, said:

"While the premium at first reserved is a definite sum, yet by further provisions the executive committee of the company can require the holders of such policies to pay a greater or less sum than that stipulated to be paid on

the face of the policies, if the condition of the defendant company at any time renders such action necessary. * * * When all the provisions of the contract are considered, it seems to retain all the essential features of assessment insurance."

This ruling has been approved and followed by the New York Court of Appeals in *Crosby v. Mutual Reserve* (Sup.) 78 N. Y. Supp. 237.

In *Hanford v. Massachusetts Benefit Association*, 122 Mo. 50, 26 S. W. 680, the late Judge Black expressed for the court the same view of the policy contract. Speaking of the contention that the policy was a regular old-line premium policy, and therefore not within the plan marked out by the statute, he said:

"According to the first clause of the seventh condition of the policy, the member must make a bimonthly payment at fixed and definite dates during his life, and the amount to be paid bimonthly is also fixed by the table of rates. Thus far these policies are premium policies, for it does not make these fixed rates, payable at specified dates, assessments, to call them by that name. But it is also provided in and by the policies that the board of directors may call for and require the payment of a different amount by giving special notice, and the amount called for may be based upon the current age of the member and the mortality experience of the association. The statute is broad enough to allow assessments to be based on the age of the member, and, for frequency of the calls, on the mortality experience of the particular association. Our statute calls for an emergency fund, and so do these policies. We think these contracts come within the statute, and are contracts of insurance on the assessment plan, as that plan is defined by the statute. The articles of association and the by-laws of the defendant are not before us, and, from the facts disclosed by this record, we can only say these policies are assessment-plan contracts."

In the later case of *Elliott v. The Des Moines Life Association*, 163 Mo. 132, 63 S. W. 400, Judge Gantt, discussing the policy certificate, which required certain definite, estimated amounts to be paid, but which further provided that in case the death rate exceeds the estimated rates the association would pay the deficiency from the emergency or reserve fund until exhausted, when additional premiums might be levied pro rata by the executive board to meet such deficiency, held that it brought the policy within the language and meaning of the statute—

"Which provides that, if the payment of the benefit is in any manner or degree dependent upon the collection of an assessment upon persons holding similar contracts, it shall be deemed a contract of insurance upon the assessment plan. While the amount of the benefit is absolutely fixed, and the assessments are definite sums estimated to be sufficient to realize the amount promised, yet it is obvious that in this safety clause is a provision by which an extra assessment or assessments may be made. * * * It seems to us this policy meets every requirement of the statute as to insurance on the assessment plan."

The same rule of construction is announced in the still later case of *Williams v. St. Louis Life Insurance Company*, 97 Mo. App. 449, 71 S. W. 377.

It is therefore little less than academic to follow the refinement of learned counsel in his contention that the stipulated payments by the contract became fixed and level at the amount he paid when he entered the association, for the controlling authority is that the right, having been reserved by the insurer to levy assessments on

policy holders to meet any impairment of its mortuary fund, and its mortuary experience, rendered variable the payments due by the assured. They were therefore subject to change at the will of the governing board of the association. This fixed the character of the contract as an assessment contract.

Such being the contract when entered into between the Merchants' Life Association and the assured, it continued to be such to the time of the reinsurance by the defendant in error. Counsel for plaintiff in error is therefore forced into the position of insisting that the reinsurance contract transformed the relation between the assured and the reinsurer into that of a simple life policy on the level premium plan. To warrant such a complete metamorphosis of the contract, we should naturally expect to find outright spoken terms in the transforming instrument. Instead of this, the position is sought to be maintained by subtle reasoning—a strained construction of a dissected member of the contract of reinsurance. And, what is still more revolutionary, this assumption involves the assertion that this new contract acts retrospectively, so as to give to the policy, which up to the moment of the reinsurance had no value whatever, a net value of \$761.70, a sum much in excess of what the assured paid by way of premiums or assessments covering the entire seven years the policy was in force. This result can only be worked out by giving to the reinsurance contract relation, back to the inception of the original insurance contract, a position which refutes the idea of any legal difference between the two contracts.

The contention that the assessment feature of the original policy contract was entirely eliminated by the reinsurance contract is based on the opening clause of the proposition submitted by the Franklin Life Insurance Company to the Merchants' Life Association, in which the word "assessments" was not included among the considerations; that, as it did recite "all the premiums due or to become due," the intentment was that the Franklin Life Insurance Company should take only as an ordinary life insurance company on the level premium plan. It is of minor consideration in determining this question what were the enumerated considerations as between the two insurance companies for the transfer. The obligatory part of the contract expressly required that the Franklin Life Insurance Company should "assume the outstanding policy contracts as shown by the two exhibits of the policies in force, of date May 13, 1899, hereto attached, and all obligations to policy holders and beneficiaries thereunder." More than this, after according to the policy holders 20 days after notice in which to determine whether or not they would accept or insure in other companies, on June 12, 1899, the company made its written assumption of said Hayden policy, as follows: "Franklin Life Insurance Company of Springfield, Ill., hereby assumes, under and according to the terms and conditions thereof, policy, etc., issued by the Merchants' Life Association of the United States Nov. 22nd, 1892, to David J. Hayden." By every legal intentment the reinsuring company took over the existing contractual obligations and rights of the Merchants' Life Association inhering in the outstanding poli-

cies as they existed at the time of the consummation of the reinsurance agreement, no more and no less. The assured thereafter recognized the reinsurance agreement by paying to the reinsurer specified quarterly mortuary funds as theretofore. The mutual obligations and rights of the reinsurer and the assured being measured and controlled "according to the terms and conditions of policy No. 1140, issued to said David J. Hayden," which was concededly on the assessment plan, the statute relating to assessment insurance companies exempted it from "any other provisions or requirements of the general insurance laws of this state." Section 7910.

As the nonforfeiture law of Missouri (section 7897) is a part of the general insurance law of the state, it does not apply to this policy. *Mutual Reserve Life Ins. Co. v. Roth*, 122 Fed. 853, 59 C. C. A. 63; *Hanford v. Mass. Ben. Ass'n*, 122 Mo. 50, 26 S. W. 680; *Whitmore v. Supreme Lodge*, 100 Mo. 36-47, 13 S. W. 495; *Haynie v. Knights Templars*, 139 Mo. 416, 41 S. W. 461.

This policy lapsed a year and more before the assured died, at which time it had no net value under the assessment plan. The policy having expressly provided "that if any premium or any assessment called in accordance with said Insurance Plan, shall not be paid on or before the day named in the notice for the payment thereof, this contract shall be null and void and of no effect," and such default having been made by the assured, the Circuit Court did not err in directing a verdict for the defendant. Its judgment, therefore, must be affirmed.

MCMULLEN LUMBER CO. v. STROTHER et al.

(Circuit Court of Appeals, Eighth Circuit. March 24, 1905.)

No. 2,114.

1. BILLS OF DISCOVERY.

While bills of discovery in the state courts are measurably discounted in view of the Codes authorizing the examination under deposition *de bene esse* of the defendant, and the compulsory production of books and papers in his possession or under his control, such Code provisions are aids to the methods of procedure in the federal courts in actions at law, but are not entire substitutes for bills of discovery and relief in equity in federal practice.

2. SAME.

So where, under contracts for the sale and delivery of large quantities of lumber of different qualities and varying dimensions, at designated places, the vendee being a nonresident of the state from that of the place of delivery, and for his better protection against mistakes or frauds of the vendor he puts an authorized agent at the place of delivery to inspect the lumber and keep memoranda thereof, but the vendor fraudulently, with the use of intoxicating liquors, renders such agent subservient to his will, or renders the protection to the vendee unavailing, whereby the evidence of the quantity and quality of the lumber delivered is especially in the breast and keeping of the vendor, a bill of discovery will lie in a suit for accounting against the vendor.

3. ACCOUNTING IN EQUITY.

Mutuality of accounts, as in case of debits and credits between the parties, is not always essential to confer jurisdiction in equity. As such

jurisdiction attaches in the instances of mutual accounts because of their intricate and complicated character the singleness of the accounts to be rendered should come equally within the jurisdiction of equity where the requisite intricacy and complications exist.

4. SAME—THE RIGHT OF REFERENCE.

As the federal courts are unauthorized in actions at law to refer the matter of complicated accounts to a referee, it should follow that whenever, under the state Code, such reference could properly be made, a suit in equity should lie in the federal courts to enable the chancellor to refer such matter to a master in chancery.

5. SAME—ADEQUATE REMEDY AT LAW.

The test of the adequate remedy at law prescribed by the federal statute is that, unless the remedy at law be "as practical and efficient to the ends of justice and its prompt administration as the remedy in equity," resort may be had to the equity side of the court.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 152.]

6. SAME.

The fact that some of the matters complained of in the bill, independently considered, might well be tried at law, is not sufficient to oust jurisdiction in equity where it attaches as to other matters of accounting arising under the same contracts. The court, having obtained jurisdiction over material parts of such accounting, will retain the same for the adjustment of all the rights and interests of the parties connected therewith. So where a part of the unascertained amount of the funds to be accounted for by the defendant party to the contract has been surreptitiously invested by such defendant and his co-conspirator in real estate, jurisdiction in equity attaches to declare the legal title held as under an implied trust for the rightful owners of the fund, according to him his option to take the property in kind or to enforce an equitable lien thereon to the extent of the fund diverted.

7. SAME—MULTIFARIOUSNESS.

A bill is not multifarious which seeks to have an accounting on contracts with one of the defendants, where another defendant is joined under allegations that the two have wrongfully taken the funds equitably belonging to the complainant, and fraudulently sought to cover them up by investing them in lands, taking the legal title thereto in themselves, and the bill seeks to fasten a trust thereon for the use of the complainant.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 371-373.]

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

As the case was determined in the court below on demurrer to the bill on the ground that it did not state facts sufficient to entitle the complainant to a standing in a court of equity, it becomes necessary to set out the substantive allegations of the bill. From March, 1901, to January 1, 1902, Herbert Y. McMullen, Frederic B. McMullen, and George W. McMullen, citizens of the state of Illinois, residing at Chicago, were copartners under the firm name of McMullen Lumber Company. In the latter part of 1901 said partners formed a corporation under the laws of Illinois under the corporate name of McMullen Lumber Company (the complainant herein), and all of the assets and property of said copartnership were transferred to said corporation, which succeeded to the business and rights of said copartnership. On or about the 9th day of March, 1901, the defendant Strother, residing in Southeastern Missouri, entered into a contract with one D. S. McMullen, as the agent and representative of the McMullen Lumber Company, under the control of said partnership, which contract was understood by all the parties to be for the benefit of said copartnership, and which was transferred to said copartnership, and was afterwards transferred to the complainant corporation. By

said contract said Strother sold and agreed to deliver to said D. S. McMullen and his assigns, and to stack and pile in the lumber yards of the said company adjacent to the mills therein referred to, the entire cut and output of oak, ash, and cottonwood lumber from two certain sawmills operated by said Strother on ground leased by him known as the "White" or "Cannon" mill and the "Michael," "Cowskin," or "Lower" mill, to be sawed between April 2, 1901, and January 2, 1902, at certain prices per thousand feet, as scheduled in the contract. (The different kinds of lumber and the amount per thousand feet are set out.) The contract provided that whenever the lumber should be put or placed in said yard or yards the title thereto should at once vest in said D. S. McMullen, his legal representatives or assigns. The lumber was to be graded and measured as delivered by the inspector of the company, according to the rules of the National Hardwood Association. Payment for the lumber delivered was to be made to said Strother every 15 days, less \$2 for each thousand feet of lumber sawed and delivered, which it was agreed said D. S. McMullen, his representatives and assigns, should retain to insure the hauling and loading of said lumber upon barges, to be done by said Strother. All the lumber was to be well manufactured, of standard lengths and thickness, and so as to measure plump when dry for market. Strother was to load said lumber on barges in the Mississippi river near Caruthersville, Mo.

On the 25th day of January, 1902, Strother entered into another contract with the complainant whereby Strother sold and conveyed and agreed to deliver to the complainant, to stack and pile in the lumber yards of the complainant adjacent to the mill theretofore referred to, the entire cut and output of oak and ash lumber from certain sawmills owned and operated by Strother, known as the "Michael," "Cowskin," or "Lower" mill, sawed between January 1, 1902, and January 1, 1903, at the prices per thousand feet as scheduled in the contract. (Here are set out the different kinds of lumber at the various prices per thousand feet.) The title to this property is the same as in the first contract, and when placed in said yard was to vest in the complainant. It also contained a like agreement respecting the grading and measurement as delivered by said inspector, according to the rules of the National Hardwood Association, with a like provision as to the time and manner of payment, with the drawback of \$2 per thousand feet for the purposes aforesaid. It was alternatively agreed in said contract that if the complainant desired any part of the lumber delivered to it, loaded on the cars of the St. Louis, Caruthersville & Memphis Railroad, Strother would do so in lieu of the delivery on barges in the Mississippi river. For the lumber so delivered to the railroad Strother should rebate \$1.20 per thousand feet out of the \$2, which it was agreed the complainant should retain to insure the hauling, loading, etc. Under this contract the average cut of lumber should not be less than 150,000 feet per month. The contract contained the same requirement as to the quality and measurement of said lumber.

On the 21st day of January, 1902, Strother and said company entered into another contract, by which Strother sold and agreed to deliver, to stack and pile in the lumber yard, as aforesaid, the entire cut and output of all oak, ash, and cottonwood lumber from the Eagle Lake Mill sawed between June, 1902, and June, 1903, at the prices per thousand feet for the different grades specified in the contract. The last-named contract contained the further provision that for the purpose of securing a suitable yard for storage and drying purposes, on the request of complainant, Strother would execute to it a lease of ground of suitable size and location near the mill, to begin at the date of the contract and end January 1, 1904. Whenever the lumber so cut by Strother was placed in said yard so to be established, the title thereto should vest in the complainant. It contained a like provision respecting the grading, measuring, and inspecting of the lumber, and a like provision respecting the time of payment and the rebate thereon contained in the first two named contracts. The average cut of lumber was not to be less than 150,000 feet per month, with a provision like the other contracts with regard to the standard length, thickness, and quality of the lumber when dry for market; to be loaded on barges in the Mississippi river near Caruthersville, Mo.

The bill alleges that the defendant Strother began to saw and deliver lumber under the first contract until January, 1902, under the contract with the

company as copartners, and afterwards until August 31st to the complainant corporation; that the several contracts aforesaid were being executed simultaneously, and deliveries of lumber under each of said contracts were made to the several general lumber yards of the complainant, no attempt being made to keep the output of each mill separately; that no account was kept by the complainant of the amount, quality, character, or value of the lumber delivered at the several yards adjacent to said mill; that each shipment, as received at the complainant's lumber yards at Cairo, Ill., from time to time, were intermixed with other lumber of the complainant's received from other and different mills, as well as with other shipments previously received from said Strother, so as to render it extremely difficult, tedious, and expensive, with endless labor, to determine the shortage in said lumber by taking account of the lumber received at the Cairo yards; that the complainant kept no account, and has no account of the quantity, character, or value of the lumber delivered to its several yards adjacent to said mills; and it does not know, and has no means of fully ascertaining or proving, the amount, quality, character, or value of the lumber delivered to it at the yards adjacent to said mills; that no account or inventory of the lumber received from Strother was taken or kept as the same was delivered, nor until long after the lumber was finally delivered at the yards at Cairo; when the complainant undertook to make such inventory it discovered that a shortage existed as to the lumber charged against it by Strother; that it had in the meantime been charged with and paid for large quantities of lumber alleged to have been delivered to it that in fact never were delivered to the complainant at any place; that the inspector appointed by the complainant and maintained at said several mills to grade and measure the same as delivered at the several lumber yards was induced by said Strother to make false and fraudulent reports and render false accounts of sale to the complainant and its predecessor for lumber sawed and delivered, which said reports or accounts of sales were approved on their face by the inspector, and were believed by the complainant and its predecessor to be correct; and, relying upon the accuracy and truthfulness of said reports, with the indorsed approval of the inspector, it paid to said Strother the amounts shown to be due by said reports and accounts, according to the provisions of the contract.

The bill alleges that the lumber was delivered daily and in various amounts under each of said contracts; that said fraudulent reports and accounts were rendered by said Strother every 15 days or oftener; that in all 45 reports or account sales for lumber sawed and delivered were made; that on all or nearly all of said reports or account sales the amount delivered was, with the knowledge, consent, and connivance of said Strother, overstated; that a less quantity of lumber than shown by said reports and accounts was delivered; that the quality or grade reported was not the quality or grade actually delivered, the reports and accounts showing much higher or more expensive grades than that delivered; that said Strother purposely and designedly induced and procured said inspector to be made and kept drunk with intoxicating liquor for long periods of time, and persuaded him to leave his post of duty, and to intrust the measuring and grading of said lumber to said Strother or his agents; that after having thus incapacitated the said inspector, or brought about his absence, the said Strother fraudulently either altered or changed the record of the grade and account of lumber already delivered, or procured the record of grade and count to be falsely kept as said lumber was delivered; that in a number of said reports Strother falsely increased the amount in quantity or grade of the lumber actually delivered to the yards adjacent to the mills, and fraudulently induced or misled the inspector into approvals, whereby the complainant was induced to overpay said Strother; that the complainant does not know, and has no means of fully proving, but Strother well knows, the extent, the dates, manner, and amounts of such overpayments and upon which of said contracts the complainant was so defrauded, and that he ought to be required to discover to the complainant said facts; that by reason of the fraudulent acts and conduct of the defendant, the complainant and its predecessor, between April, 1901, and August, 1902, did pay to said Strother for 5,022,526 feet of lumber

of the various kinds, qualities, and grades and divers lengths and thicknesses enumerated in the contract, when in fact there was actually delivered a very much smaller quantity, but just how much from each of said mills, or how much under each of said contracts, it cannot say, but on information and belief the amount it received fell short 622,526 feet; that by reason of the frauds and deceptions aforesaid it overpaid said Strother on account of said first-named contracts about the sum of \$16,000, in excess of what was justly due, which sum, in equity, he holds as trustee for the complainant, and should be required to account as such therefor; that the complainant paid said amounts at different times and dates, and in sundry and various smaller amounts, extending over a period of 17 months, upon different fraudulent accounts and reports; that said payments were on alleged deliveries made irrespective of and without distinction between the contracts under which, or the yards to which, such deliveries were alleged to have been made. How much of said shortage occurred under each contract, the complainant is unable to say exactly. The bill alleges that large quantities of the lumber were not sawed so as to measure plump and of the required thickness, so that it measured less than the required thickness, and had to be sold by the complainant as of the thickness and size smaller than as reported, and for a consequent decrease in price.

It is further alleged that on the 15th of September, 1902, it demanded of the defendant Strother that, according to contract, he execute to it a lease of the property theretofore set apart by him as a lumber yard adjacent to said Eagle Lake Mill; that he account to complainant for the overpayments made to him as aforesaid, because of the false and fraudulent reports and the diminished thickness of the lumber as reported, etc., which the defendant refused and failed to do; that afterwards said Strother wrongfully terminated the last two contracts hereinbefore referred to, and refused to perform the same, and excluded the complainant and its representatives from the property on which said mills were located, and from the lumber yards, nor did it permit the complainant or its representatives to further inspect, grade, or count the lumber thereafter manufactured, and that thereafter the defendant Strother appropriated to his own use the output of the several mills in said last two contracts described, notwithstanding by the terms of the contract such output was sold to the complainant, and in equity belonged to it; how much of said last-named lumber the defendant Strother disposed of it is unable to state, but on information and belief it is alleged to have aggregated 4,500,000 feet; that by reason of the raise in the value of lumber said lumber was worth at least \$5 per thousand feet in excess of the price Strother was to receive therefor under the contract; that the aggregate amount would be \$22,500, to which the complainant is justly entitled; that by reason of Strother's failure to deliver the lumber, and on account of the scarcity of such lumber in the market, it was compelled to supply its wants at an additional expense of \$2,500.

It is further alleged that about the 19th day of September, 1902, after the defendant had wrongfully declared said contracts at an end, he entered upon the premises theretofore set apart for the complainant's use as lumber yards, where it had stacked and stored the manufactured lumber theretofore sold to it by Strother, and appropriated to his own use a large amount of said lumber, the extent of which is to the complainant unknown, but which it believes to be of the value of \$10,000, which the defendant ought to be required to discover and account for to the complainant. It is then alleged that the defendant Strother failed to deliver to the St. Louis, etc., Railroad about 362,717 feet of lumber from its said yards, which, under a proper accounting, ought to go to the complainant, in the sum of \$961.03.

Under the third contract the complainant requested said Strother to deliver on barges in the Mississippi river 305,778 feet of said lumber from its yards, to the complainant's injury in the sum of \$441.09, which the defendant should be required to account for.

In the fourteenth paragraph of the bill it is alleged that the defendant Shepard was and is interested with said Strother as a secret partner in said transactions, and that he has received and taken part of the profits realized

by the fraudulent and wrongful acts of said Strother above set forth, but what is the extent of such interest, or how much said Shepard has realized therefrom, the complainant is unable to state, but it is believed on information that it is about \$7,500. That he took said sum with full knowledge and information of the frauds aforesaid of said Strother, and that he should be held and decreed to be a trustee for the use and benefit of the complainant to the extent of the sum so received by him.

The fifteenth paragraph of the bill is important, and is as follows:

"Your orator shows to the court that the details concerning the several matters herein complained of, to wit, the extent to which the numerous reports and accounts sale hereinbefore referred to were altered, raised, and increased in quantity and value over the actual lumber delivered to the complainant, and the extent of complainant's damage thereby, the quantity, quality, and value of the complainant's manufactured lumber which defendant Strother wrongfully took into his possession and appropriated to his own use, the quantity, quality, and value of the lumber manufactured and sold by defendant Strother after his wrongful repudiation of the contracts of sale to complainant and the amount actually realized therefrom by defendant Strother are known to defendant Strother, and are also known (according to the best knowledge and belief of complainant) to the defendant Shepard, and complainant is unable to prove, or so fully prove, these facts by other evidence and the facts concerning these matters cannot be proven or so fully by the ordinary forms of procedure at law, and your orator alleges on information and belief that the defendants kept or caused to be kept full accounts of the amounts of which your orator was defrauded as aforesaid, during the continuance of said contracts, of the profits realized from the sale of the lumber equitably the property of your orator after the wrongful repudiation of said contracts, and still have such accounts unless the same have been destroyed, and they and each of them ought to be required to discover and disclose the same to your orator."

The sixteenth paragraph alleges that the money so wrongfully obtained from the complainant, and the proceeds of the lumber of the complainant so wrongfully appropriated by the defendants, have been invested in certain real estate and personal property in Pemiscot county, Mo., or in counties adjacent thereto, or both; that in just what proportion such funds have been invested is unknown to the complainant; that defendants ought to be required to discover and disclose in what property such funds have been invested, in order that the complainant may be decreed a lien thereon to the extent to which its funds contributed to the purchase thereof, and in order that the defendants may be decreed to hold the same in trust for the complainant until the amount of its funds so invested therein be refunded.

The final allegation is that the acts complained of are contrary to equity, and that the complainant is without adequate remedy at law, because it has no record or account sufficiently full to prove either the extent, manner, or date of the several frauds committed by the defendants, who have full and accurate information thereof; nor can it so amply prove upon which of the several contracts it was defrauded as aforesaid as it may be able to show in equity, because of the full and exact information possessed by the defendants.

The prayer of the bill is that defendants be required to make full and true discovery and disclosure concerning the transactions and matters aforesaid; that they be decreed to account to the complainant with respect thereto; that an account be taken, under the direction of the court, of all dealings, transactions, etc., complained of; and for a decree for the balance ascertained, etc.

James C. Jones and George H. Peaks (Gann, Peaks & Haffenberg and Jones, Jones & Hocker, on the brief), for appellant.

Charles B. Williams (R. P. Williams, on the brief), for appellees.

Before SANBORN, Circuit Judge, and PHILIPS and RINER, District Judges.

PHILIPS, District Judge, after stating the case as above, delivered the opinion of the court.

The principal objections urged against the bill of complaint are: (1) That the complainant has an adequate remedy at law as for damages on breaches of the contracts. (2) That the case made on the face of the bill does not present the adjusting of mutual accounts between the parties. On the contrary, it presents nothing more than demands upon the defendant Strother to account to the complainant for what in law it was entitled to receive under the several contracts if kept and performed by Strother. And (3) that, notwithstanding the bill asks for a discovery from the defendant, and for relief, such a bill of discovery, if not obsolete, is not sufficient to justify a resort to equity in the jurisdiction of Missouri, where, under the Code, the defendant can be called upon to produce his books and papers for inspection, and where the defendant can be examined by the adversary on depositions taken *de bene esse* or *ore tenus* at the trial.

Taking up these objections in the inverse order, we hold that the office of a bill for discovery and relief, and the right to invoke it, exist in the federal jurisdiction, notwithstanding the criticisms made upon its exercise. In *Kelley v. Boettcher*, 85 Fed. 56-66, 29 C. C. A. 14, Sanborn, J., said:

"It is true that the federal and state statutes now in force which enable the complainant to obtain such an examination have greatly diminished the need of these discoveries; but it is none the less true that these statutes have neither abrogated the right nor curtailed the power of courts of equity to enforce them. They have only added another right to that which had already been secured in courts of chancery. Every bill for relief exhibited in a court of equity is, in effect, a bill for discovery, because it asks or may ask from the defendant an answer upon oath relative to the matters which it charges. The power to enforce such a discovery is one of the original and inherent powers of a court of chancery, and the right of a party to invoke its exercise is enjoyed in every case in which he is entitled to come into a court to assert an equitable right or title, or to apply an equitable remedy."

See, also, *Ryder et al. v. Bateman et al.* (C. C.) 93 Fed. 31; *Indianapolis Gas Company v. City of Indianapolis* (C. C.) 90 Fed. 196; *Brown v. McDonald* (C. C. A.) 133 Fed. 898.

That bills for discovery and relief inhered in the ancient jurisdiction of courts of chancery in England at the time of the adoption of the federal judiciary act is beyond question. This being so, the like jurisdiction inheres in the federal courts, unless abolished by statutes, changed or modified by some rule adopted by the Supreme Court. No such statute has been passed, and, so far from the Supreme Court having interdicted the practice, the rules in equity 40, 41, and 44, expressly recognize the existence of bills for discovery. The discussion of this question by Pomeroy (section 230, *Pomeroy's Equity*) may be regarded as matter of argument against the propriety of courts of equity indulging with too free a hand a resort to the remedy, rather than an authoritative statement of positive law, in so far as the federal courts are concerned.

The bill of complaint discloses an embarrassing state of affairs respecting the relative attitude of the litigants. For its safeguard and proper protection against mistakes, negligence, fraud, and deceit, al-

ways possible under such contracts by the party who is to make the delivery, the parties living in different states, the lumber company stipulated in the contracts for the presence at the place of preparation, grading, and delivery of the lumber of its own representative to make inspections, who would keep tally and memoranda. Under this condition the absent company would not have to rely upon the accuracy, carefulness, or honesty of the defendant Strother, or on matters of information and evidence especially in his keeping. But when by trick, cozening, or other improper means Strother displaced, or subjected to his service, the trusted agent of the complainant, he thereby locked within his own breast and keeping much of the essential evidence which the company sought to preserve on its own behalf by the contracts. This essential information pertained to matters of infinite detail, personal observation and notation connected with the quality, quantity, assortment, and measurement of millions of feet of lumber of different sizes, lengths, and grades; transactions extending over long periods of time. After Strother had ousted, or subjected to his will, the complainant's agent, the means of obtaining approximate, reliable information aliunde was minimized by the fraud of the defendant. Under such a state of facts, the utmost powers of a court of equity should be invoked to search out the conscience of such a wrongdoer. Equity possesses no more plenary or effective method than by compelling such a party to purge his conscience by uncovering to his victim the information in his breast and keeping. Equity gives the wronged party this right at the very opening of the legal altercations, to enable him to prepare his case for hearing, and to open up to him, possibly, other avenues of information.

In a case situated as this, we are unable to assent to the proposition, so stoutly asserted by counsel for appellees, that a court of equity cannot primarily take jurisdiction to compel an accounting by the derelict party because there are no mutual debits and credits between the parties of such prolix or complicated character as to invite the aid of a master in chancery. No hard and fast rule can be laid down as to the exact conditions on which a court of equity will take jurisdiction. Its powers are supposed to be plenary for measurably securing the ends of justice. Its protective and corrective power will be exerted or withheld, according to the exigencies of the particular case presented. While the primary idea of account—computatio—implies matters of debit and credit, the adjustment of which will show a balance to be accounted for by the one party or the other, "it is not necessarily restricted to several distinct items, nor is it the less an account that all the items of charge are by one person against another, instead of being a statement of mutual demands of debit and credit, provided the charges arise out of contract, express or implied, or from some duty imposed by law." 1 Enc. of L. and P. 362; *Nelson v. Posey County*, 105 Ind. 287, 4 N. E. 703. At common law it was the means by "which certain persons who were under some legal duty to account for property or money of another were compelled to render such account"; especially so where the plaintiff demanded an account, and could not give evidence of his right without it. 3 *Reeves, Hist. Eng.* 1, 277; *Field v. Brown*, 146 Ind. 293, 45 N. E. 464; 1 *Cyc. of L. & P.* 401. Indeed,

the very condition on which a court of equity takes jurisdiction for the adjustment of mutual accounts is the presence of the fact of their intricacy and complications. It should therefore logically follow, where the intricacy and complication exist, the mere singleness of the accounting should not be controlling. *State of Arkansas v. Churchill*, 48 Ark. 426, 3 S. W. 352, 880. Moreover, the want of mutuality can present no barrier where a discovery lies and relief is asked thereon. *Gloninger v. Hazard*, 42 Pa. 389. Nor should it present any obstacle to a resort to equity where, from the peculiarly complicated transactions, a trial to a jury at law would, in all reasonable probability, fall far short of the remedial adequacy of a proceeding in equity. While judges of state courts have expressed reluctance to entertain equity jurisdiction in such conditions of an accounting, it will generally be found that they parry the force of the argument of the practical unfitness of the average jury to deal with such matters by recourse to the provision of the state Code, which in an action at law authorizes the court, in its discretion, to send the matter to a referee. A striking illustration of this is furnished in the opinion of Peckham, J., in *Uhlman v. New York Life Insurance Company*, 109 N. Y. 433, 17 N. E. 363, 4 Am. St. Rep. 482. As the federal courts in law actions are not invested with the discretionary power of making such references (*Gunn v. Brinkley, etc., Company*, 66 Fed. 382, 13 C. C. A. 531), there ought not to be any question of the right to resort to the equity jurisdiction of the federal courts when the facts present such a condition of an accounting as would authorize a court of law to send the case to a referee. In *Root v. Railway Company*, 105 U. S. 189, 26 L. Ed. 975, the Supreme Court, in discussing a bill in equity for a naked account of profits and demands against an infringer of a patent, said:

"Such an equity may arise out of, and inhere in, the nature of the account itself, springing from special and peculiar circumstances which disable the patentee from a recovery at law altogether, or render his remedy in a legal tribunal difficult, inadequate, and incomplete; and, as such cases cannot be defined more exactly, each must rest upon its own particular circumstances, as furnishing a clear and satisfactory ground of exception from the general rule."

In *Kirby v. Railroad Company*, 120 U. S. 130, 7 Sup. Ct. 430, 30 L. Ed. 569, the court said:

"The complicated nature of the accounts between the parties constitutes itself a sufficient ground for going into equity. It would have been difficult, if not impossible, for a jury to unravel the numerous transactions involved in the settlements between the parties, and reach a satisfactory conclusion as to the amount of drawbacks to which Alexander & Co. were entitled on each settlement. Justice could not be done except by employing the methods of investigation peculiar to courts of equity."

In *Gunn v. Brinkley*, *supra*, it is true the court was discussing the question of mutual accounts, but the language and the sense are just as applicable to the case at bar. The court said:

"According to this bill there is here a mutual running account that extends over a period of more than six years; it involves more than 500 items; it has been complicated and confused by the fraudulent entries and omissions of a faithless trustee; and, in our opinion, it would be next to impossible for a jury to carefully examine this account and reach a just result. That can

only be done by a reference to a master or a hearing before a chancellor in the method peculiar to a court of equity."

Again, in *Hayden v. Thompson*, 71 Fed. 60-64, 17 C. C. A. 592, 595, this court said:

"These long and complicated accounts can be properly taken and stated, and the just deductions can be drawn from them only in a court in which a careful, patient, and extended examination of all the evidence can be made after it is submitted by a mind trained in the science of accounting and familiar with the law which governs it."

What are the matters presented by this bill which a jury in an action at law would have submitted to them? The accounting demanded of the defendant Strother involves the examination of 45 reports, made at different periods, to the complainant, each pertaining to eight kinds of lumber, covering 360 items, aggregating over 5,000,000 feet. The jury would be called upon to ascertain and determine which one, and how many, of these were affected with fraud; whether in respect of quantity, quality, or grading, and measurement, and under which particular contract. It would involve the investigation and ascertainment of the amount of loss resulting to the complainant by reason of Strother's failure to manufacture according to each contract, and the amount of each kind of lumber delivered. This would necessitate a finding as to the market value of that delivered as to the several items, and the deduction of the contract price; the making of proper receipts and balances as a basis for calculating interest thereon. The same process would measurably have to be gone through in ascertaining the loss, if any, consequent upon the failure to execute the lease; to ascertain the amount to be charged to the defendant by reason of having converted to his own use the lumber in the yards alleged in the bill, which would involve a finding of the amount of lumber in the yards converted by said defendant, what amount of this had been paid for and the amount not paid for; and the profits, if any, made on the whole, and the like. It would involve the ascertainment of the amount which the complainant should have on account of the failure of the defendant, after the termination of the contract, to continue deliveries up to the time limited in the contracts. The facts to be found and results to be worked out on such an issue would especially involve matters little suited to the qualification of jurors.

The whole matter is especially complicated by the fact that there are three separate contracts, with somewhat varying provisions, which were being simultaneously executed, or claimed to have been so by the complainant, with no separate accounts kept as to each, and when the extent of the deficiencies may have been greater under one than the other. How could such involved issues, requiring close analysis, intelligent separations, discriminations, and calculations, be made with even approximate accuracy by the average jury? How would it be possible for a jury, through a protracted, tedious hearing, to carry such infinite details in their minds, and work out such problems in the wranglings of the jury room? That any result, under such conditions, reached by a jury, no matter how

intelligent or honest, would necessarily be something of guesswork, does not admit of debate. That such an accounting should be referred to a master in chancery to patiently hear, in order to work out the complex and intricate sums with deliberation, and without confusing interruption, appeals to the highest sense of justice. Indeed, the conscientious judge who should sit in the trial of such a case to a jury would feel impelled, in assisting the jury to a just result, to quite nigh perform the part of a chancellor in reviewing and analyzing the many details of the evidence, and to give the result to the jury. Under the conditions that would inevitably attend such a trial the judge's own review and analysis could be but superficial, and probably incorrect.

Such a case as this presents an apt illustration of the reasons which have impelled the Justices of the Supreme Court time and again, when counsel opposing a resort to the equity side of the court have appealed to the provision of the judiciary act that "suits in equity shall not be sustained in any case where a plain, adequate, and complete remedy may be had at law" (Act Sept. 24, 1789, c. 20, § 16, 1 Stat. 82 [U. S. Comp. St. 1901, p. 583]), to say that the adequate remedy at law must be "as practical and efficient to the ends of justice and its prompt administration as the remedy in equity" to exclude the equitable jurisdiction.

It is to be conceded that as to some of the breaches of the contracts complained of, they could well be tried to a jury in an action at law. But this fact does not oust the jurisdiction in equity. The matters complained of inhere in and grow out of the same contracts and their violation on which the jurisdiction in equity is specially based, and the remedy sought is to have the derelict render an account and satisfaction. Where a court of equity thus obtains jurisdiction over any material part of the subject-matter in controversy between the parties, it brings within the compass of its jurisdiction in the single proceeding the entire adjustment of all, to put an end to the litigation. *Pomeroy's Equity*, vol. 1, pars. 181-242; 1 *Cyc. of L. & P.* 418.

There is another ground of equitable jurisdiction presented in the bill that is unquestionable. It is alleged that the moneys wrongfully withheld by the defendants in equity belong to the complainant, and that the defendants, in effect, had surreptitiously invested the funds in real estate and personal property. This being so, the complainant has the right to follow the funds into any property into which it has been converted. Equity converts the holders of the legal title into constructive trustees for the benefit of the equitable owner, and accords to the complainant the option either to take the trust property absolutely, or to enforce against it a lien to the extent of the amount so converted. *Broom Mfg. Co. v. Guymon*, 115 Fed. 112, 53 C. C. A. 16; *Piatt v. Oliver*, Fed. Cas. No. 11,116; *Docker v. Somes*, 2 Mylne & K. 665; *Angle v. C. & P. Ry. Co.*, 151 U. S. 1-25, 14 Sup. Ct. 240, 38 L. Ed. 55; *Bresnihan v. Sheehan*, 125 Mass. 11; *Sanford v. Hammer*, 115 Ala. 406, 22 South. 117; *Perry on Trusts* (5th Ed.) § 166.

The objection that the bill is rendered multifarious by bringing the defendant Shepard into the controversy in order to reach said trust property, is not sustainable. It is not essential that all the parties to a suit in equity should be directly interested in all matters involved in the bill. Multifariousness is avoided if each of the parties is concerned in matters material, provided they are allied to or connected with the others. So where some defendant may be a necessary party to some essential portion of the relief sought growing out of the entire controversy, the objection of multifariousness will not obtain. *Barcus v. Gates*, 89 Fed. 783, 32 C. C. A. 337; *Brown v. Guarantee Trust Co.*, 128 U. S. 403-412, 9 Sup. Ct. 127, 32 L. Ed. 468; *Kelley v. Boettcher*, 85 Fed. 64, 29 C. C. A. 14; *Curran v. Campion*, 85 Fed. 70, 29 C. C. A. 26; *Weir et al. v. Gas Co. (C. C.)* 91 Fed. 940.

The decree of the Circuit Court is reversed, and the cause is remanded, with directions to set aside the decree sustaining the demurrer and to overrule the demurrer.

BOWEN v. ILLINOIS CENT. R. CO.

(Circuit Court of Appeals, Eighth Circuit. March 13, 1905.)

No. 2,102.

1. RAILROADS—ACTION FOR WRONGFUL DEATH—TORT OF SERVANT.

Under section 746, Rev. Code Civ. Proc. S. D., giving to the widow of the deceased a right of action for damages against a railroad company for the killing of her husband, by reason of the neglect, carelessness, or unskillfulness of the corporation, its agents, servants, and employes, the cause of action must come strictly within the terms of the statute conferring the right, and cannot be extended to any other subject or embrace any other quality of liability.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 10, 11, 15.]

2. SAME—TORTS OF EMPLOYEES—SCOPE OF EMPLOYMENT.

Such loss of life must result from the negligence, carelessness, or unskillfulness of such agent and servant while engaged in and about the work assigned him by the master. Therefore, where the act complained of is the killing of plaintiff's husband by defendant's station agent while deceased was signing a receipt book for a package, it cannot be assumed that such package pertained to railroad freight matter, when the evidence showed that the wrongdoer was not only at the time and place acting as agent for an express company, as well as the railroad company, without some evidence warranting the inference that the package pertained to railroad freight, rather than express matter.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 16.]

3. SAME.

There is a marked distinction between an act done by the servant during his employment and an act done within the scope of his employment. To bind the master for an injury done by the servant, the servant must at the time be acting for the master within the scope of the duty assigned him.

4. SAME.

The distinction between the liability of the master for the wrongful acts of the servant in the instance of the relation of carrier and passenger, or hotel keepers and proprietors of theaters and their guests, and that

of the proprietor of a mere business house or railroad station, as to persons coming on the premises to transact some matter connected with its general business, pointed out.

5. SAME—EVIDENCE.

The deceased, having called at the railroad station to inquire of the agent as to whether any demurrage would be charged on account of his failure to unload a car of coal that day, and, being assured in the negative, turned to walk out of the room, when the agent said to him, "There is a package here for you," and handed to him, through the ticket window, a small book to be signed. Just as deceased started to sign his name therein, the agent picked up a pistol, and without a word shot the party to death. *Held*, that the widow could not recover damages against the railroad company for such wanton act of killing.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of South Dakota.

This is a writ of error to review the action of the Circuit Court in directing a verdict for the defendant. After statements, by way of inducement, the gravamen of the petition is: That one Henry A. Steagald was a man of dangerous and violent character, subject to sudden fits of anger, disregarding of the persons and lives of others, and was not a fit man to have charge of the station house and depot of a common carrier, all of which was well known to the defendant; that, in disregard of its duty to the public and to one Frank Bowen, the defendant did, with knowledge of all of said facts, and the disposition of said Steagald, retain him in its employ in the position of station agent at Ben Clare, in the state of South Dakota; that on the 27th day of February, 1903, the said Frank Bowen, in the pursuit of his business with the defendant railroad company, as a common carrier, entered said station house to transact business with the defendant as common carrier, through the said agent, Steagald, respecting a car of coal shipped to said Bowen over the defendant's road to Ben Clare; that said Steagald, then and there acting as such agent and in the course of his employment, while said Bowen was in the discharge of his lawful business with the defendant, did shoot and kill the said Bowen, to the damage of the plaintiff, who is the surviving widow of the deceased, in the sum of \$20,000. The answer of the defendant admitted that said Steagald was at the time in question the station agent of the defendant at said Ben Clare, and that he was authorized to transact for defendant such business as is usually and properly transacted by railroad station agents situated similar to the one at Ben Clare, but specifically denied that the said Steagald was at said time or at any other time its general managing agent, or general agent, in any character whatsoever. With the exception of admitting that the defendant was a railroad corporation organized under the laws of the state of Illinois, and that said Bowen was shot and killed by said Steagald, it denied all the other material allegations of the petition.

The evidence in the case is exceedingly brief. Earl Bowen, the son of said Frank Bowen, aged 13 years, testified that he had known said Steagald, the depot agent for the defendant at Ben Clare, for about six months prior to the 27th day of November, 1903; that on that day, in company with his father, who had an elevator and coal yard at Ben Clare, he entered the waiting room of the depot at that place; that the waiting room is separated from the depot agent's office by a partition, in which there is a door and the ticket window; that Steagald was at the open ticket window when his father asked Steagald if he would charge demurrage on a car of coal on a day like that. Steagald answered that he did not think so. Thereupon the witness and his father started to leave the depot, when Steagald called to his father and said there was a package there for him, whereupon his father turned around to the ticket window; that Steagald handed out a book about a foot square, in which his father started to write his name, when Steagald reached to one side, quickly jerked up a revolver, and shot his father, and then, running through the door which leads into the waiting room, again shot him, and, as the witness jumped between the door and the stove, he was shot and in-

jured by Steagald. Steagald did not say anything, and went back into the office. His father died that day. On cross-examination he testified that Steagald did not tell his father what kind of a package he had there. He simply said there was a package. The plaintiff testified that, when informed by her son of the occurrence, she went immediately to the depot and found her husband dead; that Steagald and his wife were in the depot office at the ticket window; that he spoke to her, but she did not recollect what he said; that she had known Steagald since October, 1902; that Ben Clare is a small station, and Steagald was station agent for the defendant road; that Steagald did the operating business there, handled the freight business, and acted as express agent; that he received express packages and telegrams. This was all the testimony.

At the request of defendant's counsel the court instructed the jury to return a verdict for the defendant, which was accordingly done, and judgment was entered thereon for the defendant.

Joe Kirby, for plaintiff in error.

W. S. Kenyon (C. O. Bailey and J. M. Dickinson, on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and PHILIPS and RINER, District Judges.

PHILIPS, District Judge, after stating the case as above, delivered the opinion of the court.

As the plaintiff at common law could not maintain any action against the defendant railroad company to recover damages for the killing of her husband by a person in the employ of the corporation, her right of action exists, if at all, by virtue of some statute of the state of South Dakota. The only statutory provisions touching this matter are sections 745 and 746 of the Revised Code of Civil Procedure of South Dakota, which are as follows:

"Sec. 745. If the life of any person, not in the employment of a railroad corporation, shall be lost, in this state, by reason of the negligence or carelessness of the proprietor or proprietors of any railroad, or by the unfitness, or negligence, or carelessness of their employés or agents, the personal representatives of the person whose life is so lost, may institute suit and recover damages in the same manner that the person might have done for any injury where death did not ensue.

"Sec. 746. If the life of any person or persons is lost or destroyed by the neglect, carelessness, or unskillfulness of another person or persons, company or companies, corporation or corporations, their or his agents, servants, or employés, then the widow, heir, or personal representatives of the deceased, shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover damages for the loss or destruction of the life aforesaid."

As the liability thus created is the creature of the statute, an action predicated thereon must come within its terms. The statute cannot be extended to any other subject, or embrace any other quality of actionable liability. The loss of life must be "by the neglect, carelessness, or unskillfulness of the corporation or corporations, their agents, servants, or employés." To show the liability on the part of the defendant company the petition charges that said Steagald was a dangerous, unfit, and incompetent person to be placed in the position he was by the defendant railroad company; that this fact was known to the company at the time of his employment; and that with this knowledge it continued him in its service. There is in this record not a word of evi-

dence to support this allegation, unless it can be maintained, as a matter of law, that a single act of willful homicide by the agent, committed after his employment, is proof, not only of general unfitness of the servant, but of the antecedent knowledge of the employer. It is so well settled as not to justify the citation of authorities that the presumption of law exists that the master has exercised due care and circumspection in the selection of a competent servant, and the burden rests upon him who asserts the negligence to affirmatively prove, not only the fact of incompetency, but the want of due care by the master in making the selection. Neither can the fact of such incompetency be established by proof of a single act of carelessness or recklessness after the contract of employment.

The plaintiff's evidence shows that Steagald had for six months prior to the killing of Bowen held the position of station agent at Ben Clare. There is no evidence that prior to this homicide even a delict had been imputed to this servant. In view of the facts disclosed by the plaintiff's evidence, which presumably were in the mind of her counsel when he framed the petition, it is manifest that his first conception of the law was that no responsibility attached to the railroad company for this wanton, reckless act of Steagald, unless it could be made to depend upon the negligence of the company, either in selecting such an agent, or in retaining him after having notice of his vicious character. The injury having been inflicted by the agent, the liability of the corporation can only arise by reason of the agent's neglect or carelessness in and about the conduct of the business to which he was assigned by the company. By the very terms of the statute the wanton act or conduct of the agent, which does not include neglect or carelessness in the prosecution of the agency, imposed no accountability on the master therefor, for the palpable reason that the statute giving the right of action in effect excludes it.

On the facts developed by the evidence it requires some restraint to discuss with patience the contention that in killing Bowen Steagald did the act negligently or carelessly in performing the work assigned him by the master. At the utmost the only inference possible is that Steagald was in the employ of the railroad company as its station agent at Ben Clare; that within the compass of his agency was the selling of tickets to passengers and receiving and delivering railroad freight. Bowen was not at the station as a passenger to buy a ticket. He was not there to deliver or receive freight. He went there solely for the purpose of making inquiry as to whether any demurrage would be exacted for the failure to unload a car of coal that day. When he was answered that in the opinion of the agent there would not be such demurrage, and he turned away, that matter was concluded. The assault committed had no legal relation thereto. When he was recalled by the statement that there was a package for him, and he was shot by Steagald while in the act of signing the receipt book therefor, in order to make out a case against the railroad company, it devolved upon the plaintiff to prove that such package pertained to the business of the railroad company. The plaintiff's evidence showed that Steagald not only had charge of freight matters at that station, but also of matters pertaining to the express company. The evidence did not show that the

package pertained to the business of the railroad company. If the package referred to was express matter, it did not pertain to the railroad as such, and therefore Steagald did not appear to be acting for the railroad company at the time. Whether the package came as railroad freight or as express matter was left entirely to the conjecture of the jury, to guess off. If this important fact was to be submitted to the chances of guessing right, there was not only as much, but better, reason for guessing that it was express matter. Signing a book at or near the window of the office would rather indicate that it was a receipt book for an express than a freight package. No package was displayed, and we do not know, save by the imputed statement of Steagald, that any package in fact was there to be delivered. As Steagald stood at the window of the ticket office, the indication was, when the book was signed, the package would be handed out through the window, not a place for the delivery of such bulky packages as would usually come by freight. Facts affirmatively established by tangible proofs, not conjectures, are essential to a right of recovery. Evidence that leaves the jury to roam at will in the field of conjecture and speculation to find a verdict can no more be tolerated by courts of justice than a judgment without any evidence. *Central Coal & Coke Company v. Hartman*, 111 Fed. 98, 100, 49 C. C. A. 244. On this ground alone the action of the Circuit Court in directing a verdict for the defendant might well be sustained. But, assuming that it was an actual freight package, a verdict for the plaintiff ought not to be upheld on the proofs.

The broad postulate laid down by counsel for plaintiff in error is that the railroad company owes the duty to every person who comes upon its premises to transact any business pertaining to railroad operations to protect him against personal assaults by its agents or servants at the time in charge of such premises. If this is to be established as incident to the relation between such master and servant, it will be far-reaching in its application, and would extend the doctrine of respondeat superior beyond any authoritative precedent. "Beware of analogies!" is a wholesome warning in applying the law of one class of subjects indifferently to another. Many decisions and utterances of courts, in cases growing out of the relation between carrier and passenger, are cited to support this action. The distinction between such cases and this is broad and obvious. The relation between carrier and passenger in the first place is contractual. From the moment the passenger comes to purchase his ticket and enters the train to the end of his journey he passes measurably under the control and direction of the agents and servants of the carrier, upon whom the law imposes the correlative duty of protecting him against insults, assaults, and injuries perpetrated by them, or others on the train, in so far as they can reasonably do so. As said by this court in *Clancy v. Barker*, 131 Fed. 161, 165, 166.

"The carrier takes and the passenger surrenders to him the control and dominion of his person, and the chief, nay, practically the only, occupation of both parties is the performance of the contract of carriage. * * * The carrier regulates the movements of the passenger, assigns him his seat or berth, and determines when, how, and where he shall ride, eat, and sleep; while the passenger submits to the rules, regulations, and directions of the

carrier, and is transported in the manner the latter directs. The logical and necessary result of this relation of the parties is that every servant of the carrier who is employed in assisting to transport the passenger safely * * * is constantly acting within the scope and the course of his employment while he is upon the train, * * * because he is one of those selected by his master and placed in charge of the person of the passenger to safely transport him to his destination. Any negligent or willful act of such a servant, which inflicts injury upon the passenger, is necessarily a breach of the master's contract of safe carriage, and for it the latter must respond."

Conformably to this ruling it was said, in *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 638, 7 Sup. Ct. 1039, 30 L. Ed. 1049:

"A common carrier undertakes absolutely to protect its passengers against the misconduct or negligence of its own servants, employed in executing the contract of transportation, and acting within the general scope of their employment."

It should, however, logically follow, from the premise on which this ruling is imposed, that, where the exceptional conditions on which it is propounded do not exist, the rule should not apply. In the case of the station agent, employed by the railroad company to receive and deliver freights, he is not expressly or impliedly commissioned by his employer to exercise any direction or control over the movements of the person shipping or receiving freight. It is the duty of the carrier of freight to furnish a reasonably safe place and means for receiving from and delivering to the customer his consignment. It is likewise a duty the company owes to such customer to furnish reasonably careful and competent servants to transact such business, and to see that they exercise due care in handling and delivering freight to the customer, so as not to injure him. For any neglect on its part in these respects, or inattention on the part of the servant while thus engaged in the course of the business committed to him, whereby the customer sustains injury and damage, the company is liable.

Confusion now and then appears in applying the law of responsibility of the master for the wrongs of the servant in not keeping in mind the distinction between the act done by the servant within the scope of, rather than during, his employment. Wood, in his work on the Law of Master and Servant, directs attention to this distinction in section 286:

"If the act of the servant is not expressly ordered by the master, or within the scope of his employment, the master is not liable therefor, even though done in the course of his employment. The question is whether the act was expressly or impliedly authorized by the master, and this is a question to be determined by the jury, in view of the employment, its character, the nature of the services required, the instructions given by the master, and the circumstances under which the act was done. * * * A master is liable for the act of his servant, done in the course of his employment about the master's business. But he is not responsible for an act done outside of his employment, nor for the wanton violation of the law by him."

In section 307 he says:

"The simple test is whether they were acts within the scope of his employment—not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him."

So it is said, in Elliott's Law of Railroads, vol. 3, p. 1009:

"The general rule is that the master is liable for the willful acts of the servants with reference to the master's orders, or within the scope of their employment or the line of their duty, but not otherwise."

If the act done by the servant is within the scope of his employment, it is immaterial that it is wantonly done. The master is responsible for the manner in which it is done. This is illustrated by the following adjudged cases:

In *Texas & Pacific Ry. Co. v. Hayden* (Tex. Civ. App.) 26 S. W. 331, a boy boarded a freight train and paid his fare to the brakeman. Before reaching his destination he was ordered off by the brakeman. On his refusal the brakeman knocked him off with a piece of coal. It was held that, if the brakeman had authority to eject the boy, the company would be liable, because he was guilty of excessive means in accomplishing the service while acting in the scope of his employment.

This was true in *Pierce v. N. C. R. R. Co.* (N. C.) 32 S. E. 399, 44 L. R. A. 316. The brakeman had the right to eject parties from the train, and the railroad company was held responsible for an injury to the party in ejecting him in a reckless and wanton manner, on the ground that he was acting within the general scope of his employment.

In *Denver & R. G. R. Co. v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. Ed. 1146, the defendant railroad company was in a controversy with the Santa Fé Railway Company as to the possession of a piece of railroad. The defendant company sent an armed force of several hundred men in its employ, under its vice president or assistant general manager, to drive off the employés of the Santa Fé Railway Company, which was in peaceful possession of the track. The attacking employés were armed with deadly weapons, and in the execution of this demonstration of force and arms some of the employés of the defendant company fired upon the employés of the Santa Fé Company, injuring the plaintiff, Harris. The railroad company was held responsible for this tortious act, on the ground that the servants were acting within the scope of their employment.

In *Haehl v. Wabash R. R. Co.*, 119 Mo. 325, 24 S. W. 737, a servant of the railroad company was employed to keep trespassers off of one of its bridges, and while performing this service he wrongfully shot and killed a trespasser. The company was held liable, on the ground that the act was done by the servant in the scope of his employment. The court states the rule as follows:

"The principal is responsible, not because the servant has acted in his name or under color of his employment, but because the servant was actually engaged in and about his business and carrying out his purposes. * * * But if his business is done, or is taking care of itself, and his servant not being engaged in it, but impelled by motives that are wholly personal to himself, and simply to gratify his own feeling of resentment, whether provoked or unprovoked, commits an assault upon another, when that has and can have no tendency to promote any purpose in which the principal is interested, and to promote which the servant was employed, then the wrong is the purely personal wrong of the servant, for which he, and he alone, is responsible."

Without multiplying authorities, it is sufficient to say that in these and their congeners the controlling principle, which binds the master to respond, is that, although the injury done by the servant was willful, or wanton, or done in an excessive manner, beyond the instructions or outside of the intendment of the master, nevertheless, being done within the scope of the employment, to which the master has assigned the servant, the master is responsible.

Illustrations of the nonliability of the master, under this rule, are furnished in the following cases:

Candiff et al. v. L., N. O. & T. Ry. Co., 42 La. Ann. 477, 480, 7 South. 601. The defendant's conductor, on discovering that a car had been broken open, believing that it had been done by a certain person, walked up to such person as he was quietly standing at the station and without a word shot him. It was held that, as this wanton act was entirely beyond the scope of any employment or function of the conductor, the company could not be held responsible. The court said:

"No stretch of the doctrine that masters are responsible even for the torts of their servants, when done within the scope of their employment and in the exercise of the functions in which they are employed, can make it cover such an act as this. Admitting that the conductor is charged with the duty of protecting the cars and contents confided to his care, and that acts done in execution of such charge are within the scope of his employment, and admitting that he supposed Candiff had broken into the car, and shot him for that reason, in what manner was such shooting, under such circumstances, necessary or conducive to the protection of the property?"

In *C., R. I. & P. Ry. Co. v. Smith* (Kan. App.) 63 Pac. 294, a section foreman was in the habit of carrying a gun upon handcars, without the knowledge or direction of the employer, used for his own purposes, and through the recklessness of the section foreman the gun was discharged, injuring his assistant. It was held that no recovery could be had against the railway company, on the ground that the employer is not liable for the acts of his employé, if such acts are not authorized by the former or done by the latter in the discharge of some duty.

In *Turley v. Boston & M. R. R. Co. et al.* (N. H.) 47 Atl. 261, the plaintiff testified that he went to the defendant's freight yards to look for coal cars, intending to apply for a job of shoveling coal, and was shot by defendant's servant while running away, after the latter had attempted to seize him as a trespasser. The court said:

"As there was no evidence tending to show that the shooting of the plaintiff by Saxton resulted from any fault of the defendants, was directed by them or done by their authority, or was any part of Saxton's work of cleaning and caring for the lamps in the yard, for which he was employed, * * * it cannot be found that the act of Saxton complained of, whether willful or negligent, was the defendants' act, or within the scope of Saxton's employment by them."

In *Farber v. Mo. Pac. Ry. Co.*, 116 Mo. 81, 22 S. W. 631, 20 L. R. A. 350, a brakeman forced from a freight train in a rude manner a trespasser who was stealing a ride. The court held that the liability of the railroad company must rest on the law of agency, and not on that of common carrier, as the person was not a passenger;

and, as there was not sufficient evidence to show that the brakeman on the freight train was authorized to eject passengers, there was no liability on the part of the railroad company. The court said:

"The liability of the master for the acts of the servant rests now upon the condition whether or not the act of the servant was in the course of his employment."

The most extreme case sought by counsel for plaintiff in error to have this court follow is that of *Daniel v. Petersburg R. R. Co.* (N. C.) 23 S. E. 327. A passenger on the defendant railroad had accomplished his journey, departed from the train, and gone about his private business. He did not apply for his baggage for a day or so afterwards. When he did apply there were charges for its storage, the justness of which charge was not controverted by any evidence. He demurred to the charge, and got into an altercation of words with and applied to this agent of the railroad abusive epithets. After paying the charges and receiving his baggage, he turned to leave the room, and when he reached the door, said employé, smarting under the abusive epithets applied to him, shot and killed the man. His legal representative sued the railroad company for damages and was permitted to recover. The majority of the court, while placing stress on the proposition that the business of the deceased with the baggageman had its origin in the contract for carriage with the railroad company, placed the liability of the railroad company upon the ultimate proposition that at the time and under the circumstances the law laid upon the railroad company the duty of absolute protection against such wanton violence of the servant, while the deceased was in the office for the purpose of transacting such matter of business. The minority opinion filed held that the placing of the responsibility of the master on the ground that the place of the assault was such as to invoke the rule of protection against a willful and wanton assault of the servant, as in the case of hotel keepers, proprietors of theaters and steamboats, and the like, was hardly sustainable, and preferred to establish the liability of the railroad company by stretching the relation of carrier and passenger to include the incident at the baggage room. This feat was accomplished by the "*argumentum ad judicium*." The position has no support in any well-considered case. It stands upon no fundamental postulate upon which the doctrine of *respondeat superior* has been builded. "If a case in law have no cousin or brother, it is a sure sign it is illegitimate." Bacon. When the intestate reached his destination, left the train and the premises of the company, going about his other affairs, the contract of carriage had been performed, and the relation of carrier and passenger was at an end. It is true that the contract of carriage included the baggage. While in transit, and in the storage room after it reached its destination, until a reasonable time had elapsed for its removal by the passenger, the duty of the carrier as to it was the exercise of a high degree of care for its safe carriage and prompt delivery. If the passenger would continue in force the greater responsibility of the carrier toward him and his baggage, he must apply at the place of delivery for his baggage on his arrival within a reasonable

time thereafter. *Hutchison on Carriers*, §§ 708-710. The passenger had not called for his baggage within a reasonable time, as storage charges had attached, and the carrier then held it as a warehouseman, a bailee for hire; and its obligation for it was only that of ordinary care, with the implied obligation on the part of the bailor to pay the reasonable storage charges. *Hutchison on Carriers*, § 712. While this obligation of the carrier as warehouseman, and the right of the intestate to call for and get his baggage, may technically be said to have had its root in the contract of carriage, yet, as the reason of the rule respecting the extraordinary duties of the carrier toward the passenger while under the jurisdiction and care of the carrier did not exist at the time of the injury, the rule itself ceased to apply. So that the liability of the railroad company for the unanticipated and improbable occurrence, provoked by the misconduct of the deceased and unlawfully resented by the servant, as the majority opinion rightly conceived, could be sustained only on the ground that it was the neglect of a duty on the part of the railroad company in not safeguarding every person who entered its place of business against violence and injury from its employés, no matter whether or not the injury had any legal connection with the manner of performing the duty assigned by the master to the servant.

This extreme rule of the master's liability as to place has hitherto been supposed to apply to carriers, as to their passengers, and to hotels, theaters, steamboats, or like places, as to their guests. It was applied by the Supreme Court of Pennsylvania, in *Rommel v. Schambacher*, 120 Pa. 579, 11 Atl. 779, 6 Am. St. Rep. 732. In that case the plaintiff, a minor, entered the tavern of the defendant, where he found one Flanagan, a guest. They became intoxicated on liquor furnished by the proprietor. While the plaintiff was standing on the outside of the bar engaged in conversation with the defendant, the third party pinned a piece of paper to the plaintiff's back and set it on fire, whereby he was badly injured. The proprietor was held liable for the injury, upon the ground that he was cognizant of the prank being played upon his guest, or that, having been guilty of making the third party drunk, or that he came there drunk and he knew that fact, he was bound to see that he did no injury to his customer.

The same rule was applied by the Supreme Court of Minnesota, in *Curran v. Olson*, 88 Minn. 307, 92 N. W. 1124, 60 L. R. A. 733, 97 Am. St. Rep. 517, to the instance of a saloon keeper, who gave to his house the quality of an inn, and suffered his guest to be badly burned by vicious persons saturating his feet with alcohol, while he was asleep, setting it on fire. Even there the liability of the proprietor, who was not present at the instant, was sustained upon the ground that he had knowledge of the prank being played upon his customer and took no steps to prevent it.

The liability of a hotel keeper in respect to injuries to his guests underwent thorough discussion by this court in the recent case of *Clancy v. Barker*, 131 Fed. 161. In that case a small boy, about six years of age, was a guest in the defendant's hotel, and wandered

out of his room into another room, where a bell boy, or a porter, of the hotel was playing a harmonica, for his own amusement, and the latter, accidentally or willfully, shot the boy with a pistol. The conclusion reached was—

"That when the defendants made their contract to entertain at their hotel the law was, and in our opinion it still is, * * * that their agreement was to exercise reasonable care for his safety, comfort, and entertainment, and that their agreement did not include an insurance of his person against the willful or negligent acts of their servants beyond the course of their employment."

Suppose that A. goes to a mercantile house and makes inquiry about some matter connected with its business, and when that is ended the clerk says to him, "There is a package here for you; please sign a receipt for it," and without more the clerk seizes a revolver and shoots the person to death. Is it possible that the owner of the house shall respond in damages for the injury, the result either of a fit of insanity or personal revenge on the part of the clerk, on the ground, not that it was done within the scope of his employment, but in a place where persons are invited to come and transact business with the house? How is it possible under such condition for any business house to conduct its affairs, dependent upon the employment of clerical assistance, if exposed to such liability, after the merchant has exercised due care in the selection of his clerk, who has worked for him for six months with no manifestations of insanity or homicidal tendency? How is he, within the bounds of reason, to safeguard himself against such abnormal outbreak wholly aside from any intendment connected with the work to which the clerk is assigned? To uphold the plaintiff's contention there would have to be written into the law of master and servant a new rule, making every employer an absolute insurer of the safety of every person who comes upon his premises to deal with him on any matter of his special business against any injury inflicted by any employé.

The judgment of the Circuit Court is affirmed.

MEXICAN CENT. RY. CO., Limited, v. CHANTRY.

(Circuit Court of Appeals, Fifth Circuit. January 10, 1905.)

No. 1,294.

1. INJURY TO EMPLOYÉ—RES JUDICATA—PROCEEDINGS IN MEXICO.

In an action for personal injuries received by plaintiff in Mexico while in the employ of defendant railroad company, the transcript of proceedings in a Mexican court showing, *prima facie* at least, in connection with other evidence, that, when the action was instituted, proceedings in Mexico had been had, having the force of *res judicata*, settling adversely to plaintiff his right to recover, should be admitted in evidence.

2. SAME—NEGLIGENCE OF FELLOW SERVANT—LAWS OF MEXICO.

Whether the common-law doctrine as to nonliability of employers to a servant for injuries from the negligence of fellow servants prevails in Mexico is a question of fact, to be proved like other facts, in an action

for personal injuries received by plaintiff in Mexico, while in defendant's employ, through the negligence of a fellow servant.

Shelby, Circuit Judge, dissenting from that part of the judgment directing a new trial, holding that the trial court should be directed to dismiss the case on the authority of *Slater v. Mexican Nat. R. Co.*, 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900.

In Error to the Circuit Court of the United States for the Western District of Texas.

This is an action brought in the court below by J. M. Chantry, defendant in error, against the Mexican Central Railway Company, Limited, plaintiff in error, to recover damages for injuries received at Canitas, Mexico, on or about the 27th of March, 1902; said Chantry then being engaged in his employment as a freight conductor for the railway company. Plaintiff's original amended petition in the court below sets out all the circumstances attendant upon his injuries, and, in addition, such alleged articles of the Mexican law governing cases of the kind as were deemed sufficient to show a full case for recovery.

Defendant's first amended original answer contains an exception to the plaintiff's petition as insufficient, a general denial of the same, a plea of contributory negligence, and, in addition, the following:

"(1) Defendant pleads in bar of plaintiff's recovery herein a former judgment which is conclusive and binding upon the plaintiff, and which is conclusive of his right to recover herein under the Constitution and laws of Mexico. That in the courts of Mexico, the same having jurisdiction of the subject-matter and parties, a certain adjudication was had, as shown by the attached certified copy and its translation, wherein the court judicially determined that plaintiff was injured by reason of an accident, and that no one was to blame therefor. That, under the Constitution of Mexico, to wit, article 24, and other laws of the republic of Mexico, said decision of said court is binding, and precludes the recovery by plaintiff of any damages in any civil suit by him instituted, and said article is as follows: 'Art. 24. Ningun juicio criminal puede tener mas de tres instancias. Nadie puede ser juzgado dos veces por el mismo delito, ya sea que en el juicio se le absuelva o se le condene. Queda abolida la practica de absolver de la instancia.' The same, in effect, when translated, is as follows: 'Art. 24. No criminal case can have more than three phases. No one can be tried twice for the same offence, be he absolved or condemned. All former laws on the subject are hereby abolished.' That under the construction placed upon said article by the court in said republic, as to the decision of said court as set forth in the attached certified copy, and the translation thereof also attached hereto, this plaintiff has no cause of action under the laws of the republic of Mexico; the rights of the parties hereto by virtue of said finding of the court being held as finally adjudicated under said laws. Wherefore plaintiff should not be permitted to recover herein, when, under the laws of said republic, he has no cause of action, and cannot recover on account of injuries sustained as claimed by him in his said petition, and wherefore defendant prays that it go hence and recover its costs."

To the answer was attached a copy in Spanish, and a full translation thereof into English, of an alleged adjudication in the courts of Mexico in the proceedings instituted against the Mexican Central Railway Company to inquire into and adjudicate the question of fault by reason of the derailment of the railway train at Canitas on the 27th day of March, 1902, in which wreck the American, J. M. Chantry, was hurt. The original and the translation show that the court adjudged that the injuries sustained by Joseph Chantry were caused in an accidental manner, without culpability to any person whatever.

To the foregoing plea the plaintiff filed general and special exceptions, and answer as follows:

"(1) Because it is not certified to by the proper person.

"(2) Because there is no certificate accompanying same, as required by law.

"(3) Because it shows on its face that same is not a judgment of any court of record, but is only the testimony taken by the examining court, and is criminal in its nature, under a proceeding instituted by the officials of the

Mexican government to determine the criminal liability of the defendant and its employes, and did not include plaintiff's right to recover damages in this case.

"(4) Because it shows on its face that plaintiff, J. M. Chantry, was not before the court, but one MacChantry.

"(5) Because said instrument shows on its face that it was a criminal proceeding, and is not a judgment for or against plaintiff on his rights, under the law, to recover damages for his injuries.

"(6) Because neither plaintiff nor defendant was a party to such proceeding, and for this reason neither were bound by said judgment, if same is a judgment.

"Wherefore plaintiff prays that said plea be stricken from the record.

"Patterson & Wallace,

"Attorneys for Plaintiff.

"And for further special answer hereto, comes now said plaintiff, by his attorneys, and says that, by virtue of the laws of the republic of Mexico, it is necessary to have an investigation as to the criminal responsibility of all accidents that occur in said republic; that in no event does a judgment in a criminal case bar plaintiff from his rights to a civil suit for his damages, as is shown by the attached copy of the laws of the republic of Mexico, which is here referred to and made part of this answer.

"Wherefore plaintiff prays judgment of the court.

"Patterson & Wallace,

"Attorneys for Plaintiff."

And further appended numerous alleged articles of the law of Mexico tending to sustain the views of the law as expressed in the exceptions.

On the trial of the case, among other witnesses for the defendant, Mr. J. M. Amador testified as follows:

"My name is J. M. Amador. I live at Ciudad Juarez. I am a lawyer. I am a practicing attorney. I am with Mr. Siljas. We have a company for practicing law on the other side. To practice civil and criminal law. I am a lawyer since 1885. I held the position of prosecuting attorney for more than 5 years at Zacatecas State, at the city of Zacatecas, and from 20th of November, 1900, on this other side, Chihuahua State federal court. Five years I was prosecuting attorney in the state of Zacatecas. I saw this paper. That is the court I refer to. I belonged to the same court. I am familiar with the law of Mexico with reference to criminal and civil liability for criminal acts. I have examined this paper—the Spanish copy. That is a copy of the record. This seal I know perfectly. I have read over the judgment of the court as shown by those records. Yes, sir; that is the decision of the court. That is what we call it in Spanish—office of Fomento. That means that there is no crime against any person to prosecute. Civil responsibility depends upon criminal liability. Consequently the party may be criminally liable and not civilly liable, and vice versa; but when judgment is entered by the court, showing that there is no criminal responsibility, that eliminates entirely the civil responsibility. When the judgment of the court states that there is no person responsible. For instance, a man kills another. If the defendant is found guilty of the charge, he also is civilly responsible for the murder committed. This is judgment rendered both civilly and criminally. But if judge finds, in investigation of the case, that he has no case, or nothing to punish the man criminally for, then he is discharged for lack of proof, but then this man is liable to civil responsibility; but when no crime is proven against him, as in this case, the judgment of the court is not similar to the judgment then. In that case there is no civil responsibility whatever. This book is printed by the editor of the official bulletin by order of the Minister of Justice—publico. It is an official book. Where the court finds that no one is responsible, and that the injuries are a result of an accident, then no civil suit can be instituted, but on the other hand, if the court finds that there was not enough evidence before him to hold anybody for criminal charge, then that would not prevent the civil action, because the party was simply absorbed in the criminal case. I refer to articles 326 and 327 of the Penal Code. I will read them: 'Art. 326. No person can be charged with civil liability upon an act or omission contrary to a penal law, unless it be proven: That the party sought to be charged

usurps the property of another; that without right he caused, by himself, or by means of another, damages or injuries to the plaintiff; or that, the party sought to be charged being able to avoid the damages, they were caused by a person under his authority.' I will read article 327: 'Art. 327. Whenever any of the conditions of the preceding article are established, the defendant shall be civilly liable, without regard to whether he be absolved or condemned to criminal liability.' In reference to the word 'absolved,' I can explain that, if you want. If the decision of a court says that the man is not criminally responsible (that is, if some of the judges, officials, would say that there was not enough evidence presented against this man), there would be found no criminal liability; that is to say that, as to the accident, that there is not sufficient proof to condemn the man, and still there is civil responsibility. Where the judgment of the court finds that there is no one to blame, and that it was the result of an accident, no civil action can be brought upon that cause. There is no question about that. Some of the states and territories in the republic of Mexico have two federal courts, but most of them have only one. When persons live in other parts, different from the place where the court is, the court recommends investigation, through the other courts—other federal districts of said court. This is the general code for the federal proceeding in Mexico: 'When it is necessary to execute judicial proceedings out of the place where the suit is pending, must be charged the complaint by means of requisition papers to the federal judge, or in fault of this to the common judges of the place where the said proceedings must be practiced. It must be implied in the form of requisition papers, when the proceeding is recommended to an equal or superior judge, and that the form of requisition must be addressed to any inferior.' That is the provision under which the court at Zacatecas acted in taking the testimony at Aguas Calientes. That is the procedure in the Mexican courts. Where the main court calls upon any minor court to make an investigation and return to it the testimony, the first court, or chief court, finds the judgment. The matter is determined by the first court, and the first court renders the judgment, submitting to the minor court the duty of discovering all testimony, but this second court only gets jurisdiction so far as this first court orders. Article 24 of the Constitution has reference to this same matter: 'No criminal case can be of more than three phases, no one can be tried twice for the same offense, be he absolved or condemned. All further laws on the subject are hereby abolished.' The courts in Mexico have three phases. In some states of the republic they have only two, but in only a few states. The Constitution says that no case shall have but three phases. The first phase is what is known as 'first instance.' Then it will go to a higher court. That will be second phase. Then we go up to the highest court. That will be the third phase. That will be the first instance, and the second will be the appeal, and the third by publication. Case first into court is the first instance—for instance, the first instance usually starts in the 'judge of letters,' the district court. The second instance is the circuit court. The Constitution says that no case will be of more than three phases, and the federal court shall have only two phases. In a case where it begins at the circuit court, will go up to the Supreme Court, but not where it begins in the district court. This case began with the district court. It began with the district court of Zacatecas, and then went to the circuit court. Here is the order affirming it: 'In the investigation held by your court relative to injuries caused to MacChantry by a Mexican Central train, the acting magistrate has accorded on the 2d of the present month, the following: With the foundation of the 2d paragraph of article 60, of the preliminary title reformed from the Federal Code of Proceedings revised, and there not appearing merits to place responsibility, I order the remittance of the originals to the District Court at once. To whom it may concern. All of which I transfer to you in compliance with orders and for the effect herein expressed, remitting to you the investigation in 11 pages.' That is it exactly. That is the final judgment of the circuit court."

Cross-examination:

"I think Mr. Chantry had something to do with that proceeding. He would not necessarily have to be a party to it, before it would be binding upon him.

I am testifying about the law. I get the law in Mexico. It is not necessary for him to be a party.

"(Here the plaintiff read the following article:)

"'Art. 308. The civil responsibility cannot be declared except at the instance of the party entitled to recover.'

"That is right. Q. Then, if he is not a party to these proceedings, he would not be bound by it? A. No, sir; that is not the same.

"(Here plaintiff's counsel reads the following:)

"'Art. 327. Whenever any of the conditions of the preceding article are established, the defendant shall be civilly liable, without regard to whether he be absolved or condemned to criminal liability.'

"'Art. 323. If the blows or wounds cause the loss of any member indispensable for work, or the person wounded or struck remain other wise crippled, lamed or deformed by that circumstance, he shall have the right not only to the damages and injuries but also to the sum which the judges may determine as extraordinary indemnity, considering the social position and sex of the person and the part of the body remaining crippled, lamed or deformed.

"'Art. 324. The gain which the injured party fails to earn during his inability to work shall be computed by multiplying the sum which he formerly earned per day by the number of days of his disability.'

"'Art. 326. No person can be charged with civil liability upon an act or omission contrary to a penal law unless it be proven that the party sought to be charged usurped the property of another; that without right he caused, by himself or by means of another, damages or injuries to the plaintiff; or that the party sought to be charged being able to avoid the damages, they were caused by a person under his authority.

"'Art. 327. Whenever any of the conditions of the preceding article are established, the defendant shall be civilly liable without regard to whether he be absolved or condemned to criminal liability.'

"'Art. 325. A pardon shall in no case extinguish the civil responsibility, nor the actions to enforce it, nor the legal rights which third persons may have acquired.'

"'Art. 366. Limitation is interrupted by the criminal proceedings until final judgment is pronounced. This done, the term of limitation commences to run anew.'

"No other court in the district has jurisdiction to try railroad cases, except the federal court. These proceedings originated in the district court at Zacatecas. These papers are on file at Zacatecas. These papers belong to the Zacatecas court, and will stay at Zacatecas court. I am not judge of any court. I am not giving my opinion. I am explaining the law of Mexico. There are two different kinds of crime—private and public crimes—and in the public crimes the prosecuting attorney will make charge, and in private crimes the party. This was public crime. Not necessary to have the complaint. In private crimes it is necessary to have complaint of the crime, but in public crimes the minister of the public will be the one to prosecute. He is prosecuting attorney in this case. There are two parties to a suit in Mexico—the plaintiff and defendant.

"Redirect examination:

"I have read over this instrument, it is in due and legal form, according to the judgment of the court. That is a valid and binding judgment, under the law, and is to be respected in the courts. Under that judgment, no civil suit can be instituted upon that cause of action. There is no question about that."

At this stage defendant produced a certified copy of proceedings and judgment attached to his answer, and offered the same in evidence. "The court permitted said instrument to be introduced in evidence only in so far as it tended to contradict the plaintiff, but refused to permit the same in evidence as a bar or as an estoppel, or in any way as affecting plaintiff's right to sue to recover herein. Defendant then and there offered to prove by any number of witnesses, and through competent proof, that under the laws of Mexico such judgment was and is final and conclusive, and that the same would bar plaintiff's recovery in any civil suit involving the same cause of action in the courts of the republic of Mexico, but the court then and there refused to hear further proof, holding that said judgment would in no way be a bar or pre-

vent the recovery of plaintiff in the courts of this country, to which action of the court in refusing to permit said instrument to be offered in evidence as a bar and estoppel, and in refusing to hear proof to show that plaintiff, under the laws of Mexico, had now, since the entry of said judgment, no cause of action, defendant then and there, in open court, excepted."

There was verdict and judgment for the plaintiff, and the railway company sued out this writ of error.

F. A. Falvey and Waters Davis, for plaintiff in error.

Geo. E. Wallace, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

After stating the case as above, the opinion of the court was delivered by PARDEE, Circuit Judge.

To recover in this transitory action for the alleged personal injuries, it must be shown that the laws of Mexico give a right of action. Foreign laws are matters of fact, and, like other facts, must be pleaded and proved. *Liverpool & G. W. S. Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788. Assuming that in this case it has been sufficiently pleaded and proved that under the laws of Mexico the plaintiff is given a civil right of action to recover from the defendant company for the injuries in question, we still meet the proposition that, prior to the suit brought, and the trial of the same, said right of action had been lost or extinguished by legal proceedings in the courts of Mexico; and the question arises whether such proceedings, sufficiently pleaded and proved, will defeat the cause of action sued on. After much consideration, we conclude, on principle and authority, that the rule declared in *McLeod v. Connecticut & P. R. Co.* (Vt.) 6 Atl. 648, as follows: "Although a civil right of action acquired or a liability incurred in one state or country for a personal injury may be enforced in another to which the party in fault may have removed or where he may be found, yet the right of action must exist under the laws of the place where the act was done or neglect accrued. If no cause or right of action for which redress may be had exists in the country where the personal injury was received, then there is no cause of action to travel with the person claimed to be in fault, which may be enforced in the state where he may be found"—is a correct statement of the law of the case.

The record shows that the plaintiff in error duly pleaded proceedings in Mexico under the laws of Mexico had prior to the institution of the present suit, by and through which whatever right the defendant in error may have had to prosecute his suit in any jurisdiction was extinguished. The plea seems to be good, and, so far as the record shows, was so treated by the trial court. On the trial of the case the evidence of Amador, Mexican lawyer, made a prima facie case to the effect that, under the laws of Mexico, by proceedings of the kind and nature described in the certified transcript attached to the plea, the defendant in error's right of action was extinguished. In connection with this evidence, the certified transcript of the proceedings in the courts of Mexico in relation to the railroad wreck in which the defendant in error was injured, and the finding by said courts that in such wreck no culpability was attached to any one, was offered in evidence,

but was rejected by the court for the purpose for which it was offered, and admitted only for the limited purpose of contradicting the oral evidence of the defendant in error. This transcript, in connection with the other evidence, would have shown, *prima facie* at least, that, at the time the present suit was instituted, proceedings in Mexico had been had in the nature of, and having the force of, *res judicata*, settling the defendant in error's right to recover adversely to him. Certainly, if no cause of action existed in Mexico at the time this suit was brought, the same ought not to be maintained. Holding this view, we are of opinion that the trial judge erred in rejecting the evidence offered, and that for this reason the judgment of the court below should be reversed.

We do not think it necessary to pass on other points raised on this writ of error, further than to say that whether or not the common-law doctrine as to the nonliability of employers to one servant for injuries resulting from the negligence of a fellow servant prevails in Mexico is a matter of fact, to be proved like other facts. See, in this connection, *Mexican Central Ry. Co. v. Sprague*, 114 Fed. 544, 52 C. C. A. 318.

The judgment of the Circuit Court is reversed, and the cause is remanded, with instructions to grant a new trial.

SHELBY, Circuit Judge. I concur in the judgment of reversal, but, as I place it on grounds fatal to the plaintiff's cause of action, it seems proper to briefly state them:

This is a common-law action for damages for personal injuries received by the defendant in error (the plaintiff below) while in the service of the plaintiff in error (the defendant below). It is alleged in the declaration that, while engaged in the service of the defendant as conductor, the plaintiff was injured by the defendant's servants, whose negligence caused him to be knocked down between the cars, and that his right foot was caught under the wheels of the cars and mangled to such an extent as to render him a cripple for life. The accident occurred in Mexico, and the plaintiff, in his pleadings, sets out the laws of Mexico upon which he bases his right of recovery. For convenience of reference, these statutes, so far as is necessary, are printed in the margin.¹ They make railway companies civilly liable for the negligence, imprudence, and want of capacity of their servants. Negligence is made a crime, and civil liability is fixed, which requires the payment of all the damages caused to the injured party. The judges who take cognizance of the suit for damages are required to endeavor to have the parties agree on the amount of damages and "terms of payment." The measure of damages is fixed by the statute. The guilty defendant must pay all the expenses of cure, the damages the plaintiff may have suffered, and that which he may fail to gain during the time which he may not be able to do the work by which he subsisted. If the plaintiff recovers so that he can do other work (different from his accustomed work), "the civil responsibility shall be reduced to paying him the sum which his ability to earn in his new employment falls short of his daily earnings

¹ See note at end of case.

in his former occupation." It is clear that, if the plaintiff had sued in Mexico, a judgment for the plaintiff would have required the defendant to pay him at stated times such sums as he had been earning before the injury, and that if the plaintiff recovered so that he could do other work appropriate to his education, etc., the payments required of the defendant would be reduced by the amount the plaintiff earned in his new vocation. Article 322, note. It seems, also, that by proceedings subsequent to the judgment the defendant may be relieved of the liability fixed by the judgment, and that such liability may "be expressly left to the charge of the public treasury." Articles 331, 334, note. There are other differences between the *lex loci delicti* and the *lex fori*, not necessary to be mentioned here, which are elaborately stated by the Supreme Court of Texas in refusing to administer and enforce the Mexican statutes. *Mexican National Ry. Co. v. Jackson*, 89 Tex. 107, 33 S. W. 857, 31 L. R. A. 276, 59 Am. St. Rep. 28. This is an action at law for damages for a statutory tort. No room is left for presumption as to what laws prevailed in Mexico, for the plaintiff presents the statutes making the alleged negligence a tort, and prescribing the penalty, and limiting in certain points the defendant's liability by providing the terms and character of the judgment. It is not a judgment for a lump sum, but for periodical payments. These payments may be reduced by a change in the physical condition and occupation of the plaintiff, and by procedure after judgment the defendant may be relieved of the liability; it being made a charge on the public treasury. It is clear that in this suit no such judgment can be rendered by the Circuit Court sitting in Texas. It is a general rule that a civil right of action or liability incurred in one country for a personal injury may be enforced in another country to which the party in fault may have moved, or where he may be found, if the right of action exists under the laws of the place where the act was done or the neglect occurred. But the rule does not apply to statutory torts, where the statute, in creating the liability, at the same time creates a mode of redress peculiar to that state, by which alone the wrong is to be remedied. *Minor on Conflict of Laws*, § 194. I think the principles announced by the Supreme Court in *Slater v. Mexican National R. Co.*, 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900, are conclusive of this case. That was a suit brought in the Circuit Court in Texas for damages for the negligence of the railroad company in causing the death of William H. Slater. The statutes of Mexico and those of Texas both give an action for wrongfully causing death, and the court said:

"Of course, there is no general objection of policy to enforcing such a liability, although it arose in another jurisdiction."

In affirming the judgment of the Circuit Court of Appeals, which directed the dismissal of the action (115 Fed. 593, 53 C. C. A. 239) the Supreme Court said:

"As Texas has statutes which give an action for wrongfully causing death, of course there is no general objection of policy to enforcing such a liability there, although it arose in another jurisdiction. But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act, in any degree, is subject to the *lex fori*, with regard to either its quality or its consequences. On the other hand, it equally

little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation—an obligatio—which, like other obligations, follows the person, and may be enforced wherever the person may be found. But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here, absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose. * * * We may lay on one side, as quite inadmissible, the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught. * * * It is sufficiently obvious from what has been quoted that the decree contemplated by the Mexican law is a decree analogous to a decree for alimony in divorce proceedings—a decree which contemplates periodical payments, and which is subject to modification from time to time as the circumstances change. The present action is a suit at common law, and the court has no power to make a decree of this kind contemplated by the Mexican statutes. * * * But we are of opinion, further, that justice to the defendant would not permit the substitution of a lump sum, however estimated, for the periodical payments which the Mexican statute required. * * * Evidently the Texas courts would deem the dissimilarities between the local law and that of Mexico too great to permit an action in the Texas state courts. *Mexican National Ry. v. Jackson*, 89 Tex. 107, 33 S. W. 857, 31 L. R. A. 276, 59 Am. St. Rep. 28; *St. Louis, Iron Mountain & Southern Ry. v. McCormick*, 71 Tex. 660, 9 S. W. 540, 1 L. R. A. 804. The case is not one demanding extreme measures, like those where a tort is committed in an uncivilized country. The defendant always can be found in Mexico, on the other side of the river; and it is to be presumed that the courts there are open to the plaintiff, if the statute conferred a right upon them, notwithstanding their absence from the jurisdiction, as we assume that it did, for the purposes of this part of the case."

While the facts of the two cases are different—one being for damages for wrongfully causing death, and the other for wrongfully inflicting personal injuries—as both causes of action depend absolutely on foreign statutes, I cannot avoid the conclusion that the principles announced in the former case are equally controlling in the latter. In each case the judgment or decree provided for by the statute prescribes periodical payments that may be reduced by subsequent events. The statutory judgment in each case is such that "in an action at common law the court here has no power to make." The procedure here is such that the defendant in this case, as in the *Slater Case*, would be deprived of substantial rights secured to it by the foreign statutes on which the suit is based. The opinion and judgment of the Supreme Court is, of course, controlling on this court; and it seems to me that, if we permit this case to proceed to judgment for the plaintiff in the court below, we ignore the principle announced—that it is "unjust to allow a plaintiff to come here, absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose." Neither can I reconcile the direction to proceed to try this case again under the Texas law, allowing a verdict and judgment for a lump sum only, with the opinion quoted—that "justice to the defendant would not permit the substitution of a lump sum, however estimated, for the periodical payments which the Mexican statute required." I am forced,

therefore, to the conclusion that the opinion of the Supreme Court, which requires the plaintiff to seek his remedy "on the other side of the river," is just as applicable to this case as to the Slater Case.

The Circuit Court, I think, should be directed to dismiss the case. I dissent, therefore, from that part of the judgment which directs a new trial.

NOTE.

The following are the pertinent Mexican statutes set out in his pleadings by the plaintiff:

"Art. 184. Companies [railway] are liable for all faults or accidents which occur through tardiness, negligence, imprudence, or want of capacity of their employés."

"Art. 304. The civil liabilities arising from an act or omission contrary to a penal law consists on the obligation imposed on the party liable, to make (1) restitution, (2) reparation, (3) indemnization, and (4) payment of judicial expenses.

"Art. 305. Reparation comprehends: The payment of all the damages caused to the injured party, to his family or to a third person, for the violation of a right which is formal, existing and not simply possible, if such damages are actual, and arise directly and immediately from the act or omission complained of or there be a certainty that such act or omission must necessarily cause, as a proximate and inevitable consequence."

"Art. 305. Indemnization imports: The payment of damages, that is, of that which the party fails to enjoy as a direct and immediate consequence of an act of omission by which a formal, existing and not merely possible right is attacked, and of the value of the fruits of the thing usurped and already consumed, in the cases in which the same should be done comfortably with civil right.

"Art. 306. The condition required by the two preceding articles, that the damages and injuries should be actual, shall not prevent that the indemnization of subsequent damages and injuries be exacted by a new suit, when they shall be accrued; if they proceed directly from, and as a necessary consequence of the same act or omission from which resulted the previous damages or injuries.

"Art. 307. The payment of judicial expenses embraces those absolutely necessary, which the injured person incurs for the purpose of investigating the act or omission which causes the criminal proceeding and to avail himself of his rights in such proceeding or in civil suit."

"Art. 313. The judges who take cognizance of suits based upon civil responsibility shall endeavor that the amount and terms of payment be fixed by agreement of the parties. Failing in this, the provisions of the following article shall be observed."

"Art. 321. In case of blows or wounds, from which the injured party does not remain a cripple, lamed or deformed, he shall have the right that the responsible party pay all his expenses of cure, the damages he may have suffered, and that which he may fail to gain during the time which, in the opinion of competent persons, he may not be able to do work by which he subsisted. But it is essential that the inability to work should be the direct result of the wounds or blows, or be a cause which is [the] immediate effect of such blows or wounds.

"Art. 322. If the inability of the injured person to devote himself to his accustomed work be permanent, from the moment in which he shall recover and can properly devote himself to other and different work, which may be lucrative and appropriate to his education, habits, social position and physical constitution, the civil responsibility shall be reduced to paying him the sum which his ability to earn in his new employment falls short of his daily earnings in his former occupation.

"Art. 323. If the blows or wounds cause the loss of any member not indispensable for work, or the person wounded or struck remain otherwise crippled, lamed or deformed, by that circumstance, he shall have the right not only to the damages and injuries, but also the sum which the judge may determine

as extraordinary indemnity, considering the social position and sex of the person and the part of the body remaining crippled, lame or deformed.

"Art. 324. The gain which the injured party fails to earn during his inability to work, shall be computed by multiplying the sum which he formerly earned per day by the number of days of his inability.

"Art. 325. The provisions of the foregoing articles for computing the civil responsibility for wounds or blows shall be applied to all other cases where, in the violation of the penal law, a person may cause the illness of another, or may have placed him under disability to work.

"Art. 326. No person can be charged with civil liability upon an act or omission contrary to the penal law, unless it be proven: That the party sought to be charged usurped the property of another; that without right he caused, by himself or by means of another, damages or injuries to the plaintiff, or that the party sought to be charged being able to avoid the damages, they were caused by a person under his authority.

"Art. 327. Whenever any of the conditions of the preceding articles are established, the defendant shall be civilly liable, without regard to whether he be absolved or condemned to criminal liability."

"Art. 330. In order that masters may be held civilly liable through their clerks and servants, according to the provisions of articles 326 and 327, it is an indispensable condition that the act or omission of the clerks or servants causing the liability shall occur in the service for which they are employed.

"Art. 331. Under the condition of the preceding article, those liable are: Railroad companies."

"Art. 331.—Limitation. The various actions by which the civil responsibility may be demanded, or the execution of the final judgment declaring that such responsibility has been incurred by the accused may be asked, shall be extinguished according to the terms and in the manner provided by the Civil Code, according to the nature of the demand and the subject matter treated of."

"Art. 364. Amnesty shall not extinguish the civil responsibility, nor the action to exact it, nor the legal rights which third persons may have acquired. Nevertheless, when the responsibility may not yet have been made effective, and the demand is not for restitution, but for the reparation of damages, of indemnity for injuries, or for payment of judicial expenses, the guilty person shall remain free from such obligations only when it is declared in the amnesty and they are expressly left to the charge of the public treasury."

CHRISTIE-STREET COMMISSION CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 27, 1905.)

No. 2,094.

1. INTERNAL REVENUE—TAXATION—RECOVERY BACK—CONSTRUCTION OF STATUTES.

A claim to recover back internal taxes illegally exacted under a misconstruction of the war revenue law of 1898 (Act June 27, 1898, c. 503, § 1, 30 Stat. 494 [U. S. Comp. St. 1901, p. 752]) is a claim founded upon a law of Congress, within the meaning of the act of March 3, 1887 (chapter 359, § 1, 24 Stat. 505, U. S. Comp. St. p. 752) and it may be enforced by an action directly against the United States under that act, after it has been presented to the Commissioner of Internal Revenue, whether it has received his approval or not, and whether it is an action on a contract or an action sounding in tort.

2. SAME—SPECIAL AND GENERAL LAW STAND TOGETHER UNLESS CLEARLY REPUGNANT.

Specific legislation upon a single subject and a general law relative to that and other subjects must stand together, unless clearly repugnant,

the one as the law of the particular subject, and the other as the general law of the land.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 235-237.]

3. SAME—LIMITATION OF SECTION 3227, REV. ST. [U. S. COMP. ST. 1901, P. 2089], NOT REPEALED BY THE ACT OF 1887.

The limitation of two years prescribed by section 3227 of the Revised Statutes [U. S. Comp. St. 1901, p. 2089] for the commencement of actions to recover back internal taxes illegally exacted is not inconsistent with, and is not repealed by, the act of March 3, 1887 (chapter 359, § 1, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752]), which provides that no suits shall be allowed under that law unless they are brought within six years after the causes of action respectively accrue.

4. LIMITATION—ACTION TO RECOVER TAXES BARRED IN TWO YEARS.

An action against the United States upon a claim to recover back internal taxes illegally collected, which has been presented to, but has not been approved by, the Commissioner of Internal Revenue, is barred by section 3227, Rev. St. [U. S. Comp. St. 1901, p. 2089], two years after the cause of action accrues.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Western District of Missouri.

For opinion below, see 129 Fed. 506.

On November 30, 1902, the plaintiff, a corporation engaged in the business of dealing in stocks, bonds, grain, provisions, and merchandise, filed a complaint against the United States in the Circuit Court of the Western District of Missouri to recover back \$4,811.76, which it alleged the collector of internal revenue had unlawfully exacted from it, against its protest, by threats and duress, between July 1, 1898, and August 15, 1899, under a misconstruction of the act of June 13, 1898, "to provide ways and means to meet war expenditures and for other purposes." 30 Stat. 448, c. 448, U. S. Comp. St. 1901, p. 2286. The plaintiff also averred that the Commissioner of Internal Revenue subsequently decided that the moneys thus collected had been erroneously taken; that he agreed to repay them; that thereupon, on December 9, 1899, the plaintiff presented its claim to him for the repayment of the moneys, but the Commissioner never either allowed or disallowed the claim. A demurrer to this complaint was sustained, and the action was dismissed on the ground that it was an action sounding in tort, and also that, if it was an action upon a contract, it was barred by the limitation of two years fixed by Act June 6, 1872; c. 315, § 14, 17 Stat. 257, Rev. St. § 3227, 2 U. S. Comp. St. 1901, p. 2089.

Jas. H. Harkless (Chas. S. Crysler and Clifford Histed, on the brief), for plaintiff in error.

A. S. Van Valkenburg (Wm. Warner, on the brief), for the United States.

Before SANBORN and HOOK, Circuit Judges, and RINER, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The case presents two questions: May one whose claim for a repayment of internal taxes illegally collected has been presented to, but has not been allowed by, the Commissioner of Internal Revenue (section 3226, Rev. St., 2 U. S. Comp. St. 1901, p. 2088) maintain an action against the United States to recover these taxes under the act of

March 3, 1887 (24 Stat. 505, c. 359, 1 U. S. Comp. St. 1901, pp. 752, 753)? If so, does the limitation of two years fixed by section 3227, Rev. St., U. S. Comp. St. 1901, p. 2089, or the limitation of six years provided by section 1 of the act of 1887, fix the time within which the action may be successfully brought?

Sections 3220, 3226, 3227, Rev. St., U. S. Comp. St. 1901, pp. 2086, 2088, 2089, are a part of the system of laws enacted by Congress for the collection of the taxes imposed to obtain the internal revenue of the government, and to adjust the claims for excessive payments exacted by the officers of the nation. By these sections the Commissioner of Internal Revenue is authorized to—

"Pay back all taxes erroneously or illegally assessed or collected * * * also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal taxes collected by him." Section 3220.

They also provide that:

"No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously assessed or collected * * * until appeal shall have been duly made to the Commissioner of Internal Revenue * * * and a decision of the Commissioner has been had therein: provided: that if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner at any time within the period limited in the next section." Section 3226.

Section 3227 declares that:

"No suit or proceeding for the recovery of an internal tax alleged to have been erroneously or illegally assessed or collected * * * shall be maintained in any court unless the same is brought within two years next after the cause of action accrued."

The act of March 3, 1887, was conceived and passed with no special reference to claims for taxes illegally collected for revenue purposes, but to authorize the adjudication of four general classes of claims against the United States in the Court of Claims and in the Circuit and District Courts. It gave to those courts jurisdiction of—

"All claims (1) founded upon the Constitution of the United States or any law of Congress, except for pensions; (2) or upon any regulation of an executive department; (3) or upon any contract, express or implied, with the government of the United States; (4) or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty, if the United States were suable." Chapter 359, § 1, 24 Stat. 505, 1 U. S. Comp. St. 1901, p. 752.

It is conceded on all sides that, if this action can be sustained at all, it is because it is of the first class, and that its maintenance is conditioned by the true answer to the inquiry whether or not it is "founded upon any law of Congress." Counsel for the defendant argue that it is an action for wrongfully exacting from the plaintiff moneys which it was not legally required to pay, in violation of the general rule which forbids the taking of property without right or compensation; that it has no relation or reference to the revenue law of 1898, but that it is an action sounding in tort; and that the proposition that it is founded upon any law of Congress is without authority or reason to

support it. In support of this view they call attention to the fact that the act of February 24, 1855 (10 Stat. 612), granted to the Court of Claims the same jurisdiction over every cause of action founded upon any law of Congress which is vested in that court and in the Circuit and District Courts of the United States by the act of 1887, and to the earlier decisions of the Supreme Court to the effect that under this statute, and under the provisions of sections 3220-3228, Rev. St., U. S. Comp. St. 1901, pp. 2086-2089, actions for taxes erroneously collected could be maintained against the United States only when the claims for them had been allowed by the Commissioner (U. S. v. Kaufman, 96 U. S. 567, 569, 24 L. Ed. 792), while, in cases in which the Commissioner had refused or neglected to approve the claims, the only remedy was an action against the collector for the tortious taking of the money. U. S. v. Savings Bank, 104 U. S. 728, 734, 26 L. Ed. 908. A careful examination of the opinions in these cases, however, discloses the fact that they rest on the distinction between actions *ex contractu* and actions *ex delicto*, and upon the theory that the allowance of a claim by the Commissioner constitutes a meeting of the minds of the nation and the claimant, and thus raises the implication of a contract, upon which a cause of action may be maintained, while a refusal or a neglect of the Commissioner to approve the claim raises no such implication, and leaves the action one sounding in tort. The opinions in the authorities here cited fail to consider the real question in this case—whether such claims are of the first class specified in the acts of 1855 and 1887, of the class of claims founded on the Constitution or upon a law of Congress—and are devoted exclusively to the discussion of the issue whether or not they fall within the third class, in the class of claims founded upon any contract, express or implied, with the government.

The analogous rulings that an action may be maintained against the United States for property which it takes without claim or color of title, because the law implies a contract to return it or to pay its value (U. S. v. Great Falls Mfg. Co., 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846; U. S. v. Lynah, 188 U. S. 445, 23 Sup. Ct. 349, 47 L. Ed. 539), while the seizure of property to which it claims title will not sustain such an action, because a taking of this nature raises no such implication (Langford v. U. S., 101 U. S. 341, 25 L. Ed. 1010; Hill v. U. S., 149 U. S. 593, 13 Sup. Ct. 1011, 37 L. Ed. 862; Schillinger v. U. S., 155 U. S. 163, 15 Sup. Ct. 85, 39 L. Ed. 108), are of the same character. They determine only whether the claims upon which the actions there under consideration were based were founded upon contracts with the government, and fail to discuss or decide what claims are founded upon the laws of Congress.

The acts of 1855 and 1887 here under consideration mark a rational and gratifying advance in civilization and public policy, and they should be liberally construed to accomplish the benign purpose of their enactment. The theory that a nation or its government should refuse to submit its controversies with its citizens to the adjudication of impartial tribunals is but the fast receding echo of the rule that the King can do no wrong. There are few more grievous wrongs than the denial by a nation of a hearing and trial of the just claims which its citi-

zens may have against it. There is no reason why a government should not submit its controversies with its subjects to adjudication, or why it should not itself practice that justice whose administration is the great purpose of its existence. Justice demands, and a wise public policy requires, that nations should submit themselves to the judgments of impartial tribunals, to the enforcement of their contracts and to satisfaction of their wrongs, as universally as individuals.

The decisions of the Supreme Court upon the specific question before us evidence a constantly increasing tendency to adopt this view.

In the year 1868, in the case of *Nichols v. U. S.*, 7 Wall. 122, 131, 19 L. Ed. 125, that court held "that cases arising under the revenue laws were not within the jurisdiction of the Court of Claims."

In the year 1877, in *U. S. v. Kaufman*, 96 U. S. 567, 24 L. Ed. 792, it held that its declaration in the *Nichols* Case was too broad, and that the act of 1855 gave the Court of Claims jurisdiction of an action upon a claim for taxes illegally collected, which had been allowed by the Commissioner of Internal Revenue.

In 1881, in *U. S. v. Savings Bank*, 104 U. S. 728, 734, 26 L. Ed. 908, it affirmed this decision.

In the year 1900, *Dooley, Smith & Co.* had brought an action against the United States in the Southern District of New York to recover back certain taxes illegally exacted from them upon merchandise imported into Porto Rico from New York. Their claim had not been allowed by any officer of the government, so that there was no contract, express or implied, to pay it. They were met, as is the plaintiff in the case at bar, by the contention that theirs was an action "sounding in tort," and that none but actions upon contracts could be maintained under the act of 1887. The Supreme Court first again discarded the decision in the *Nichols* Case, then reviewed the authorities upon actions founded upon contracts and upon torts, and discussed the question "whether any claim sounding in tort can be prosecuted in the Court of Claims, notwithstanding the words 'not sounding in tort,' in the Tucker act, are apparently limited to claims for damages, liquidated or unliquidated," and finally announced its decision in these words:

"In the cases under consideration the argument is made that the money was tortiously exacted, that the alternative of payment to the collector was a seizure and sale of the merchandise for the nonpayment of duties, and that it mattered not that at common law an action for money had and received would have lain against the collector to recover them back. But whether the exactions of these duties were tortious or not—whether it was within the power of the importer to waive the tort, and bring suit in the Court of Claims for money had and received, as upon an implied contract of the United States to refund the money, in case it was illegally exacted—we think the case is one within the first class of cases specified in the Tucker act, of claims founded upon a law of Congress, namely, a revenue law, in respect to which class of cases the jurisdiction of the Court of Claims, under the Tucker act, has been repeatedly sustained."

In the year 1903, in the case of *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397, 406, 407, 24 Sup. Ct. 376, 378, 48 L. Ed. 496, that court said of an action against the collector of internal revenue to recover taxes illegally exacted:

"This suit was cognizable by the Circuit Court, under the judiciary act of 1807-08, as one arising under both the Constitution and the laws of the United

States. 25 Stat. 433, c. 866. It arose under the Constitution, because the plaintiff's cause of action, as disclosed in its statement of demand, has its sanction in that instrument, if it be true, as alleged, that the act of 1898, under which the defendant proceeded when collecting the taxes in question, is repugnant to the Constitution. And it arose under the laws of the United States because it arose under a statute providing for internal revenue."

It is said that there is a wide distinction between a claim which arises under, and one which is founded upon, a Constitution or a law. But after patient deliberation this distinction proves too subtle and elusive for the density of our perception. A claim is both founded upon, and it arises under, a provision of a Constitution or of a law which conditions and determines its validity. Nor does the argument persuade that the claim in the Dooley Case was founded upon the Constitution because the duties collected were not uniform, as that instrument required them to be, while the claim at bar is not founded on the revenue law of 1898, notwithstanding the fact that the taxes which the government collected from the plaintiff were exacted by virtue of that law, and the misconstruction of it by its officers. In each case the United States exacted moneys without right, and in violation of the general rule that the property of the citizen may not be taken without legal authority. In each case the taking was tortious. In one case the claim was founded upon the Constitution and upon the war revenue law of 1898. In the other it was founded upon that law alone. The acts of 1855 and 1887, however, vest in the courts as complete jurisdiction of a cause of action upon a claim founded upon a law of Congress as upon one founded upon the Constitution and the law.

The demurrer in the case at bar admits that the taxes which are the subject of this action were illegally exacted from the plaintiff by virtue of the war revenue law of 1898, misconstrued by the collector of internal revenue. The claim to recover back these taxes was therefore founded upon, and its validity is conditioned by, that law. The demurrer also admits that this claim was duly presented to the Commissioner of Internal Revenue for allowance and payment in accordance with the provisions of sections 3220 and 3226—a *sine qua non* of an actionable claim. It is therefore also founded upon the law of Congress evidenced by these sections, since a failure to comply with them would destroy its validity. Jurisdiction was granted to the courts over the action upon this claim, founded as it is upon these laws of Congress, by the act of 1887. The Commissioner of Internal Revenue was powerless to make or modify this congressional grant, or to oust the jurisdiction of the court either by his inaction or by his rejection of the claim, and plenary power was vested in the Circuit Court to hear and determine it upon its merits.

A claim to recover back internal taxes illegally exacted under a misconstruction of the war revenue law of 1898 is a claim founded upon a law of Congress, within the true meaning of the act of March 3, 1887; and it may be enforced by an action directly against the United States under that act after it has been presented to the Commissioner of Internal Revenue, whether it has received his approval or not, and whether it is an action on a contract or an action sounding in tort.

Is the time for the commencement of such an action to enforce a claim to recover back internal taxes illegally collected limited by the two years fixed by section 3227 of the Revised Statutes [U. S. Comp. St. 1901, p. 2089], or does the time extend to the six years prescribed by section 1 of the act of 1887? Counsel for the plaintiff in error argue that the time allowed is six years (1) because the act of 1887 prescribed this period, and by its terms repealed all laws and parts of laws inconsistent with its provisions (24 Stat. 505, §§ 1 to 16); and (2) because, as he claims, prior to the passage of the act of 1887 the limitation declared by section 3227 governed actions upon claims not approved by the Commissioner only, and had no application to actions directly against the United States upon claims approved by the Commissioner, and the act of 1887 added to the actions maintainable against the United States which were thus exempt from this limitation actions upon claims which had not been approved by the Commissioner and in this way brought the action at bar within the exemption. When the act of 1887 was passed there was, and had been for many years, a code of laws which prescribed the rights and duties of the officers of the United States and of its citizens in the assessment, ascertainment, and collection of the internal revenue requisite to support the government, and in the adjustment of claims for excessive payments. Sections 3220, 3226, and 3227 constituted a part of this system of laws which related to this specific subject. They prescribed and limited the means by which one might recover back from the United States internal taxes which had been illegally exacted from him. Section 3227 provided that no suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected should be maintained in any court unless it was brought within two years next after the cause of action accrued. The adjustment and collection of taxes and of claims for excessive payments on account of such assessments was not the primary subject of the act of 1887. That act was a general law passed for the purpose of conferring jurisdiction of actions upon numerous classes of claims upon certain courts of the United States. It contained a limitation in these words:

"Provided that no suit against the government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made." U. S. Comp. St. 1901, p. 752, § 1.

Section 16 of the act provides that all laws and parts of laws inconsistent with its provisions are repealed.

If Congress had affirmatively declared by this law that all actions allowed under it might be commenced at any time within six years after their respective causes accrued, there might be some chance for an argument that there was an inconsistency between the limitation of this act and that of section 3227 which would work a repeal of the latter. But there is certainly no repugnancy between a general law to the effect that no action upon any of several classes of claims shall be brought after six years from the accrual of the cause of action, and a statute that no action upon any of a specific

class of these claims shall be sustained unless it is commenced within two years of the time when the cause of action arose; and, as there is no inconsistency between the two limitations, the act of 1887 neither repealed nor modified the provision of section 3227. This conclusion is in accordance with familiar rules of construction. Specific legislation upon a particular subject is not affected by a general law upon the same subject unless it clearly appears that the provisions of the two laws are so repugnant that the legislators must have intended by the later to modify or repeal the earlier act. The special act and the general law must stand together, the one as the law of the particular subject, and the other as the general law of the land. *Gowen v. Harley*, 56 Fed. 973, 978, 979, 6 C. C. A. 190, 196; *State v. Stoll*, 17 Wall. 425, 436, 21 L. Ed. 650; *Board of Commissioners of Seward County v. Ætna Life Ins. Co.*, 32 C. C. A. 585, 590, 90 Fed. 222, 227; *The Distilled Spirits*, 11 Wall. 356, 365, 20 L. Ed. 167; *Henderson's Tobacco*, 11 Wall. 652, 658, 20 L. Ed. 235. "All statutes in *pari materia* are to be read and construed together, as if they formed part of the same statute, and were enacted at the same time." *Potter*, Dwar. St. 145. When the two limitations are read in accordance with the latter rule, all doubt that they are both in force and that they are consistent with each other is instantly dispelled.

Nor is the second contention of counsel upon this question more persuasive. The premises upon which they base their argument are unsound, and their conclusion is inadmissible. From the passage of the act of 1855 until the present day, actions upon claims for internal taxes illegally collected through misinterpretation of the revenue law have been maintainable directly against the United States after their presentation to the Commissioner, whether the claims were approved by him or not, because these claims were founded upon a law of Congress. *Dooley v. U. S.*, 182 U. S. 222, 224, 226, 228, 21 Sup. Ct. 762, 45 L. Ed. 1074. Since the year 1872 the time within which such actions could be successfully brought has been limited to two years after the respective causes of action accrued. Act June 6, 1872, c. 315, § 14, 17 Stat. 257; section 3227, Rev. St., 2 U. S. Comp. St. 1901, p. 2089. This class of actions, the class founded on a law of Congress, was not enlarged by the act of 1887, but it remained bounded by the same limits and conditioned by the same words after as before the passage of that act. The action in hand is one of this class. It rests upon a claim founded on a law of Congress, which was presented to the Commissioner of Internal Revenue pursuant to the provisions of section 3226. It is an action directly against the United States, and the logical and unavoidable conclusion is that it was barred by the limitation of section 3227, because it was not commenced until more than two years after the cause of action it presents accrued.

The judgment below must accordingly be affirmed, and it is so ordered.

WALKER MFG. CO. v. KNOX.

(Circuit Court of Appeals, Sixth Circuit. April 13, 1905.)

No. 1,375.

1. CONTRACT OF EMPLOYMENT—CONSTRUCTION.

Plaintiff, on January 29, 1895, offered to assist defendant in obtaining a foreign connection for the sale of its materials to a French syndicate, and on February 4th defendant replied that it would be glad to arrange with such syndicate, and that, if plaintiff could bring about a satisfactory deal, he should be liberally paid. On February 8th plaintiff wrote defendant with reference to the matter, stating that he was at defendant's command to act on any plan defendant should suggest. Both defendant and the French syndicate, however, at this time were not ready to make new connections, and nothing was arranged until the following September 20th, when further letters passed between the parties, which resulted in the completion of negotiations. *Held*, that such facts did not establish a variance as showing a contract not made until September, instead of in February, as alleged.

2. SAME—DAMAGES—EXCESSIVENESS—APPEAL—REVIEW.

In an action to recover the reasonable value of plaintiff's services, performed at defendant's request, the excessiveness of the verdict is a question for consideration of the trial court on a motion for a new trial, and cannot be reviewed on appeal.

3. SAME—VALUE OF SERVICES—EVIDENCE.

Where defendant had agreed to pay plaintiff the reasonable value of his services, without reference to any fixed custom to pay any definite price, evidence of witnesses familiar with such services that it was usual to pay a percentage of from 2 to 5 per cent. of the value of the goods, sold as the result of the efforts of the employé, was not objectionable as failing to show that there was any fixed custom to pay a definite price.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 113.]

4. SAME.

In an action for the reasonable value of plaintiff's services it was no objection to a recovery that the witnesses disagreed as to the price usually paid for such services, the jury not being bound to find in accordance with the testimony of any of the witnesses, but entitled to exercise their own judgment on their estimate of the value of the services.

5. SAME—VALUE OF SERVICES—ESTABLISHMENT OF AMOUNT BY EMPLOYER.

Where defendant agreed to pay plaintiff the reasonable value of his services, and there was no agreement that such value should be fixed by defendant, at least until after the services had been performed, such a stipulation subsequently made was unilateral, without consideration, and not enforceable.

6. SAME—EVIDENCE.

In an action for the reasonable value of plaintiff's services, correspondence *held* insufficient to establish an agreement to accept a check for \$500 in full for plaintiff's services.

7. SAME—INSTRUCTIONS.

Where, in an action for services, the court charged that the jury must find "what plaintiff did, if anything, under the contract, which induced the making of this contract," and that the burden of proof was on plaintiff to show that by his conduct subsequent thereto he did something that influenced a syndicate to enter into a subsequent contract with defendant, it was not error for the court to refuse a requested instruction that he must have rendered services for and at defendant's instance and request, and, if he did anything not done at defendant's request, but at the request of another, he could not recover.

8. SAME.

Where plaintiff was employed to negotiate a contract for the sale of defendant's materials to a French syndicate under a contract which did not stipulate that he was to be the sole factor in accomplishing the object sought, he was entitled to recover the reasonable value of his services, though he did not do all that was done to promote it.

9. SAME—EVIDENCE—DECLARATIONS OF AGENTS.

Where, in an action for plaintiff's services in promoting a foreign contract for the sale of defendant's materials, the value of materials sold was material to the question of the reasonable value of plaintiff's services, the admission of evidence of a conversation had between plaintiff and defendant's vice president during the time materials were sold under the contract, as to the amount of such sales, which conversation did not occur until after such vice president had left defendant's employ, was prejudicial error.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Cushing & Clarke, for plaintiff in error.

Hills, McGraw & Van Derveer and Thomas H. Bushnell, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. By this suit the plaintiff, Knox, sought to recover from the Walker Manufacturing Company compensation for services which he claimed to have rendered the defendant during the year 1895 under circumstances which are alleged to have been substantially as follows: The defendant was a corporation of Ohio, engaged in the manufacture and sale of electric street railway apparatus, and having its business office at Cleveland. It was desirous of introducing its apparatus into European markets. The plaintiff was an expert electrician in the employment of a street railway company of Chicago. He had at Paris a personal friend, one Le Blanc, who, in association with a French syndicate, was engaged in selling in Europe the electric street railway apparatus of another American company. In order to secure its object, the defendant, about February 5th of that year, employed the plaintiff to negotiate for the defendant with Le Blanc and his associates for the introduction into Europe of the defendant's apparatus by means of sales to be made by said syndicate, for which service the defendant agreed to pay plaintiff a reasonable compensation. The plaintiff says that he accomplished the object sought by his efforts, continued until some time in October of the same year, when he brought the French syndicate into an agreement with the defendant whereby the former became sales agents of the latter, and that said syndicate has sold in Europe more than \$1,000,000 worth of the defendant's apparatus. He states that the reasonable value of his services is \$100,000, of which he has been paid only \$500.

By the answer and replication the following issues were developed, as stated by counsel for the plaintiff in error: (1) Whether there was such a contract; (2) whether the plaintiff rendered any service under it; (3) what was the value of the services; (4) whether the contract was void for want of consideration. The verdict rendered by the jury

solved the first, second, and fourth of these issues in favor of the plaintiff, and answered the third by assessing the value of his services at \$14,760. Judgment was entered for that sum. The defendant has brought the case here, and complains of rulings of the court upon the trial, which it assigns as errors.

The defendant requested the court to instruct the jury to find a verdict for the defendant. This request was refused by the court, and the defendant excepted. Its counsel support the assignment of error thereon upon two grounds: First, that there was no such contract proven as was described in the plaintiff's petition; second, that there was no evidence upon which any measure of damages justified by law could be based. As to the first, it should be stated that the negotiations were conducted by correspondence. On the day of its date the plaintiff wrote the defendant the following letter:

"Chicago, January 29, 1895.

"Prof. Sidney F. Short, E. E. Walker Manufacturing Co., Cleveland, Ohio—Dear Sir: I write to you to know, whether your company have a representative in the European countries for the handling of your electrical apparatus. If not, will you tell me as to the probabilities of your company entertaining the idea of establishing an agency for the handling of your goods abroad. I am, and have been for some time, in close connection with representatives of a very influential street railway syndicate (both operating and constructing) with headquarters at Paris, who are making inquiries as to the merits of the different electrical systems in this country with a view of adopting one of them for the equipment of not only their own lines, but to use on installation in their construction department. As you perhaps know, electric street railway interests are looking up wonderfully in all of the European countries and from what I am able to learn, I think it is safe to predict that they will do as much work in the future toward equipping lines electrically, across the water, as we have done in the past in this country, and as far as they have gone they have used little else aside from American machinery. Knowing your make of electrical apparatus as I do, I can fully endorse it to the French Syndicate and I fully believe it would be a golden opportunity for you to widen your field in the electrical branch, in case the syndicate should decide upon your material and should you wish them to handle an agency for you.

"Yours very truly,

G. W. Knox."

To this letter the defendant replied as follows:

"Cleveland, O., February 4, 1895.

"G. W. Knox, Electrician, Chicago City Railway Co., Chicago, Ill.—Dear Sir: Your letter and telegram with reference to the representation of our company in Europe were received. The writer being out of the city last week did not have an opportunity to answer these letters until to-day.

"We wired you, however, yesterday, that we would be glad to arrange with your syndicate to represent our company in Europe.

"Before the writer came into the Walker Manufacturing Co., a year ago, a contract was made with Mr. H. McL. Harding, of New York, with reference to representing the company in its sales department in certain eastern territory, and contract also covers representation in the foreign market. But matters have changed materially since that contract was made and we can undoubtedly make arrangements with your people satisfactorily, but we would have to bring Mr. Harding into consultation with us in the matter. In any event, if you can bring about a satisfactory deal for our foreign work, you shall be liberally paid for your work. If you can suggest a plan by which a meeting can be had between your parties and ourselves, we will have Mr. Harding meet with us and a suitable arrangement can undoubtedly be reached which will be advantageous to all parties concerned. Let us hear more par-

ticularly from you with reference to it, and if possible arrange details as soon as possible. We also have your letter with reference to some information regarding motors, which will be fully answered to-morrow.

"Yours respectfully,

The Walker Manufacturing Co.

"Dictated by S. H. Short."

On February 8, 1895, the plaintiff addressed a letter to the defendant, in which, after communicating certain facts in regard to his relations with Le Blanc, the desire of the French syndicate to obtain the right kind of apparatus, and its financial standing, he says:

"They have a splendid advantage in that country inasmuch as a number of members of the syndicate are closely allied with people in the street car railway fraternity, besides owning lines of their own in their country, a thing of itself of much importance. Now I shall be very glad to use all of my influence in bringing about the final closing of a deal between the syndicate and your company, and I wish to say I think it will be well to be on the alert, as Mr. Bannister of the Westinghouse Company, himself, informed me they were very anxious to treat with the French Syndicate and do business in that country, and they may yet try and meet the syndicate's request, so I am at your command to act upon any plan that you may suggest, pending Mr. Le Blanc's arrival in Paris and his perfecting the plans to go ahead with the deal. I can reach Mr. Le Blanc with cablegram upon his arrival about a week hence, so if you have any communication for the syndicate you can, if you wish, send it to me and I will forward same, or I will give you Mr. Le Blanc's address and you can deal direct with him."

And on February 13, 1895, the defendant wrote to the plaintiff a letter, in which it said:

"I wish to say to you confidentially, that we have a contract with Mr. Harding, made long since, which enables him to control the arrangement made in foreign countries. This contract will, however, expire next November, and we would like to have you advise the French Syndicate to make a temporary arrangement with Mr. Harding as he can only make an arrangement until that time, then we will make a permanent agreement directly with the French Syndicate after that date. We believe it would be best for all parties concerned, that temporary agreement of this kind should be made with Mr. Harding, and if you will take the matter up and urge Mr. Le Blanc to make the contract we will follow it up later with a permanent arrangement about the first of the year.

"Your services in this connection will be duly appreciated by this company and we will satisfactorily arrange to remunerate you for the interest you have taken in the matter."

The evidence tended to show that the plaintiff had some occasional correspondence with Le Blanc after the correspondence in February. In June the defendant wrote the plaintiff again on the subject, and, after making some suggestions about the manufacturing of motors in Paris by the French syndicate, said: "We believe that if you will take this matter up with them it might work to our mutual benefit." Not much negotiation was going on during the summer nor until September 19th, when the plaintiff sent to the defendant the following telegram:

"September 19, 1895.

"S. H. Short, Care Walker Manufacturing Co., Cleveland, Ohio: Just received following from Le Blanc. Are free from General Electric. Disposed to use Walker material. We ask European agency. Letter follows with details. Will pass order for six equipments upon receipt of cable agreement from Walker. This is important. Means immense business for you. Be on the alert, as Bannister informed me the other day he will go to Europe this month, know he is after this business. Am at your command in this matter. Wire me message to Le Blanc.

G. W. Knox."

On the following day the defendant replied by letter as follows:

"September 20, 1895.

"G. W. Knox, Electrician, No. 2020 State St., Chicago, Ill.—Dear Sir: Your telegram duly received. We have wired you as per enclosed verification. We wish to take this matter up immediately and endeavor to close the contract with Mr. Le Blanc's party, which will be mutually beneficial, and we will make a very reasonable and fair arrangement. Of course, we will have to go into the matter with foreign parties very carefully, as to details of agreement to be made. We have wired Mr. Harding to meet us here Saturday or Monday with reference to this matter. We can in all probability get him to relinquish his claims to foreign territory so that we can make arrangements direct with Mr. Le Blanc at once. However, Mr. Harding's contract expires shortly so that we can make permanent arrangements at that time in any event. Some time since, you remember that I promised you that we would take care of you if you would look after this matter for us. I therefore now propose that we send you a draft for \$500, retainer fee in advance for services in assisting us in carrying on negotiations for our representation in Europe, and when they are completed we will make such arrangements as will be fair for your compensation in the matter. Please let us know if this will be satisfactory.

"Yours respectfully,

S. H. Short."

On September 21, 1895, the plaintiff wrote defendant that their letter of September 20th was "perfectly satisfactory," except that he preferred not to accept the \$500 until after the consummation of their contract with the French company.

We have not rehearsed all the testimony bearing upon the question, but have set out the most significant part of it. The defendant's counsel points out that the contract relied upon in the petition is one made in February, and that the court held a contract was then made by the correspondence above set forth; whereas the counsel contends no contract for the employment of the plaintiff was then closed, and that, if any contract was ever made between the parties, it was later on, in September; and so that the petition is not proved. There is some slight color for this contention, but we think the more reasonable construction is that the parties intended to bargain in February for the employment of the plaintiff upon a just and reasonable compensation, and that, although his operations were suspended for several months, they were revived again in September, and resulted in accomplishing the object in view. It was the same object from first to last, and the compensation intended was the same. Plaintiff's letter of January 29, 1895, was manifestly an invitation of a proposition to employ him in bringing about such an arrangement as was mentioned in the letter. The proposal came in defendant's letter of February 4th, and the plaintiff's letter of February 8th imports an acceptance of it. The delay in the prosecution of the scheme which followed is explained by the facts that the French syndicate was under an engagement with the General Electric Company, and the Walker Manufacturing Company had a contract with Harding, which for a time stood in the way, but both of which came to an end in October of that year. Moreover, the defendant's letter of September 20th treats the promise therein made as one in continuation of that made in the earlier correspondence.

There is often some difficulty in ascertaining the terms of a contract created by informal correspondence, carried on as this was, and where one feels sure that there was in fact a mutual understanding upon which

the parties acted. But in the present case we think the subsequent correspondence confirms the interpretation which we put upon the letters written by the parties in the early part of February.

The second ground on which the request for peremptory instructions is rested is that there was no competent proof in respect to the damages. We premise that on this writ of error we have no power to pass upon the question whether the verdict was excessive. That was a question to be considered by the trial court on the motion for a new trial. We can only decide whether any error in law was committed in reaching the verdict. This is said because counsel for plaintiff makes sore complaint of the amount awarded by the jury, and contrasts this sum with the small amount of time and effort given by the plaintiff in his endeavors in behalf of the defendant. But, whatever we might think upon that subject, we cannot correct the verdict. *Ætna Life Insurance Co. v. Ward*, 140 U. S. 76, 91, 11 Sup. Ct. 720, 35 L. Ed. 371; *Erie Railroad Co. v. Winter*, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71; *Lincoln v. Power*, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224.

The inquiry for us therefore is whether the court erred in its rulings in admitting testimony relative to the value of the plaintiff's services, and whether there was any testimony on that subject which could properly be regarded as a legal basis on which to estimate the value of such services. Several witnesses were called by the plaintiff, who testified that they had more or less familiarity with the prices customarily paid for services rendered in such employment, where they had been efficient in bringing the parties together in a contract advantageous to the employer. The testimony of these witnesses was of a similar character, and governed by the same principles. We need not, therefore, discuss the testimony of each separately. They testified, in substance, that it was usual to pay the party employed a percentage of from 2 to 5 per cent. of the value of the goods the sale of which was the result of the contract brought about by the efforts of the employé. This testimony was objected to upon various grounds, the chief of which was that such evidence failed to show that there was any fixed custom to pay any definite price, as was in fact shown by the testimony of these different witnesses. And counsel argues this question as if it were one of the existence of a custom or usage as those terms are used in technical legal parlance. And, if the question was such, the argument would have conclusive force, for much of this testimony would have been inadmissible by that test. But we think the question here involved was not necessarily of that character; and, if there was no settled custom, the question was in fact none other than the common one which arises in cases generally where the plaintiff seeks to recover upon a quantum meruit for services rendered. In such cases the common course is to prove what price or sum is usually or customarily paid for services of the kind shown to have been rendered; and it is no objection to a recovery that the witnesses disagree in their evidence as to the price which is usually paid. The testimony was admissible to show what was usually, though perhaps not universally, paid. Besides, it is to be observed that the contract is inconsistent with the recognition by the parties of a custom which should control the price to be paid.

Their agreement was for the payment of what was reasonable. No such thing as a fixed percentage was in their minds. It would hardly be contended that in these circumstances the value of services of such character as those with which we are here concerned should be estimated by a price per diem for the time the employé was actually engaged in the service of his employer, or by any other arbitrary standard. And we hardly know how else the value of the services rendered by the plaintiff could have been proved than by substantially such testimony as was here given. Of course, the jury were not bound to find in accordance with the testimony of any of the witnesses, but, after hearing them, could exercise their own judgment, and find such verdict as, upon their estimate of the value of the evidence and their own conclusions upon all the facts, they should think right. *Head v. Hargrave*, 105 U. S. 45, 26 L. Ed. 1028; *Pennsylvania Co. v. Scofield*, 121 Fed. 814, 58 C. C. A. 176; *Lafin v. Shackleford*, 98 Fed. 372, 39 C. C. A. 102. We are therefore of opinion that the court did not err in refusing to regard the fact that there was no settled custom as a sufficient reason for giving the peremptory instruction requested by defendant.

It is next urged that the court erred in refusing to give the following instruction to the jury:

"It appears from the testimony introduced upon the trial of this case that the plaintiff, Knox, declared himself willing to leave the matter of compensation additional to the \$500 which he admits was paid to him wholly to the discretion of the Walker Manufacturing Company, and therefore the court says to you that if you shall conclude from the evidence introduced upon this trial that the Walker Manufacturing Company acted in good faith in refusing to pay any further sum than \$500, taking into consideration all the evidence introduced upon this trial, the plaintiff should not recover, and you should return a verdict in favor of the defendant."

We have already stated the substance of the agreement made before the services were performed in regard to compensation, from which it appears that the defendant would make such compensation as should be reasonable, or, as defendant wrote to plaintiff, he should be "liberally paid" for his work. After the contract between the defendant and the French syndicate was closed, whereby the services of the plaintiff were completed, the defendant wrote to plaintiff, saying: "We would like now to have from you an expression of the amount of the compensation which you think is due you for the work you have done in bringing about this agreement." To which the plaintiff on November 1st replied: "As to the compensation which you make mention of in your letter, will say I am perfectly willing to abide by whatever your company are in the practice of doing in such cases, and as they feel freely disposed." And in a later letter the defendant wrote, referring to the same subject, and inclosing a check for \$500: "We hope as matters develop to send you further compensation in accordance with your letter of the 1st inst." And on a later date the plaintiff replied to this: "As to future compensation which you speak of in your letter, I wish to reiterate what I said in my former letter, that I am perfectly satisfied to let the matter rest with your company as will feel at all times that it will do the right thing by

me as you have already so handsomely done.'” Subsequently the defendant refused to pay more than the \$500, claiming that it had then learned that plaintiff had been acting in the transaction as the agent of Le Blanc. Counsel for defendant relies upon the rule stated in *Mechem on Agency*, § 604, as follows:

“It is competent for the parties to agree that the compensation shall be such an amount as the principal may fix. Thus, if the agent agree to serve for such compensation as the principal shall at the termination of the agency determine to be right and proper under all the circumstances, the amount so fixed by the principal, if he acts honestly and in good faith, is conclusive, although as a matter of fact it be less than the services were really worth. Agreements of this sort, however, must be clear, and appear to have been fairly made.”

But this rule is stated as applicable to a stipulation of a contract made before the service is performed and upon the faith of which the employment is given and the work done, and not when the service has been performed under a contract for reasonable compensation, and the liability to pay has become fixed. Such a stipulation on the part of the plaintiff at that time would have been unilateral, and without consideration. It would, for nothing, have entirely discharged the tie of the defendant's obligation. But if this were otherwise, when the defendant paid the \$500 and the plaintiff accepted it, it is evident that that was not intended as the limit, but that there was to be “future compensation.” We think there is nothing in this ground to support the contention that the court should have given the peremptory instruction requested by defendant.

The defendant also requested the court to instruct the jury as follows:

“Before the plaintiff can be entitled to your verdict in any amount in this case, you must find by a preponderance of the testimony introduced that he rendered the services which he claims in his petition to have rendered for, and at the instance and request of, the defendant, the Walker Manufacturing Company. If, therefore, you find from the testimony introduced upon this trial that whatever the plaintiff did, if he did anything, in the way of bringing about the contract of the defendant with Le Blanc and others of October, 1895, was done not at the request and for the benefit of the defendant, but for and at the request of Le Blanc, the plaintiff would not be entitled to your verdict in this case, and you should return a verdict in favor of the defendant.”

This, in its terms, was refused, and the defendant excepted. But the court instructed the jury that they “must find what the plaintiff did, if anything, under this contract, which induced the making of this contract. The burden of proof is upon the plaintiff to show that by his conduct subsequent to the 4th of February, or subsequent to his letter of the 8th of February, which made the contract, he did something that influenced the French syndicate to enter into the contract that was subsequently made.” And the verdict was for the plaintiff, which could not have been if the jury had not found that what he did was under the contract with defendant, and that he had done something which influenced the French syndicate to enter into the contract. Le Blanc was one of the syndicate, and therefore identified with it in what he said

and did. There is really nothing in the record which would have justified a finding that the plaintiff was not acting consistently with his duty to the defendant, or that he was in the employment of the other party. We think the instruction of the court upon this subject was all that was required by the evidence, and that there was no error in refusing the particular instruction asked.

Again, it is assigned as error that the court instructed the jury thus:

"It is not necessary, however, for the plaintiff to prove that the influence exerted by him was the sole influence, but it is necessary for him to show that by reason of something that he did an influence was brought to bear upon the French syndicate, or upon their representative, which in whole or in part induced the making of the contract which was entered into between the Walker Manufacturing Company and Le Blanc and his associates."

But we see no objection to this. He was entitled to be paid for what he did in bringing about the contract of the parties. If he did not do all that was done to promote it, it might be that he should not recover so much as if he had. It would be a matter for consideration in settling the value of his services. The contract of his employment did not stipulate that he should be the sole factor in accomplishing the object sought. On the contrary, it would seem that it would naturally follow that influences which he might reach would contribute to the result. This assignment of error is not sustained.

Several other exceptions upon points of minor importance are discussed in the briefs. We have considered them all, but, except as they are involved in what has already been said, they do not require discussion. We find no error in the rulings to which these exceptions apply.

There is, however, another assignment of error which is insurmountable. The plaintiff was a witness in his own behalf. In rebuttal, his attention was called to a conversation which he had at Niagara Falls in the autumn of 1897 with Mr. Short, who was vice president and electrical engineer of the defendant during the year 1895. The defendant sold out its plant and business to another company on January 1, 1896, and at that time Short's employment by, and position in, the defendant company terminated. Over the objection of the defendant, the plaintiff was permitted to testify as follows:

"It was in the fall of 1897, at the International Hotel at Niagara Falls, I met Mr. Short. I asked him about the foreign business with Le Blanc. He said it had been very satisfactory. I asked him if it hadn't amounted to more than they expected. He said, 'Yes, it has.' I then said, 'It has amounted to perhaps a million or a million and a half, hasn't it?' His reply was, 'Yes,' it was better than that, running between one million and a half and a million and three-quarters in sales."

The ground of objection was that it was not competent to prejudice the right of the defendant by statements of Short at the time referred to. Clearly, the objection was well taken. The transaction was ended, and Short's relation to the company had long since ceased. He had no authority, at the time of this interview, to transact business for, or to make statements which should

affect, the company. *Vicksburg & M. Railroad v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 299; *Goetz v. Bank of Kansas City*, 119 U. S. 551, 7 Sup. Ct. 318, 30 L. Ed. 515; *Central Electric Co. v. Sprague Electric Co.*, 120 Fed. 925, 57 C. C. A. 197; 1 *Greenleaf on Evidence*, § 113. His statement related to a very material subject. The amount of the sales which had been effected by the contract of the defendant with the French syndicate was claimed by the plaintiff to be—as, indeed, it was—an important factor in estimating the value of the plaintiff's service. In fact, much of the testimony upon this subject of his expert witnesses to which we have already referred was given in answer to hypothetical questions which included it as a factor. And it rather aggravates the prejudice which might occur from the ruling, though, perhaps, it does not essentially affect the point for decision, that Short was dead at the time of the trial.

The result is that for this error the judgment must be reversed, with costs, and the cause remanded, with a direction to award a new trial.

WEST et al. v. HOUSTON OIL CO. OF TEXAS.

(Circuit Court of Appeals, Fifth Circuit. April 4, 1905.)

No. 1,381.

1. EVIDENCE—DECLARATIONS OF GRANTOR—DISPARAGEMENT OF TITLE.

Declarations of a grantor, made in his own interest, after he had conveyed property in controversy, and in disparagement of the title so conveyed, are inadmissible in behalf of himself or his subsequent vendee, or in rebuttal of declarations against his interest tending to sustain the first conveyance.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 846.]

2. SAME—WITNESSES—CHARACTER.

Where, in trespass to try title, the vital issue of fact was as to the genuineness of a deed, evidence of the character of the officer alleged to have taken the acknowledgment thereto was inadmissible on the issue of forgery.

3. SAME—REVIEW.

Where an issue of fact in a civil case is tried by the court without a jury, and the court did not make a special finding of facts, as provided by Rev. St. § 700 [U. S. Comp. St. 1901, p. 570], the sufficiency of the facts found to support the judgment could not be reviewed.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

Hazlewood and J. A. Templeton, for plaintiffs in error.

J. F. Lanier and Thos. H. Franklin, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. This was the Texas statutory action of trespass to try title to land, brought by the Houston Oil Company of Texas, defendant in error, against Samuel A. West et al., plaintiffs in error, to recover land described in the petition. The pleadings are formal. By stipulation in writing, a jury was

waived, and the cause was tried by the presiding judge. The plaintiff offered the original grant to Jesse McGee for a league of land as a colonist in Lorenza De Zavala Colony, which grant embraced the land in controversy, and was issued October 23, 1835. Plaintiff then offered a deed from Jesse McGee and wife, dated the 7th of October, 1881, conveying the land sued for to C. P. Huntington, and successive mesne conveyances from Huntington to the plaintiff, with other proof not necessary to recite, and rested. Defendants (below, but for convenience styled defendants here) then offered a written instrument, which we copy in full, with the indorsements thereon:

"The Republic of Texas, County of Jasper. Be it known that on the 14th day of January, A. D. 1840, I, Jesse McGee, for and in consideration of the sum of one thousand dollars to me in hand paid by William Dobson, both of the republic aforesaid, the receipt whereof is hereby acknowledged, have granted, bargained and sold and by these presents do grant, bargain, sell, alien, convey and confirm in bona fide sale all that tract, lot or parcel of land containing four thousand, four hundred and twenty-eight acres and being the league of land granted to me, the said McGee, by George Anto Nixon, commissioner for the Empresario Lorenzo De Zavala, which said land is situated in Jefferson County, on Cabiceras Bayou and joining the land of Francis Valeres on the east, and for further description of said land reference is hereby made to the original plat and field notes of survey which are on file and of record in the general land office of this republic, and reference may also be had to the title papers, which are herewith handed to the purchaser. To have and to hold said bargained land and premises with all and singular the rights, rent, issue and appurtenances thereunto belonging or in any wise appertaining to the said Dobson, his heirs and assigns, and I, the said McGee, for myself, my heirs and assigns, the said bargained land and premises shall and will warrant and forever defend to the said Dobson, his heirs and assigns against the claim of all other persons.

"In testimony of which I have hereunto set my hand and seal ——— date above. Jesse McGee. [Seal]

"Witnesses:

"P. May and

"Joseph Merary.

"Republic of Texas, County of Jasper. Personally appeared before me, Jesse McGee, who acknowledged he signed, sealed and delivered the annexed deed of conveyance to William Dobson for the purposes therein contained.

"Given under my hand and seal of office the Jny. 14th, 1840. Eighteen hundred forty. Martin Palmer,

"C. J. C. C. and Ex-Officio Notary Public.

"[Seal of Jasper County Court.]"

"[Indorsed as follows:] Jesse McGee to William Dobson. Deed. Filed for record Feb. 21, A. D. 1846. Recorded same day, book 'E', pages 367 and 368. Fees \$1 and 17/100. Alexander Caldry, Clk. Co. J. C.

"Filed in Newton County for record March 27th, 1871, at 8 o'clock a. m. G. J. P. Hardy, Clerk D. C. N. C.

"State of Texas, County of Newton. This is to certify that the foregoing deed was filed in my office to be recorded on the 27th day of March, 1871, at 8 o'clock a. m., and that the same has been duly recorded in book 'E' records of deeds in my office on pages 295 and 296. Given under my hand and the seal of the District Court, this 27th day of March, A. D. 1871.

"Gen. J. P. Hardy, C. D. C. N. C.

"Filed for record in my office on this the 28th day of March, A. D. 1871, at 5 o'clock p. m. John S. Goodrich, C. D. S. C.

"State of Texas, County of Sabine. This is to certify that the annexed deed was filed in my office for record on the 28th day of March, A. D. 1871, at 5 o'clock p. m., and was by me duly recorded in book K of the records of deeds for Sabine County on pages 331 and 332 at 6 o'clock p. m. same day.

"John S. Goodrich, Clk. D. C. S. C."

The defendants followed this up with mesne conveyances from Dobson to Lawrence, dated May 20, 1846, from Lawrence to Sheldon, dated 16th September, 1848, and from Sheldon to Samuel West, dated November 2, 1848, with proof that they (the defendants) were the heirs of Samuel West, and other proof not necessary to be recited here.

At some time during or before the trial, J. F. Lanier, as attorney for plaintiff, submitted his affidavit, in which, among other things, he stated:

"That a certain instrument, under which the defendants in the above entitled and numbered cause claim title to the land in controversy, a portion of the Jesse McGee league, lying and being in Sabine and Newton counties, Texas, and purporting to have been executed by Jesse McGee and William Dobson, and dated the ——— day of January, 1840, I believe was not executed by the Jesse McGee to whom the land sued for herein was originally granted, nor by his authority, but I believe said deed to be a forgery."

On December 18, 1903, the court rendered judgment which showed that the judge had concluded and adjudged that the law and facts are for the plaintiff, the Houston Oil Company of Texas, and against the defendants. On the next day, December 19, 1903, the defendants moved the court to allow them 42 days in which to file a petition for a new trial and to prepare defendants' bill of exceptions, which order was granted on that day; and defendants' counsel, in open court, requested the court to make out and file in said cause his findings of fact and conclusions of law, which he did on, to wit, the 21st day of December, 1903.

In *Norris v. Jackson*, 76 U. S., on page 127 (19 L. Ed. 608), Mr. Justice Miller says:

"The first thing to be observed in the enactment made by the fourth section of the act of 3d March, 1865, allowing parties to submit issues of fact in civil cases to be tried and determined by the court, is that it provides for two kinds of findings in regard to the facts, to wit, general and special. This is in perfect analogy to the findings by a jury, for which the court is in such cases substituted by the consent of the parties. In other words, the court finds a general verdict on all the issues for plaintiff or defendant, or it finds a special verdict. This special finding has often been considered and described by this court. It is not a mere report of the evidence, but a statement of the ultimate facts on which the law of the case must determine the rights of the parties—a finding of the propositions of fact which the evidence establishes, and not the evidence on which those ultimate facts are supposed to rest."

In the case we are considering the learned judge of the Circuit Court opens his statement of his findings of fact as follows: "In the above cause, a jury having been waived in writing by all the parties to this suit, I find the facts to be substantially as follows:" and then follow 27 specifications, covering a little more than five closely printed pages of the printed record. We here give, in whole or in part, certain of the specifications into which this special finding of fact is divided, to wit:

"(13) The other deeds introduced by the defendants, attempting to connect themselves with the title issued to Jesse McGee, describe the land substantially, as to location, as in the above-mentioned deed, purported to be from Jesse McGee to William Dobson,

"(14) All the title papers of the deeds were recorded in Jefferson county from the years 1840 to 1846, inclusive, and were never recorded in Sabine and Newton counties until 1871. Most of the land sued for is in Sabine county, the deed records of which county were destroyed by fire in 1874, and none of the deeds of the defendants were ever re-recorded in Sabine county."

"(19) I find that only one grant was made to Jesse McGee, so far as the evidence in this case shows, and that grant was made to the person under whom the plaintiff derains title."

"(23) I find that Martin Palmer's reputation in regard to land titles was bad, as that of a forger, and he is the party that purports to have taken the acknowledgment to the deed from Jesse McGee to William Dobson."

"(25) I find that there was but one Jesse McGee, and he was the party that conveyed the land under whom the plaintiff claims. I find that, when he sold the land to the persons under whom plaintiff gets its title, that Jesse McGee was in actual possession of the land, and had in his possession at that time a certified copy of the original Spanish grant to him, and delivered it to the purchaser at the time, and that said certified copy is a true copy of the only grant ever made to Jesse McGee, so far as the testimony in this case shows."

"(27) I find that the plaintiff and those under whom it claims title were innocent purchasers for value, without notice. The only thing to place them upon notice was the recording of the instrument under which the defendants claim title—that is, the supposed grant to Jesse McGee, above referred to, and which is spurious—and the deed from Jesse McGee to Dobson, and Dobson to Lawrence, when in these conveyances and the field notes of said Spanish grant the land therein described is said to be twelve miles west of the Neches river and three miles south of Pine Island, and said grant and deeds describe it as being in Jefferson county, Texas. The grant to Jesse McGee describes the land as a timber tract, and Sandy creek running through it, and has trees for corners or bearing trees, and in truth and in fact the land sued for and that conveyed to the plaintiff is a timber league in Sabine and Newton counties, Texas, and is more than 100 miles from Jefferson county. The defendants' title shows that theirs was a prairie league, and was in Jefferson county, Texas, twelve miles west of the Neches river, and three miles from Pine Island; and the Neches river and Pine Island being well-known and fixed objects, and the plaintiff's title calling for a timber league more than 100 miles from Jefferson county, and not west of the Neches river, but east of the Neches river, and, in addition thereto, east of the Angelina river, and it further being shown that the plaintiff and those under whom it claims paid a valuable consideration for the said land, and without notice of the defendants' claim, unless the record of the Spanish grant under which defendants claim, and the deeds under which defendants claim, would constitute notice, I find that such recordation did not constitute notice to plaintiff, and that plaintiff was a purchaser for value, without notice. I find that Jesse McGee had not previously sold this league of land, and the proof offered by the defendants was of an unsatisfactory and loose character, consisting of declarations said to have been made by Jesse McGee, and that he had previously sold the land. I do not believe this evidence, because it is unreasonable that a party would sell land, and then take possession of it, and advertise to the world that he had sold his property, when at the same time he was claiming it and attempting to sell it. If this conclusion is incorrect, then I find that the plaintiff and those under whom it claims had no notice of such sale, if it was ever made, except the record of the defendants' title, as above stated, and that the same did not constitute notice."

"I would suggest that the original deed from Jesse McGee to William Dobson and the Spanish grant under which the defendants claim be sent up as a part of the record in this cause for the inspection of the appellate court."

"Upon these findings the only conclusion of law is that the law is with the plaintiff, and that judgment be entered in favor."

When the defendants had rested in their offerings of evidence, the plaintiff called a witness (T. W. Ford) who lived in the town of Jasper, Jasper county, Tex., in 1887, and was then, and had for some years prior thereto been, engaged in purchasing pine lands in that section

of the country for C. P. Huntington, W. S. Herndon, and other parties. He testified that he knew Jesse McGee in 1887; he purchased either the east half or the west half of the McGee league, in Sabine and Newton counties, for Col. Herndon, and he paid therefor the consideration named in the deed to Herndon. When this testimony was offered by the plaintiff, it was objected to by the defendants' counsel, whereupon the plaintiff's counsel made the following statement to the court, namely: "It goes to the question of the assertion of title to the entire league." Defendants' counsel then objected to the evidence because this sale to Herndon was made in 1887, while the sale to Huntington, under whom plaintiff claims, was made in 1881. They objected further to any evidence tending to prove the payment of a valuable consideration, for the reason that such evidence was irrelevant and immaterial, and could only be offered for the purpose of showing that plaintiff and those under whom it claims were innocent purchasers for value, without notice of defendants' claim, and, if that be true, it would only be an equitable title, such as could not be asserted in a court of law. They objected, further, that such evidence was irrelevant and immaterial, because their title papers had been recorded in Sabine and Newton counties, when Ford purchased the land from McGee, and such records would be constructive notice to the party making such a purchase, which objections the court overruled, and the witness was allowed to testify that when he bought this land for Col. Herndon he did not know of any adverse claim to it. He knew Jesse McGee. He went to his house. He (McGee) was living on this league of land at the time witness purchased it. Witness never wrote a letter to Jesse McGee and stated to him that on account of any defect or for any reason he could come back from Denton county and become the owner of this land again. Witness had known Jesse McGee since about 1880. He knew D. J. Henderson, who is now dead. Thinks he (Henderson) let McGee have some money, and afterwards bought the land from McGee, and then witness bought from Henderson, perhaps for Herndon. Witness saw McGee execute some instruments. McGee could not write or sign his name. He always signed by marks the deeds that he made, that witness took for him to sign. He said that he could not sign his name, and made his mark. Witness does not know whether he signed for McGee, or the notary signed for him. He made his mark, and witness thinks his wife also signed by her mark. McGee lived some 20 miles from Jasper, Tex. Witness bought from him at two different times the whole league of land, except 200 acres that he reserved as a homestead. Witness does not think that he ever knew of any one having written McGee from Jasper county concerning the title to the land. Does not think he ever asked anybody about the title to it. He says he bought thousands of acres of land in that vicinity, and went to see McGee, and bought this land. Witness was raised in Newton county, and knew the country pretty well. He lived in that county until 1880. Before he bought this land from McGee he knew that defendants' title papers were on record in Newton county. He examined the records before making the purchase, and said:

"I knew there was a title on record in Newton county prior to that for a league of land in Jefferson county. Of course, I know what the records con-

tained. I want to say, in connection with that, that it did not occur to me that a conveyance of land in Jefferson county conveyed land in Newton county. I remember there was a deed to some one—purporting to be from Jesse McGee to somebody—to a league of land situated near Pine Island Bayou, I think. I followed it from its origin down as far as the records show."

The witness here identified a certified copy from the General Land Office of the protocol of the Jesse McGee league of land. This instrument was in Spanish, was dated June 12, 1839, and it was made by John P. Borden, Commissioner of the General Land Office. Witness said he first saw this instrument in the hands of Jesse McGee, and that McGee delivered it to him with the deed to the land. The witness was then asked the following question:

"Q. Did you every say anything to Jesse McGee, at or about the time you purchased the land from him, about this alleged Jefferson County deed? A. Yes, sir; I did. Q. Well, what did you say to him?"

When this testimony was offered, defendants' counsel objected to the same because the proposed testimony was hearsay, and a declaration made subsequent to the date of the defendants' grant and in disparagement of defendants' title, and was self-serving, and was made in the interest of the declarant, and was irrelevant and immaterial, and was wholly disconnected with any declaration offered by the defendants. The court overruled the objections and admitted the testimony on the question of purchase in good faith, but stated that he did not admit it as a declaration tending to show that he still had the title, or anything of the kind, to which ruling of the court the defendants then excepted, and urged the following additional objection to the testimony, namely:

"That the issue of purchase in good faith cannot be made on the law docket. It must be made in an equity suit, and in this case it is wholly irrelevant and immaterial, and self-serving declaration."

This objection was also overruled, and the witness was permitted to answer as follows:

"I spoke to him about the record I saw there. Of course, it did not occur to me as a legal proposition, and I did not think it was the land up there; but, being the same name, and seeing these deeds recorded in Newton county, when it seemed they should have been recorded in Jefferson county, caused me to ask him about this. I told him about the record, and asked him about the deed, and he said he knew nothing about it; and I asked him if he had ever conveyed any league of land to anybody, and he said he did not know anything about it, and that it was the first he had ever heard of it, and that he did not know that there was any such deeds on record, and that he had never made any such conveyance as that; and it occurred to me there was some other tract conveyed down there, I did not know."

To which rulings of the court and admission of testimony defendants duly excepted, and reserved their bill.

The plaintiff also offered to prove by D. W. O'Brien that he had heard of Martin Palmer, who resided in Jasper county in 1840, and that he had heard his general reputation for honesty discussed. To the admission of this evidence, defendants' counsel objected when it was offered, because it was irrelevant and immaterial. Thereupon plaintiff's counsel stated that it was offered on the question

of forgery, and he then propounded to witness the following question: "Q. What was his general reputation, if you know, with regard to forging land titles, or other crookedness in connection with land titles?" To the testimony thus sought to be elicited the defendants made the additional objection that the question was not confined to the time the deed from McGee to Dobson was made, and does not show where the reputation was. Thereupon plaintiff's counsel supplemented their question as follows, namely: "Q. Well, generally, throughout this section of the state, and in Jasper county?" The court overruled the objection, and admitted the testimony as bearing on the question of forgery, and the witness then testified, over objection, as follows, namely:

"I came to Texas in 1840, and I knew but little about this section of the country until I returned to it in 1852. I was clerk of the district court for two years, beginning in '54, and clerk of the county court for six years, beginning with '56 and ending in '62. I don't know that I ever saw Mr. Palmer, but I heard of him frequently. I have heard of Mr. Palmer during the period of my residence here, from '52 up to the present time, quite frequently. I learned by the records and from hearsay that he was a member of the board of land commissioners of Jasper county; that there were a great many frauds perpetrated by that board, of which he was president, I think. Q. You mean fixing up forged titles? A. Well, the character I heard of him was with respect to land matters. Q. That was his general reputation? A. Yes, sir. Q. You have heard his character discussed in that respect, then? A. Yes, sir; a good deal. Q. Well, is it, or not, a fact that all you heard of him was bad? (Defendants objected to this question as leading.) A. I don't know whether I could state that, or not. I might have heard somebody speak favorably of him. Q. You do state that you have heard that there were a great many frauds perpetrated by him while a member of the land board? A. I have heard that there were a great many fraudulent land certificates. Q. Is it not a fact that another board was appointed to investigate the acts of that board? (Objected to by defendants' counsel as irrelevant, immaterial, and hearsay.) A. That is a matter of history, I think. The Court: What do you mean by a 'matter of history'? A. I think the records of the legislative bodies of the state will show that fact."

To the ruling of the court in overruling the objections and admitting the testimony as above set out, the defendants excepted and reserved their bill. On cross-examination by defendants' counsel, the witness testified that he came to Texas in 1849. Never saw Palmer in his life. He believed that, when he came to Texas, Palmer lived in Leon county. Thought that the land board of which Palmer was a member was not then in existence. All he knew about Palmer's connection with it was from the records and from hearsay. After coming to Texas in 1849 he lived at Bolivar Point until 1852, when he moved to Beaumont, where he has since resided. He had heard Palmer's reputation discussed in Jasper county after 1849. Could not say whether it was in the 50's or 60's, but it was before and after the Civil War, and it was after witness moved to Beaumont. Had heard that reputation discussed by his neighbors and acquaintances, both individually and as a member of the board. "Q. What did you say that reputation was? A. As far as land matters were concerned, it was bad, as far as I heard it or knew it. Palmer was generally reputed to have been chief justice and ex officio notary public of Jasper county in 1840."

The witness said he had no connection with the title to the McGee league, nor with the plaintiff.

That the evidence objected to may be seen in its proper setting, we have recited almost literally the whole of the testimony of these witnesses. The counsel for the defendants correctly states the law as to the admission of Ford's testimony:

"That declarations of a grantor, made in his own interest, after he had once conveyed the property in controversy, and made in disparagement of the title as conveyed, are inadmissible, either in his own behalf, or in behalf of his subsequent vendees, to affect such prior conveyance, is an elementary proposition. That such declarations are not admissible, even in rebuttal of declarations of such grantor against his interest, tending to sustain the first conveyance, and made by him subsequent thereto, which declarations have been introduced in evidence by the parties holding under such conveyance, is equally well settled."

Hays v. Hays, 66 Tex. 607, 1 S. W. 895; Snow v. Starr, 75 Tex. 412, 12 S. W. 673; *Ætna Insurance Company v. Eastman*, 95 Tex. 34, 64 S. W. 863; 1 Greenleaf, Evidence (16th Ed.) §§ 147, 148, 152, 153, 189.

We think he also correctly states the law with reference to the other witness, wherein he says:

"It seems to be a rule of almost universal application in civil actions that the good or bad character of one whose reputation is not made an issue therein should be excluded, as irrelevant and immaterial. And this is true whether such party whose character is sought to be inquired into be or be not a party to the action. The improper admission of such evidence creates a false issue in the case."

Redus v. Burnett, 59 Tex. 576; Rankin v. Busby (Tex. Civ. App.) 25 S. W. 678; McElroy v. Phink (Tex. Sup.) 76 S. W. 753.

We must hold, therefore, that the testimony of those witnesses which was objected to was inadmissible, and the admission of it over the objections was such error as requires the reversal of the judgment. From the nature of the action, and the character of the documentary evidence offered by the respective parties, it is clear that the vital issue of fact involved in the controversy was as to the genuineness of the deed dated January 14, 1840, purporting to be executed by Jesse McGee, and to convey to William Dobson the league of land granted to McGee by George Antonio Nixon, commissioner for the *Empresario Lorenza de Zavala*, and for further description making reference to the original plat and field notes of survey which are on file and of record in the General Land Office of the republic. It sufficiently appears from the findings of fact made by the judge that this is the controlling, if not, in substance, the only controverted, question of fact in the case. A reference to Rev. St. U. S. § 700 [U. S. Comp. St. 1901, p. 570], as construed in the cases of *Norris v. Jackson*, 9 Wall. 125, 19 L. Ed. 608; *Miller v. Life Insurance Company*, 12 Wall. 285, 20 L. Ed. 398; *Insurance Company v. Folsom*, 18 Wall. 237, 21 L. Ed. 827; *Cooper v. Omohundro*, 19 Wall. 65, 22 L. Ed. 47; *Martinton v. Fairbanks*, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862; and *City of Key West v. Baer*, 66 Fed. 440, 13 C. C. A. 572—will show to counsel engaged in this case why we cannot extend our review further.

The judgment of the Circuit Court is reversed, and the cause is remanded to that court, with directions to award the defendants a new trial.

UNITED ENGINEERING & CONTRACTING CO. v. BROADNAX.

(Circuit Court of Appeals, Second Circuit. March 10, 1905.)

No. 118.

1. **CONTRACTS—CONSTRUCTION.**

Where a proposal to furnish granite for the construction of a bridge contained a provision that the granite was to be Crotch Island granite, from the quarries of G. & S. and J. L. G.—it being the intention of the writer to use both quarries in obtaining the stone—such statement amounted to a mere intention to use both quarries, and not an agreement to do so, so that, on the offer being accepted, plaintiff's inability to obtain granite from the J. L. G. quarry did not constitute a breach of the contract; there being evidence that the other quarry could have been so worked as to have furnished all the stone required within the time prescribed.

2. **SAME—MEASURE OF DAMAGES.**

In an action for breach of a contract to purchase dimension granite of plaintiff for the construction of a bridge, to be the product of one or both of two named quarries, the measure of damages is the difference between the contract price and the cost of performance of the contract.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1106.]

3. **SAME—FEDERAL COURTS—MOTION FOR NEW TRIAL—REVIEW.**

A decision on a motion for a new trial is not the subject of review in a federal appellate court.

4. **SAME—OBJECTIONS TO EVIDENCE—SCOPE.**

Where, in an action for breach of a contract to purchase dimension granite, defendant objected to a question asked for the purpose of determining the cost per cubic yard of producing the rough dimension granite blocks in connection with the contract, on the ground that it was not the correct way to establish the measure of damages, such objection was insufficient to present the question that the issue was not the cost of production to plaintiff, but the fair and reasonable cost.

5. **SAME—CONDITIONS—PAROL EVIDENCE.**

Where a written acceptance of an offer to furnish dimension granite for bridge construction stated that it should become effective only when the contract was made between the acceptor and a steel company approved by a bridge commission, such condition will be presumed to be exclusive, and parol evidence is therefore inadmissible to prove other conditions precedent.

6. **SAME—MOTION TO DISMISS—OBJECTIONS—SCOPE.**

Where, in an action for breach of a contract to purchase dimension granite, defendant moved to dismiss the complaint on the ground that there was no evidence to establish damages under the rule of law applicable to the facts in the case, such objection was insufficient to raise the question that there was no sufficient proof on which prospective profits could be estimated, for the reason that the value of the stone in the ledge was not proved.

7. **SAME—CONSTRUCTION OF WORDS—PAROL EVIDENCE.**

Where a proposal to furnish dimension granite for bridge construction recited that the granite should be in accordance with specifications and acceptable to the engineer, the phrase "acceptable to the engineer" was not ambiguous, and parol evidence was therefore inadmissible to explain the same.

8. SAME—EVIDENCE.

In an action for breach of a contract, the exclusion of a question put to defendant's president, asking him whether a phrase in the contract was inserted by reason of any suggestion made by him, was proper.

9. SAME—CONSTRUCTION OF CONTRACT.

Where plaintiff's proposal to furnish all the dimension granite required in the construction of certain bridge approaches, to be in accordance with specifications and acceptable to the engineer, was accepted, subject to the approval of the commission, as per official contract form and specifications, he was entitled to furnish as much dimension granite as it would take to make the construction walls as specified in the contract approved by the bridge commission, and not only so much as defendant might choose to call for.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a judgment of the Circuit Court, Southern District of New York, entered upon the verdict of a jury, in favor of defendant in error, who was plaintiff below. The action was to recover damages for breach of contract. The verdict was for \$19,422.19, but upon motion for new trial the plaintiff consented to its reduction in the amount of \$7,679.70. The facts sufficiently appear in the opinion.

For opinion below, see 128 Fed. 649.

L. Laffin Kellogg, for plaintiff in error.

H. H. Bowman, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The contract is in writing. On February 12, 1901, plaintiff wrote to defendant as follows:

"I propose to furnish you all the dimension granite required in the construction of the new East River Bridge approaches, the granite to be in accordance with the specifications and acceptable to the engineer for thirty-three (33) cents per cubic foot f. o. b. New York Harbor, subject to the following conditions:

"You are to furnish free wharfage.

"You are to discharge the vessel, etc.

"You are to pay the freight, etc.

"It is understood that this granite is to be Crotch Island granite from the quarries of Goss & Small and John L. Goss. It is the intention of the writer to use both quarries in obtaining this stone."

To this on the same day defendant replied—the answer being written on the same piece of paper—as follows:

"Accepted subject to the execution of contract between this company and the Penna. Steel Company and the approval of the Commission as per official contract form and specifications."

Subsequently the contract between defendant and the Pennsylvania Steel Company was executed and approved by the bridge commission. It is not disputed that defendant got its stone for the approaches elsewhere, and refused to receive any from the plaintiff under the contract sued upon. The alleged errors which have been treated in argument may be considered in the order in which they are presented in the brief.

1. Defendant contends that the court should have directed a verdict in its favor on the ground that the proof showed that John L. Goss refused to allow plaintiff to make any deliveries from his quarry. It is argued that plaintiff was obliged to furnish stone from the quarry of John L. Goss as well as from the quarry of Goss & Small, that he was unable to do so, that his inability to do so constituted a breach of the contract, and that defendant was therefore justified in treating the contract as null and void. The evidence introduced by both sides indicates that both quarries were mentioned solely in order to provide that in case one quarry should prove insufficient, or be put out of commission through some accident, there might be another source of supply (acceptable to the bridge commission engineer) from which the plaintiff could furnish the stone in time to meet the requirements of the work of construction. The mere statement of an intention to use both quarries is not an agreement to do so. There was evidence warranting the finding that the Goss & Small quarry could have been so worked as to have furnished all the stone required within the prescribed time. There was nothing to show that there was any special wish to obtain John L. Goss granite. Moreover, if the words used are to be construed with the greatest strictness, they contain no requirement as to the relative proportions which may be drawn from each quarry. The terms of the contract would be complied with if all the stone except 10 cubic yards were drawn from either quarry, and only 10 cubic yards from the other. We think the trial judge was right in construing "and" to mean "or" (*Davis v. Boardman*, 12 Mass. 80; *Brown v. Furniture Co.*, 58 Fed. 286, 7 C. C. A. 225, 22 L. R. A. 817), and in holding that it was the true meaning of the contract that the "whole quantity had got to come from those quarries, one or the other or both."

2. It is contended that the verdict should be set aside because it was based wholly on testimony as to the difference between the contract price and the cost of performance, whereas, the true measure of damages was the difference between the contract price and the market value. It is suggested in the brief that the alleged error under this point is raised by the exception to the denial of the motion to set aside the verdict. But a decision upon a motion for a new trial is not the subject of review in a federal appellate court. *Laber v. Cooper*, 7 Wall. 565, 19 L. Ed. 151; *Railway Co. v. Heck*, 102 U. S. 120, 26 L. Ed. 58. However, the point is fairly presented by an exception "to so much of the charge as is to the effect that the difference between the cost of production and the contract price is the measure of damages." The article to be furnished under this contract was so-called dimension granite; that is, as defendant's witness testified, stone cut as nearly as possible to sizes from which it would be proper to extract a dressed piece of stone, such as a pillar, column, pedestal, or anything else that would be necessarily accurate in dimensions. Fixed dimensions are given prior to the quarrying of the stone, and it is got out according to those dimensions. Moreover, the stone was to

be, the product of one or both of two named quarries. The case is within the rule laid down in *Masterson v. The Mayor*, 7 Hill, 61, 42 Am. Dec. 38. We have so recently discussed the question, what is the measure of damages in cases of this kind? that a reference to the opinion in *Allen v. Field* (C. C. A.) 130 Fed. 641, is sufficient on this branch of the case.

Under this point the defendant alleges error because the evidence was confined to showing what would have been the actual cost of performance to plaintiff's assignors, suggesting that there is no evidence to show that the cost to them was the fair and reasonable cost. No request to charge, no exception to the charge, called the attention of the court to any such proposition. A great deal of evidence was taken as to what it would have cost to have got dimension granite of the sizes which were required for the approaches out of this quarry, and the only exception to any of it is the one covered by the fourteenth assignment of error. This question was put to a qualified witness: "What would the cost per cubic yard have been, in connection with this contract of producing the rough dimension granite blocks?" To which defendant objected "on the ground that it is not the correct way to establish the measure of damages," and called the attention of the court to certain authorities. The court overruled the objection, saying, "I think the cases you mention do not preclude this mode of giving damages," and exception was reserved. No doubt, this sufficiently presented the proposition that a comparison of contract price with "market value," and not with "cost price," was, according to defendant's theory, the true measure of damages; but it failed to challenge the attention of the court to the point now raised, viz., that the question did not contain the words "fair and reasonable."

3. It is contended that the court erred in excluding evidence offered for the purpose of showing that the acceptance of plaintiff's offer was to be effective only in case the labor law was not declared unconstitutional, and in case the source of supply was approved by, and acceptable to, the engineer of the bridge commission. Reliance is had on authorities which hold that parol evidence is sometimes admissible to show that the execution or delivery of a written instrument was conditional, and not to take effect until some subsequent event should take place. In those cases, however, the written instrument itself did not undertake to set forth the conditions precedent to its validity. Here, on the contrary, it expressly states that it shall become effective only when a contract between the defendant and the Pennsylvania Steel Company should be executed, and the approval of the bridge commission obtained. Having thus enumerated conditions precedent to validity, it will, under familiar principles, be presumed that the written enumeration is exhaustive (*Seitz v. Brewers' Refrigerating Company*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837), and parol testimony to add to it was properly excluded.

The other points argued may be briefly disposed of:

It is contended that there was no sufficient proof upon which prospective profits could be estimated, "for the reason that the

value of the stone in the ledge * * * was never proved." This point was not reserved by any exception. Defendant seeks to raise it under denial of motion to dismiss the complaint; but the ground therein stated, "that there has been no evidence offered to establish damages under the rule of law applicable to the facts in the case," called the attention of the court only to the proposition already discussed, viz., that defendant insisted that contract price should be compared, not with cost, but with market value.

There is certainly nothing ambiguous in the phrase "acceptable to the engineer," and the trial court properly excluded questions as to what it meant. Nor was there error in excluding a question put to defendant's president, asking him whether a phrase in the contract was inserted "by reason of any suggestion made by him."

The judge correctly charged that under the contract the plaintiff was entitled to furnish as much as it would take of dimension granite to make the construction walls as specified under the contract approved by the bridge commission, and not only so much dimension granite as the defendant might have chosen to call for. The inclusion in the damages of certain "backing" which was required in construction according to specifications, but which was not technically "dimension granite," was corrected by the reduction of the verdict upon decision of motion for new trial.

The judgment is affirmed.

BARTON BROS. et al. v. TEXAS PRODUCE CO. et al.

(Circuit Court of Appeals, Eighth Circuit. April 4, 1905.)

No. 2,105.

1. FEDERAL COURTS—FINDINGS BY TRIAL JUDGE—REVIEW.

The Circuit Court of Appeals will not disturb the conclusion of a trial judge on disputed questions of fact, where the hearing was on oral testimony, except for cogent reasons, such as a palpable mistake or misconception of the decided weight of the evidence.

2. BANKRUPTCY—DISCHARGE—OBJECTIONS—FALSE OATH—SCHEDULES.

On an application for bankrupt's discharge, evidence held to sustain a finding that the bankrupts had been guilty of making a false oath to their schedules, etc., in fraudulently failing to schedule certain money received shortly before the bankruptcy proceedings were instituted, and claimed by them to have been stolen.

Appeal from the District Court of the United States for the Western District of Arkansas.

Joe Hardage, T. N. Wilson, George B. Pugh, and R. E. Wiley, for appellants.

William H. Arnold, Oscar D. Scott, and James D. Head, for appellees.

Before SANBORN, Circuit Judge, and PHILIPS and RINER, District Judges.

PHILIPS, District Judge. The partnership firm of Barton Bros. was composed of Clib Barton, William P. Barton, Jr., and Ross J.

Barton, engaged in mercantile business at Antoine, Pike county, Ark. On the 28th day of November, 1902, on the petition of appellees, the said partnership and the individuals thereof were adjudged involuntary bankrupts, on their admission in writing of their inability to pay their debts and their willingness to be adjudged bankrupts. In August, 1903, Clib Barton died. On October 6, 1903, William P. Barton, Jr., and Ross J. Barton filed a petition asking for a discharge in bankruptcy for the firm of Barton Bros. and for themselves individually. On November 5, 1903, appellees filed specifications of objection to the discharge, which specifications were afterwards amended. The first specification alleged that on the 11th day of December, 1902, said William P. Barton, Jr., and Ross J. Barton, respectively, falsely and fraudulently made oath that the schedule of assets filed by them contained all of their real and personal property, when in fact said schedule of assets did not contain a large sum of money, to wit, about \$8,000, which had been received by said bankrupts upon the sale of a large lot of cotton a few days prior to the proceedings in bankruptcy, and that said sum of money was in the possession of the bankrupts at the time they filed their schedule of assets in bankruptcy and at the time they made said oath; second, that they falsely and fraudulently made oath that the list of personal property scheduled and claimed by them as exempt contained all the personal property, of whatever kind, when, in truth, said schedules of exemptions did not contain a large sum of money, to wit, about \$8,000 received by them as the proceeds from the sale of the cotton aforesaid, which said sum of money was in their possession at the time they filed said schedules. The hearing of these objections to the discharge was had before the District Judge on oral testimony, at the conclusion of which the court denied the petitions for discharge, from which action of the court the petitioners have appealed to this court.

The evidence, without contradiction, showed that on or about the 25th day of November, 1902, Clib Barton, who was the active manager of the business, went to Little Rock, Ark., and sold a lot of cotton of the firm, and received therefor between seven and eight thousand dollars in money, in packages of fifty and one hundred dollar bills, which he brought home and delivered to William P. Barton, Jr., who was the bookkeeper of the firm, who claims to have put the package containing the money in an ordinary wooden desk, with a roller top, and inside of a drawer inclosed with a door, and that he locked the door and the desk, where the money, according to the petitioners' statement, remained during Friday night and Saturday and Saturday night following, when they allege the storehouse was burglarized, and the desk opened, and the money abstracted and stolen. This was a simple question of fact for the determination of the trial court on the evidence. The function of the District Judge on such a hearing is akin to that of a chancellor in an equity proceeding. Where, as in this case, the hearing was on oral testimony, his conclusions on disputed questions of fact should not be disturbed by the appellate court, except for cogent

reasons, such as a palpable mistake or misconception of the decided weight of the evidence. *Furrer v. Ferris*, 145 U. S. 132, 12 Sup. Ct. 821, 36 L. Ed. 649; *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; *Lansing et al. v. Stanisics et al.*, 94 Fed. 380, 36 C. C. A. 306; *Snider et al. v. Dobson et al.*, 74 Fed. 757, 21 C. C. A. 76; *Warren v. Burt et al.*, 58 Fed. 101-106, 7 C. C. A. 105; *Latta et al. v. Granger*, 68 Fed. 69, 15 C. C. A. 228; *Paxson et al. v. Brown et al.*, 61 Fed. 874, 10 C. C. A. 135; *Stuart v. Hayden et al.*, 72 Fed. 402, 18 C. C. A. 618. The learned judge who heard this case patiently for two days, with opportunity to observe the witnesses, their conduct on the stand, with probable personal knowledge of what manner of men they were, was in better position to form a correct estimate of the probative force to be attached to their testimony than this court can form from the more or less imperfect expression of the testimony in type.

A careful reading of the record has failed to persuade us that injustice has been done appellants by denying their petition for a final discharge from their debts. The spirit of the bankrupt act is commendable. Its purpose is to release the honest debtor from the burden of debts which he is unable to longer carry; to give freer play to his energies and enterprises, that he may thereafter be better able to support himself and those dependent upon his earnings, and thereby be in position to render a better service to the state and to society. This beneficent policy is conditioned always upon the bankrupt's full and complete surrender of all his unexempt property for the benefit of his creditors. He must be honest in this respect. He must neither conceal nor withhold knowingly anything from his creditors which they are entitled, under the law, to know or receive. Whenever the court is impressed with the belief, after due inquiry and examination, that in the main the bankrupt has intended and tried to comply with the law, he should be dealt with liberally on his petition for manumission from his debts. On the other hand, in order to obstruct gross abuses of the spirit of the bankrupt act, that it may not aid the dishonest debtor in being acquitted of his honest debts, while withholding aught that he should surrender for the benefit of his creditors, it is the duty of the court to look into the heart of his transactions.

When the partners received between seven and eight thousand dollars for said cotton, their assets reduced to cash were inadequate to meet their liabilities. They had past-due obligations to creditors. This large amount of cash, without notice of its possession to their creditors, was placed in an insecure wooden desk in a public store, and left unguarded for two whole nights. This money was not entered by the bookkeeper on the cashbook of the company. It was not even counted by said bookkeeper, for the flimsy reason, assigned by him, that he was busy, and for the lack of opportunity to make the count without exposing the money to the public, although two nights had intervened, when they would have had the privacy of their own counting room for such purpose. The three partners knew of the deposit of this money in said desk. There was a large safe in the storeroom, which, while it may not

have been burglar proof, was a much safer place for money against an accident of fire. William P. Barton, Jr., claims to have left the store the evening before the alleged burglary, and gone to his home, where he remained all night. The other two brothers were in the store after he left, and were in there when the principal clerk left. All the doors to the storeroom were securely fastened from the inside, except the front door, which was locked from the outside. On the following Sunday morning the loss of this money was proclaimed by William P. and Ross Barton, and when third parties reached the store the back door was open, and a window in the rear of the building was shown to be raised, and there was a goods box on the outside, below this window, to indicate that the entrance to the building might have been effected through said window. But the presence of a layer of dust on the sill of the window, and cobwebs on the inside thereof, undisturbed, disproved the entry of any person through the window. The physical condition of the desk just after the loss of the money was proclaimed well warranted the conclusion that the person or persons who abstracted the money accomplished their work by having keys to the front door of the storehouse and to the desk. There was no indication of any breaking of the outside roller to the desk, nor any evidence of a violent entry into the drawer or the door inside of the desk. It is true that the door was found open and wrenched from the hinges, but as these hinges were inside of the door, and the lock of the door was unbroken, this wrenching of the door from its hinges could only have been done after the door itself was opened with a key. All of which indicated that the job was done by a bungler, who sought inconsiderately to leave evidence of a violent entry, which was transparently foolish.

Without going into further details, the only plausible suggestion against the complicity of the surviving brothers in the appropriation of this money is the opportunity Clib Barton had to take it, as he had the means of access to it. This suspicion is largely predicated of the assumption that he was seen at a late hour the night of the alleged burglary about the balcony of the storehouse. This assertion rests upon the merest hearsay testimony. No witness testified to having so seen him, but a witness was permitted, without objection, to say he was told that Clib Barton was wandering about drunk that night, and was seen about the place at a late hour. It is apparent why this incompetent statement was admitted unchallenged. The objecting creditors deemed it a circumstance bearing on the existence of a probable conspiracy between the brothers to surreptitiously extract and hide the money, while the surviving brothers were willing enough to save themselves by the imputation thus cast upon their dead brother, so long as the ignominy of it did not proceed from their own mouths. In a contention between living brothers and the dead one, the presumption would rather favor the innocence of the latter. Maudlin drunk as he was when he returned with the money, he turned the package over to William P. Barton, Jr., the bookkeeper, who thus became its custodian; and it is doubtful if Clib Barton, who continued in an intoxicated con-

dition from the time he returned home until the time of the alleged burglary, even knew where the money was placed by William P. Barton, Jr. The other brother did know that the money was placed in said desk. It is true that there was evidence tending to show that Clib Barton, after he returned from Little Rock, passed a \$50 bill at a saloon; and, while it would not be a strained inference that this bill was a part of the money received for the cotton, there is no more reason for assuming that he extracted it after than before the delivery of the package to his brother.

There were other instances and circumstances in evidence of an inculpatory character against the conduct of the petitioners in connection with this money, which are not of sufficient importance to affect the conclusion reached by the District Judge. Giving to his conclusion that deference to which it is entitled, his action in denying the petitioners for discharge must be affirmed. It is accordingly so ordered.

WATSON v. MERRILL.

(Circuit Court of Appeals, Eighth Circuit. March 18, 1905.)

No. 2,087.

1. BANKRUPTCY—RENTS ACCRUING AFTER PETITION—PROVABLE CLAIM.

Rents which the bankrupt had agreed to pay at times subsequent to the filing of the petition in bankruptcy do not constitute a provable claim under the bankruptcy law of 1898, because they are not a "fixed liability * * * absolutely owing at the time of the filing of the petition against him," and because they do not constitute an existing demand, but both the existence and the amount of the possible future demand are contingent upon future events, such as default of lessee, re-entry of lessor, and assumption by trustee, so that they neither form the basis of an unliquidated nor of a liquidated provable claim. Act July 1, 1898, c. 541, § 63, cls. "a," "b," 30 Stat. 562, 563, 3 U. S. Comp. St. 1901, p. 3447.

2. SAME—DAMAGES FOR BREACH OF CONTRACT TO PAY RENTS NOT PROVABLE CLAIM.

Damages for the breach of a contract of the bankrupt to pay rents at times subsequent to the filing of the petition in bankruptcy do not constitute a provable claim, for the same reason that the claim for the rents is not provable.

3. LEASE—REPOSSESSION BY LESSOR RELEASES LESSEE.

The retaking of the premises by the lessor releases the lessee from payment of all subsequently accruing rents unless the contract expressly provides otherwise.

4. BANKRUPTCY—TRUSTEE—OPTION TO ASSUME EXECUTORY CONTRACTS.

The trustee in bankruptcy has the option to assume or renounce the leases and other executory contracts of the bankrupt, as he may deem for the best interest of the estate.

5. SAME—ADJUDICATION DISSOLVES NO CONTRACTS.

An adjudication of bankruptcy absolves the bankrupt from no agreement, terminates no contract, and discharges no liability.

6. SAME—ADJUDICATION NO BREACH OF BANKRUPT'S LEASE.

An adjudication of bankruptcy in a case in which there was no rent due at the time of the filing of the petition in bankruptcy does not constitute a breach at that time of the covenants of the bankrupt in his lease to pay rents accruing thereafter.

(Syllabus by the Court.)

Appeal from the District Court of the United States for the District of Kansas.

This is an appeal from a decree of the District Court, sitting in bankruptcy, which reversed an order of the referee that the appellant, Watson, should be allowed a claim of \$1,437.50 for damages for the breach by P. A. Brown, by means of his adjudication as a bankrupt, of a lease which he had taken from the appellant. On May 1, 1902, Brown leased of Watson a storeroom in a building about to be erected for a term of 10 years from October 1, 1902, and agreed to pay a monthly rental of \$60 in advance during the term. He paid this rent to March 1, 1903. On February 6, 1903, a petition in bankruptcy was filed against him, and receivers were appointed, who took possession of his personal property in the rented premises. On April 2, 1903, he was adjudged a bankrupt, and a trustee was appointed. On March 2, 1903, Watson and Brown made a written contract which recited that it had become impossible for Brown to comply with the terms of his lease, and that he was obligated to his lessor thereby in the sum of \$6,900, and in which he acknowledged himself to be indebted to Watson in the sum of \$2,300, and surrendered to him all his rights and privileges under the lease, while Watson by the same contract released Brown from any further obligation to pay rent for the leased premises. Afterwards Watson filed his proof of claim for \$2,300 against the estate of Brown, which was founded on the lease and on the contract of March 2, 1903. He also filed a petition for the liquidation of this claim, in which he alleged that he had incurred extraordinary expense in the construction of the building in expectation of the rental, that the rental value of the premises was only \$40 per month, and that he had sustained damages to the amount of \$20 per month from March 1, 1902, until the end of the term of the lease, which amounted in the aggregate to \$2,300. The referee found the rental value of the premises to be \$47.50 per month, and allowed the claim of Watson for \$1,437.50 for damages for a breach of the lease. Upon a petition for review, the District Court reversed this decision, and directed the referee to disallow the claim.

David Ritchie, for appellant.

H. C. Tobey, W. S. McClintock, I. J. Ringolsky, and Thomas L. Bond, for appellee.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The contention of counsel for the appellant is that the claim of the lessor is not for rents which were payable after the petition for adjudication in bankruptcy was filed, but for damages for a breach of the contract in the lease to pay these rents; that the adjudication in bankruptcy dissolves all contractual relations of the bankrupt at the date of the filing of the petition in bankruptcy (In re Jefferson [D. C.] 93 Fed. 948; *Bray v. Cobb* [D. C.] 100 Fed. 270; In re Hays, Foster & Ward Co. [D. C.] 117 Fed. 879); that the dissolution of a contractual relation is a breach of the contract; and that for the breach of the contract to pay the rents accruing subsequent to the filing of the petition a claim for damages may be allowed in bankruptcy (In re Swift, 112 Fed. 315, 50 C. C. A. 264; In re Stern, 116 Fed. 604, 54 C. C. A. 60; In re Frederick L. Grant Shoe Co. [C. C. A.] 130 Fed. 881).

It is, however, the nature of the claim, and not the name which is applied to it, that conditions its provability in bankruptcy. Wat-

son's claim was for \$20 of the \$60 per month which the lessee had agreed to pay him for rent of the leased premises for 115 months after the petition in bankruptcy was filed. In reality, his claim was for the entire \$60 per month, but he had received by the surrender to him of the premises by Brown under their contract of March 2, 1903, and had credited to him, the rental value of the premises, \$40 per month, so that the rent which he claimed remained unpaid was but \$20 for each month.

At the close of the hearing the referee found that the rental value of the premises was \$47.50 per month, and that the only rent remaining unpaid was \$12.50 per month for the 115 months subsequent to February, 1903, and this amounted to \$1,437.50, which he allowed to the appellant under the name of damages for the breach of the contract in the lease.

These facts demonstrate the proposition that, while counsel and the referee call this allowance damages for a breach of the lease, it is in fact nothing but that part of the monthly rent which was to accrue after the petition was filed, which the referee found that the lessee had not paid by his surrender of the leased premises to the lessor in March, 1903. But rent which the bankrupt has agreed to pay, and which is to accrue subsequent to the filing of the petition in bankruptcy, does not constitute a provable claim under the bankruptcy law of 1898 (Act July 1, 1898, c. 541, 30 Stat. 562, 563, 3 U. S. Comp. St. 1901, p. 3447), because it is not "a fixed liability * * * absolutely owing at the time of the filing of the petition against him" (section 63a), and because it is not an existing demand, but both the existence and the amount of the possible future demand are contingent upon unforeseen events, such as default of the lessee, re-entry by the lessor, and assumption by the trustee, so that it is neither an unliquidated nor a liquidated provable claim (section 63b). *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19, 19 Sup. Ct. 77, 43 L. Ed. 341; *In re Ells* (D. C.) 98 Fed. 967, 969, 970; *In re Mahler* (D. C.) 105 Fed. 428, 430; *Fidelity Safe Deposit & Trust Co. v. Armstrong* (C. C.) 35 Fed. 567, 569; *Matter of Hevenor*, 144 N. Y. 271, 274, 39 N. E. 393; *In re Commercial Bulletin Co.*, Fed. Cas. No. 3,060; *In re Collignon*, 4 Am. Bankr. Rep. 250; *Atkins v. Wilcox*, 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118; *In re Curtis* (La.) 9 Am. Bankr. Rep. 286, 292, 295, 33 South. 125; *In re Heinsfurter* (D. C.) 97 Fed. 198; *Beers v. Hanlin* (D. C.) 99 Fed. 695; *Lamson Consol. Store Service Co. v. Bowland*, 114 Fed. 639, 642, 52 C. C. A. 335, 338; *Wilson v. Pennsylvania Trust Co.*, 114 Fed. 742, 52 C. C. A. 374. *In Deane v. Caldwell*, 127 Mass. 242, 244, Chief Justice Gray (subsequently Mr. Justice Gray of the Supreme Court) announced the true rule upon this subject in these words:

"Before the day at which rent is covenanted to be paid, it is in no sense a debt—it is neither debitum nor solvendum—for, if the lessee is evicted before that day, it never becomes payable. *Bordman v. Osborn*, 23 Pick. 295. It is not within the provision of a bankrupt act allowing 'uncertain or contingent demands' to be proved against the estate of a bankrupt, because it is not an existing demand, the cause of action on which depends upon a contingency, but the very existence of the demand depends upon a contingency."

The lease before us admirably illustrates the principle. It provides that the lessee shall pay \$60 per month for the term of 10 years "for the use and benefit accruing to him from the use and occupancy" of the premises; that, if he pays these sums as they fall due, and performs all his covenants, he may hold and enjoy the premises, but that if any rents are due and unpaid, or if default is made in any of his covenants, or if he allows any undue waste of any of the improvements on the premises, the lessor may at once re-enter and repossess the premises. The contract contains no covenant that the lessee will pay any rents after his default and the re-entry by the lessor. The use and occupation of the premises during the term of the lease were the consideration for the payment of the monthly rents, and the payment of the rents was the consideration for the use of the premises. If the rent for any month was not paid, or if waste was permitted, the lessor had the option to repossess himself of the premises, and to withhold from thenceforth the consideration for future installments of rent, or to permit the lessee to continue in possession of the property, and to enforce the collection of the rents by an action or by some other proceeding. He could not, however, do both. His resumption of the premises necessarily constituted, in the absence of an express agreement to the contrary, a termination of the lease, and a release of the lessee from the payment of all the installments of rent he had promised to pay thereafter. *Lamson Consol. Store Service Co. v. Bowland*, 114 Fed. 639, 642, 52 C. C. A. 335, 338.

Moreover, if by contract or by virtue of legal proceedings the lessor became entitled to the possession of the premises, and also to the difference between the amount which he might secure from another tenant, or the rental value of the leasehold, and the rents reserved, that amount would always be uncertain and contingent upon future events. *Matter of Hevenor*, 144 N. Y. 271, 274, 39 N. E. 393.

When the petition in bankruptcy was filed, no rent was due and unpaid. There was therefore no debt owing by the lessee to Watson, and the latter had no legal demand or claim against him under the lease. The future existence of any such claim or demand, and its amount, if it ever came into existence, were contingent upon (1) the future default of the lessee; (2) the exercise by the lessor of his option to resume the possession of the leased premises if such a default should occur; and (3) upon the assumption of the lease by the trustee in bankruptcy. For the latter had the option to take the leasehold estate, and to assume the payment of the agreed rents. *Ex parte Houghton*, Fed. Cas. No. 6,725; *Ames v. Union Pac. R. Co.* (C. C.) 60 Fed. 966, 970, 971; *In re Ells* (D. C.) 98 Fed. 967, 968. As the lessor had no legal claim or demand against the lessee for the agreed rents to be paid in the future, when the petition in bankruptcy was filed, and as the future existence and the amount of such a claim were both contingent upon unforeseen future events, Watson had no provable claim for any part of these rents. Since his claim is in fact for nothing but \$12.50 per month of the agreed rents payable after the filing of the petition in bankruptcy, the application to it of the title of a claim for damages for

a breach of the lease neither changes its nature, nor makes it more provable than it would have been if its real character had been described by its name.

2. An adjudication in bankruptcy does not dissolve or terminate the contractual relations of the bankrupt, notwithstanding the decisions to the contrary in *In re Jefferson* (D. C.) 93 Fed. 448; *Bray v. Cobb* (D. C.) 100 Fed. 270; and *In re Hays, Foster & Ward Co.* (D. C.) 117 Fed. 879. Its effect is to transfer to the trustee all the property of the bankrupt except his executory contracts, and to vest in the trustee the option to assume or to renounce these. It is the assignment of the property of the bankrupt to the trustee by operation of law. It neither releases nor absolves the debtor from any of his contracts or obligations, but, like any other assignment of property by an obligor, leaves him bound by his agreements, and subject to the liabilities he has incurred. It is the discharge of the bankrupt alone, not his adjudication, that releases him from liability for provable debts in consideration of his surrender of his property, and its distribution among the creditors who hold them. Even the discharge fails to relieve him from claims against him that are not provable in bankruptcy, and, since his obligation to pay rents which are to accrue after the filing of the petition in bankruptcy may not be the basis of a provable claim, his liability for them is neither released nor affected by his adjudication in bankruptcy, or by his discharge from his provable debts. One agrees to pay monthly rents for the place of residence of his family or for his place of business, or to render personal services for monthly compensation for a term of years; he agrees to purchase or to convey property; and he then becomes insolvent and is adjudicated a bankrupt. His obligations and liabilities are neither terminated nor released by the adjudication. He still remains legally bound to pay the rents, to render the services, and to fulfill all his other obligations, notwithstanding the fact that his insolvency may render him unable immediately to do so. Nor are those who contracted with him absolved from their obligations. If he or his trustee pays the stipulated rents for his place of residence or for his place of business, the lessors may not deny to the payor the use of the premises according to the terms of the lease. If he renders the personal services, he who contracted to pay for them may not deny his liability to discharge this obligation. His trustee does not become liable for his debts, but he does acquire the right to accept and assume or to renounce the executory agreements of the bankrupt, as he may deem most advantageous to the estate he is administering, and the parties to those contracts which he assumes are still liable to perform them. And so throughout the entire field of contractual obligations the adjudication in bankruptcy absolves from no agreement, terminates no contract, and discharges no liability. *In re Curtis* (La.) 9 Am. Bankr. Rep. 286, 33 South. 125; *In re Ells* (D. C.) 98 Fed. 967, 968; *Witthaus v. Zimmerman*, 11 Am. Bankr. Rep. 314, 316, 86 N. Y. Supp. 315; *White v. Griffing*, 44 Conn. 437, 446, 447; *In re Pennewell*, 119 Fed. 139, 55 C. C. A. 571.

3. Not only this, but if counsel for appellant could sustain his

proposition that the adjudication of bankruptcy absolved the parties to the lease from their contract at the date of the filing of the petition in bankruptcy, or terminated the lease on that day, still the lessor would have no legal claim against the estate, because the petition was filed on February 6, 1903, the rent was paid by Brown to March 1, 1903, there had been no breach of the contract when the petition was filed, and, if both parties were released from the agreement at that time, or if the lease was then terminated, neither party could have subsequently been in default under it or have committed a breach of it, because thereafter no contract would have existed to be defaulted, and no covenant to be broken.

4. Finally the adjudication in bankruptcy did not constitute a breach of the lease, and it raised no cause of action as of the date of the filing of the petition in bankruptcy. At that date the rent had been paid until March 1, 1903—until 22 days after the date of the filing. There could therefore have been no breach until March 1, 1903, when the rent for March fell due; and consequently there was no claim or demand founded on a breach of the contract at the time the petition was filed, and, if one ever accrued, it arose many days after the filing of the petition, and too late to constitute a provable claim against the estate of the bankrupt. The rule of law that, where one has disabled himself from performing a contract, it immediately ripens, and an action for its breach arises, which is illustrated by *In re Swift*, 112 Fed. 315, 50 C. C. A. 264, wherein a stockbroker had made a contract to deliver stock to a customer, and he was held to have made it impossible for him to fulfill his agreement by his adjudication in bankruptcy, which took the stock from him, and vested it and all his property in his trustee, is not in conflict with this conclusion, because the leasehold estate of Brown—the only thing essential to the performance of his contract—never passed to his trustee, as the latter did not elect to assume it. Brown was not necessarily disabled by the adjudication from using or selling his leasehold or from paying the rent. The mere probable financial inability of one to fulfill his contract, or to pay his debt not yet due, does not make them immediately due and actionable. The cases *In re Stern*, 116 Fed. 604, 54 C. C. A. 60, and *In re Frederick L. Grant Shoe Co.* (C. C. A.) 130 Fed. 881, cited by appellant's counsel, fail to rule the question here under consideration, because the breaches of contract in those cases occurred before the petitions in bankruptcy were filed.

The conclusion is that a claim for damages for a breach of a contract in a lease to pay installments of rent for the use of the premises at times subsequent to the filing of the petition in bankruptcy is not provable under the bankruptcy law of 1898, and the order of the District Court is affirmed.

FWLER v. STEBBINS et al.

(Circuit Court of Appeals, Eighth Circuit. March 18, 1905.)

No. 2,053.

1. RES ADJUDICATA—IDENTITY OF NAMES—EVIDENCE OF IDENTITY OF PARTIES.

Identity of parties is as essential to the estoppel of res adjudicata as identity of causes of action.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1080.]

Identity of names is presumptive, but it is not conclusive evidence of identity of persons.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1819.]

2. SAME—DESCRIPTIONS IN RECORD TO IDENTIFY PARTIES.

Where the pleading upon which a judgment or decree is based discloses the fact that there were two persons with the same name who may be identified by their descriptions in the pleading, and that one of these persons was made a party to the suit, and the other was not, the latter may exempt himself from the estoppel of the decree by applying to himself by competent evidence the description in the pleading.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Kansas.

The plaintiff, Lewis Fowler, brought an action of ejectment against the defendants, A. G. Stebbins, A. W. Dennison, and the Citizens' State Bank. They answered that he was the same person who was a party defendant under the name Louis Fowler in a suit to partition the property in controversy, which had been brought by John Martin Fowler, the nephew of Hiram H. Fowler, who died intestate, the owner of the land, in December, 1894, that service of the summons or notice had been made upon the plaintiff in that suit by publication; that a decree had been rendered therein that he had no interest in the property, and that the property be sold, and the proceeds be distributed among others, who were adjudged to be the owners of it; that the defendant Stebbins purchased and obtained a conveyance of the land under that decree; that he and the other defendants hold it under that title; and that the claim of the plaintiff to the land was rendered res adjudicata by the decree in that suit in partition. They attached and made a part of their answer the petition, summons, or notice, and decree in partition. One of the parties named as a defendant in the partition suit was Louis Fowler. The petition contained these averments concerning him: "That said Hiram H. Fowler did not leave either widow or children surviving him, nor any parents, and, under the laws of this state, said real estate descended in equal shares to his brothers and sisters, and to the children of his brothers and sister who were deceased." "That the decedent, Hiram H. Fowler, formerly had a son named Louis Fowler, who died more than ten years ago, and the defendant Louis Fowler, who claims to be an heir of the decedent, Hiram H. Fowler, is not the son of said Hiram H. Fowler, and is not in any manner related to him, and is not an heir of said decedent, nor in any way interested in the above-described land." The petition contained this, among other prayers: "And that defendants Louis Fowler and Maria Fowler be found and adjudged to be in no wise related to the decedent, Hiram Fowler." The notice published informed the defendants that, unless they answered, a decree would be rendered against them that John Martin Fowler and others were the owners of the property; "that the defendants Louis Fowler and Maria Fowler are in no manner related to the deceased, Hiram H. Fowler, and have no interest whatever in and to said premises"; and that the property or its proceeds be divided among its owners. The decree contained a finding that the facts set forth in the petition were true; that Hiram H. Fowler died without leaving either widow, children, or parents; that the defendant Louis Fowler was not the son of Hiram H. Fowler, was not in any way related to

him, and had no interest in the property; and it adjudged that he was barred and estopped from setting up any claim to the land. The plaintiff replied to this answer that he is the only son of Hiram H. Fowler, and that he is the owner of the property by descent from his father; that he is not the same person who was made a defendant in the suit in partition by the name Louis Fowler; that that person was some Louis Fowler to him unknown, who was not related to Hiram H. Fowler, while he is that son of Hiram H. Fowler, who the plaintiff in the suit in partition supposed and alleged was dead, and consequently did not make a party to that suit. Upon the trial of the action the defendants objected to the introduction of any evidence by the plaintiff upon the ground that, under the admission in the pleadings that the defendants had the title under the decree in partition, the claim of the plaintiff was *res adjudicata*. The court sustained this objection, directed a verdict, and entered a judgment for the defendants.

C. H. Brooks (J. D. Houston, on the brief), for plaintiff in error.

A. L. Redden (T. A. Kramer, on the brief), for defendants in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Identity of parties is as essential to an estoppel by *res adjudicata* as identity of causes of action. Conceding that the difference in the name Louis Fowler in the proceedings in partition and the name of the plaintiff, Lewis Fowler, is not material, on account of the identity of sound, nevertheless the latter was not bound by the decree in partition unless he was a party to the suit in which it was rendered—unless he was the Louis Fowler whom the plaintiff in the partition suit made a defendant by his petition. When one commences a suit to secure desired relief, the burden is upon him in the first instance to make such persons parties to his suit as will enable the court to lawfully grant the decree he seeks. When the decree or judgment has been rendered, it is evidence of its own validity. Identity of names is presumptive, but it is not conclusive, proof of identity of persons. One brings an action on a promissory note, and issues an attachment upon land, procures a judgment based upon service by publication upon a defendant called John Smith. That action, attachment, and judgment are presumptive evidence that each particular John Smith was the defendant, and was bound by the judgment. But they are not conclusive evidence of that fact. The John Smith who actually owned the land may prove by competent oral or written evidence that he was not the John Smith who was made defendant in that action; that he never made the promissory note which was the foundation of it; that its maker was another person, who bore the same name, but had no interest in his property; and upon the presentation of such proof the owner of the land becomes free from the estoppel of the judgment. A judgment is docketed against John Brown, based upon personal service. Presumptively, it is a judgment against each John Brown in the county, and a lien upon his real property. Yet every John Brown but the actual defendant may prove that he was not the defendant in the action, and, in order to do so, may show not only that the summons was never served upon him, but that he was not the person who made the note or contract or committed the act which was the basis of the recovery.

The fallacy in the contention that the judgment or decree conclusively estops every person who bears the name of a party to it from denying the truth of findings evidenced by the judgment or decree lies in the false assumption that every person who bears that name is the party to the suit. The person who was the party to the suit is estopped to deny the truth of the findings and the validity of the decree. No other person is thus bound. The *prima facie* presumption is that there is but one person who bears any particular name, and this presumption is the basis of the rule that identity of name is presumptive evidence of identity of person. When the fact is established that there are more than one person who have the same name, and only one person by that name was made a party to the suit, the inevitable result is that only one of these parties was bound by the findings or by the judgment; and the question which one was so bound is open for trial by oral and written evidence, under the established rules of law, and in the trial of this issue no one is bound by the findings and decree until the fact is established by the evidence that he and not another was the party to the suit in which they were named.

The record in the partition suit, therefore, was not conclusive proof that the plaintiff in the action of ejectment was the same Louis Fowler who was made a defendant in that suit; and as he alleged in his reply, and his counsel asserted in his opening address to the jury, that he could establish by evidence the fact that he was a different person from the Louis Fowler who was made a party to that suit, he should not have been deprived of an opportunity to do so.

Moreover, the record in the partition suit robs the decree therein of the customary presumptive effect of a judgment upon the issue of identity. The proceedings which lead up to a decree generally disclose but one party with the same name, and the decree is presumed to be against each person of that name, because the presumption is that he is the only person who bears that name. If, however, the basis of a judgment be a complaint against George Smith, in which the plaintiff expressly avers that there are two men by that name, one of whom is the son of James Smith, and the other the son of Charles Smith, and that the defendant is not the son of James, but is the son of Charles, the issue of the identity of the defendant is tendered upon the face of the action itself, and proof by any George Smith that he is the son of James, or that he is not the son of Charles, would unquestionably exempt him from the estoppel of the judgment. In the suit in partition the summons or notice and its publication undoubtedly called into court and bound by the decree that Louis Fowler whom the plaintiff made a party to his suit, and it bound him only. The petition preceded the summons or notice in time, and was the foundation for its issue. Recourse must therefore be had to that pleading to learn who the Louis Fowler was that the complainant in that suit made a defendant. In that petition he avers that there were two persons named Louis Fowler, that one of them was the son of Hiram H. Fowler, that this one had died more than 10 years before the suit in partition was brought, and that the other was the defendant Louis Fowler, who was "not the son of Hiram H. Fowler, and is not in any manner related to him." The decree finds that these averments are true, and adjudges that the defend-

ant Louis Fowler has no interest in the land. The plaintiff in the action of ejectment alleges that he was that son of Hiram H. Fowler who the plaintiff in the partition suit alleged was dead, and that consequently he was not the Louis Fowler who was a party to that suit. The logic of this position is a demonstration. The plaintiff in the partition suit had the right to make and to refuse to make such persons parties to the suit as he elected. If he had alleged that there were two Louis Fowlers; that one was the son of Hiram, but that the defendant Louis Fowler was not the son of Hiram, and was no relation to him—could there be any doubt that the son would not have been, and the Louis Fowler who was not the son would have been, a party to the suit? Did the Louis Fowler who was the son of Hiram become a party to the suit because the plaintiff alleged that he was dead, and thereby placed beyond all question the fact that he neither made nor intended to make him a party? These questions bear their own answers.

Where the pleading upon which a judgment or decree is based discloses the fact that there were two persons with the same name who may be identified by their descriptions in the pleading, and that one of these persons was made a party to the suit, and the other was not, the latter may exempt himself from the estoppel of the decree by applying to himself by competent evidence the description in the pleading.

The judgment below is reversed, and the case is remanded to the Circuit Court, with directions to grant a new trial.

BERGH et al. v. HERRING-HALL-MARVIN SAFE CO.
(Circuit Court of Appeals, Second Circuit. February 27, 1905.)

No. 40.

1. LANDLORD AND TENANT—PERSONAL PROPERTY—REMOVAL—TRADE FIXTURES.

Where certain rented property was used as a factory, boilers, engines, shafting, hangers, pulleys, etc., placed on the premises by the tenant for use in its business, and removable without material injury to the building, were trade fixtures, which the tenant was entitled to remove on termination of the lease.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fixtures, §§ 23-29.]

2. SAME—EJECTMENT—VOLUNTARY SURRENDER.

Where tenants were summarily ejected, their retirement without immediate removal of trade fixtures could not be regarded as a voluntary surrender thereof to the lessor.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fixtures, §§ 63-65.]

3. SAME—TIME FOR REMOVAL.

A dispossessed tenant is entitled to a reasonable time within which to remove trade fixtures.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fixtures, §§ 63-65.]

4. SAME—CONVERSION BY LANDLORD.

Where receivers appointed for an insolvent corporation were dispossessed from rented premises occupied by them, and thereafter demanded posses-

sion of trade fixtures left on the premises of the lessor, which he refused, such refusal amounted to a conversion of the property.

5. SAME—ACCEPTANCE OF NEW LEASE.

The acceptance of a new lease by a tenant, without reservation of the right to remove trade fixtures previously placed on the premises, does not operate as an abandonment of the tenant's right to remove such fixtures on being subsequently ejected from the premises.

In Error to the Circuit Court of the United States for the Southern District of New York.

John L. Cadwalader and William Greenough, for plaintiff in error.

John A. Garver, for defendant in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. Prior to December 23, 1897, the Herring-Hall-Marvin Company was engaged in the business of making safes upon premises owned by the defendants and leased to said company, situated on South and Front streets in the city of New York. These premises had originally been leased for eight years from February 1, 1881, to Nichols & Co., who, in 1883, sublet the same to Herring & Co. and from that time until the termination of the last lease, in November, 1900, the premises were occupied by the said company, or its predecessors, under leases from the defendants, for the business of manufacturing safes. On December 23, 1897, receivers of said company were appointed who took possession of said premises, under the existing lease from defendants, together with all the property pertaining thereto, and continued in possession until the termination of the lease on November 19, 1900, the receivers being dispossessed for the non-payment of rent. The receivers attempted to remove from the premises the property in controversy, insisting that the articles were trade fixtures which could be removed without substantial injury to the building. They were prevented from doing so by the defendants upon the ground that the articles were not trade fixtures but were essential parts of the realty. The right of action of the receivers for this alleged conversion was duly assigned to the plaintiff, the Herring-Hall-Marvin Safe Company. The jury found that the two boilers were worth \$1,000, the two engines \$1,200, the shafting, hangers, pulleys and appliances \$1,100 and all the other items \$335. Although inclined to the opinion that there could be no recovery for the boilers the trial judge directed a verdict for the full amount, \$3,635, in order that the entire controversy might be finally disposed of in this court. One of the engines (the Corliss), with some of the shafting and heating apparatus was in the building when Herring & Co. purchased the plant of Nichols & Co., in 1883. The parties agreed upon the value of this engine as \$850. The other engine (the Gamble), the agreed value of which is \$350, was placed in the building during the existence of the last set of leases. The boilers were put in in 1894; they were new at that time and replaced the old boilers, purchased from Nichols & Co., which were worn out. They were used to run the engines and the exhaust steam was used for heating. As to the other property in question the major part was placed in the building by Herring & Co. With

the exception of the boilers, the Gamble engine, the Worthington pump and the dynamo all of the articles passed upon by the jury were placed upon the premises during the leases to Nichols & Co. of 1881 and to Herring & Co. of 1889. The leases provided that at the end of the respective terms the premises should be surrendered in good condition and none of them referred specifically to any of the articles which are the subjects of this controversy.

The principal question argued is whether there was error in the refusal of the court to direct a verdict for the defendants. The defendants insist that the articles in question were not the property of the plaintiff or its assignors, the right of removal, if it ever existed, being lost by taking new leases without any reservation permitting such removal.

The law of the state where the property is situated, when explicit and uniform, is taken as the guide in deciding what annexation to the freehold of a chattel makes it a part of the realty. In New York the rule is that if the article be attached for temporary use with the intention of removing it and in such a manner that its removal can be effected without substantial injury to the freehold it will be regarded as a chattel and may be removed by the tenant. If, on the other hand, the annexation be permanent in character or the article be specially adapted for use in the place where it is annexed it becomes a fixture and cannot be removed. *N. Y. Life Ins. Co. v. Allison*, 107 Fed. 179, 46 C. C. A. 229. Articles annexed to the realty for the purpose of carrying on a trade are known as "trade fixtures" and are removable by the tenant during his term if the removal will not materially injure the premises. *Am. & Eng. Enc. of Law* (2d Ed.) vol. 13, p. 642. It seems, therefore, that all of the articles in controversy were trade fixtures and, with the possible exception of the boilers and a part of the shafting, could be removed without injury to the building. The testimony is clearly to this effect and the court so finds. We see no reason why the boilers and shafting should be excepted. Boilers have frequently been held to be trade fixtures under similar circumstances to those disclosed by the present proof.

In *Livingston v. Sulzer*, 19 Hun, 375, the court, at page 380, says:

"We are at a loss to see why the ranges and boilers, and other fixtures, would not have been properly removable by an outgoing tenant who had placed them there for the purposes of trade and business."

See, also, *Smith v. Whitney*, 147 Mass. 479, 18 N. E. 229; *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146; *Globe Mills v. Quinn*, 76 N. Y. 23, 32 Am. Rep. 259.

The same is true of the shafting, pulleys, etc. *Cook v. Trans. Co.*, 1 Denio, 91.

We are pointed to no testimony which establishes the fact that the removal of these articles would have materially injured the freehold. The plant of the lessees was put in the building for the purpose of "manufacturing safes"; the lessors knew this and it was expressly stated in the leases. The boilers were there to generate steam for running the engines. This was their paramount use; incidentally the exhaust steam was used for heating purposes. It appeared that the

steam pipes and radiators were old and out of order and that the heating plant "had not been used latterly by Herring & Co., or Herring-Hall-Marvin Company to any great extent. It was in pretty bad order; pretty bad repair." The building was a factory where the workmen were constantly engaged in physical exercise and it certainly does not satisfactorily appear that a heating plant was a necessity in a building of this character or that the pipes and radiators were so attached to the realty as to make them fixtures. The claim for these articles was abandoned at the trial because they were found to be valueless. As originally constructed there seems to have been no heating plant provided for the building, the one in question having been put in by Nichols & Co. There is nothing to show that such a plant was essential or that the owners did not desire to have the building in a condition where it could be used for purposes where a general heating plant would not only be unnecessary but objectionable.

Regarding the shafting the proposition is advanced that a portion of it was essential to the maintenance of the building for the reason that it was used in raising and lowering a so-called elevator. The court found otherwise. There is no convincing proof that this elevator was essential to the continued use of the building and no satisfactory testimony to show what proportion of the entire shafting was necessary to operate the elevator. The defendants converted it all and now insist that a part, at least, belonged to them without showing what that is or what it was worth.

We are, therefore, convinced that all of the articles were trade fixtures which could have been removed without material injury to the building.

We are of the opinion that, in any event, the plaintiff is entitled to recover for the property placed in the building during the existence of the 1893 lease. This was the last lease made; it did not expire until 1904 and, of course, there was no abandonment of the plaintiff's title by renewal. The tenants were summarily ejected from the premises November 19, 1900. Their retirement in such circumstances cannot be regarded as a voluntary surrender of their property to the lessor; there can be no presumption of abandonment. It is hardly consistent for a landlord to turn his tenant out of doors and then assert title to the latter's chattels because he did not carry them with him. A dispossessed tenant is entitled to a reasonable time in which to remove his chattels. The receivers duly demanded possession of their property, but were not allowed to remove it; this amounted to a conversion. *Lewis v. O. N. & P. Co.*, 125 N. Y. 341, 26 N. E. 301; *Moore v. Wood*, 12 Abb. Prac. 393.

As before stated the defendants contend generally that the acceptance of the new leases, without reservation as to existing fixtures, operated as an abandonment of the right of removal. This rule is clearly stated in *Ewell on Fixtures*, p. 174, as follows:

"It is also well settled that if a tenant having the right to remove fixtures erected by him on the demised premises accepts a new lease of such premises without reservation or mention of any claim to such fixtures, and enters upon a new term thereunder, the right of removal is lost, notwithstanding his right of possession has been continuous. In such a case the acceptance

of a new lease of the premises, including the fixtures, without any reservation of right or mention of any claim to the fixtures or occupation under the new letting, are equivalent to a surrender of possession to the landlord at the expiration of the first term."

Counsel for defendants have collected numerous authorities in support of this rule and it cannot be denied that many of them, broadly considered, sustain the defendants' contention, but we are constrained to think that the better reasoning so limits the application of the rule as not to include the present controversy. The rule is of ancient origin and has grown up step by step, the common law accepting some of the harsh analogies of the civil law, until, as trade and commerce expanded, it was found that a harsh application of it to the new relations was producing inequitable results never contemplated at the time the rule had its origin. The trend of recent authority is toward a restricted application of the rule to trade fixtures so as to prevent manifest injustice. Regarding the rationale of the rule it is difficult to discover any principle of logic or equity which can be invoked in its support. Take the case at bar. The defendants are owners of real estate in the city of New York. The Herring Company had installed a plant for manufacturing safes on defendants' property with their consent. For 17 years the business was continued and the rent paid until November, 1900, when the lease terminated. What right had the defendants to the Herring plant; what consideration did they pay; what had the Herring Company done to forfeit its rights; what principle of law or equity demanded that machinery, worth several thousand dollars, should be taken from the manufacturer and handed to the landowner? At a time when manufacturing is well-nigh universal, when the transmission of power by steam and electricity has made it possible to use a multitude of buildings and parts of buildings for manufacturing purposes which were never so used before, a rigid application of the rule in question would produce the most inequitable results. Assume, for example, that the lessee of a floor in one of the modern buildings concludes to go into the printing business and, with consent of the lessor, installs a plant, including Mergenthaler typesetters, Hoe presses and the like, all fastened to the building. At the end of the term the lease is renewed in the identical language of the first lease. If the defendants' contention be correct the moment the tenant goes into possession under the new lease the title to this exceedingly valuable property passes to his landlord. Such a rule must yield to modern conditions and modern progress.

Our views in this regard cannot be better expressed than by quoting from *Devin v. Dougherty*, 27 How. Prac. 455, where the tenant, for business purposes, had built an awning over the sidewalk in front of his shop during the time of the original lease, which was renewed without reservation as to the awning. The court said:

"As the new lease was intended merely to provide for a further occupancy of the premises, and that for the same purposes, I see not why it was necessary for the tenant to reserve in it any rights in regard to a thing which was his, and which it must have been understood he was to continue to use as

his own during his new term. He hired, for a second time, his landlord's premises; but how can that be said to be also a hiring of property, upon these premises, which belonged to himself, and which, as yet, he had a right to use upon those premises under a lease still in force? What need was there of any agreement as to what he then had a right to remove, and an equal right to continue to use upon the premises as long as he secured the right to the occupancy of such premises?"

This excerpt from the opinion of Judge Reynolds is quoted not because the decision is controlling, but because of the admirable manner in which a common-sense proposition is stripped of technicalities and presented in clear and convincing language.

The most recent decision upon the question is *Bernheimer v. Adams*, 70 App. Div. 114, 75 N. Y. Supp. 93, affirmed by a unanimous decision of the Court of Appeals, May 19, 1903, 175 N. Y. 472, 67 N. E. 1080. As no opinion was written in the Court of Appeals we must look to the opinion of the Appellate Division for the facts and arguments supporting their conclusions. The opinion is carefully written and substantially all of the leading cases bearing on the question involved will be found there cited. The court makes a distinction, which we think is a proper one, between fixtures which are distinctively realty, such as buildings, fences, bank vaults and the like, and chattels known as trade fixtures, which are capable of being removed without injury to the freehold. With this distinction observed no injustice can be done.

If the fixtures are appurtenant to the land, so that a deed or lease of the premises will necessarily include them, a reservation should be made if the tenant desires to retain them, but as to chattels which can be removed and carried away without injury no such exception should be necessary. There can be no presumption that a tenant intends to present his personal property to his landlord because the lease fails to give him the right to remove it. He has that right without regard to the landlord's wishes and nothing short of conduct which amounts to an estoppel and evinces a clear intention to abandon his property can deprive him of that right. The law does not favor forfeitures.

There was no reversible error in the admission of the testimony of Frank O. Herring as to the intention of the firm in placing the articles in question in the building. If the question had been confined to the intention of the witness there can be no question as to its competency, for the reason that the intention of the lessee in placing the disputed property on the premises is one of the principal elements in fixing its legal status. But even if it be assumed that the question were too broad it was immaterial, as, irrespective of the answer of the witness, there was ample testimony to sustain the finding of fact that the articles were not intended to be left on the premises permanently. The acts of the parties and the circumstances surrounding the leases and occupancy were sufficient to warrant a presumption to this effect.

We have examined the other exceptions argued and are of the opinion that they were not well taken.

The judgment is affirmed.

UNION PAC. R. CO. v. LUCAS.

(Circuit Court of Appeals, Eighth Circuit. March 18, 1905.)

No. 2,071.

1. PRACTICE—CONFLICTING EVIDENCE FOR JURY.

Where the substantial evidence upon a material issue of fact is conflicting, the question is for the jury and not for the court.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 342, 343.]

2. RAILROADS—FIRES—EVIDENCE—VALUES—OWNER MAY TESTIFY THOUGH NOT AN EXPERT.

The owner of property who personally purchased and used it may testify to its value, although not an expert upon that subject.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2217.]

The owner of land and buildings which he purchased and used in his business may testify to the value of the land with the buildings and to the value of the land without them, in order to prove the damage from their destruction, after he has testified that he knows their value, and that they were situated in a small village, where there were few sales, although he was not familiar with other purchases or sales of such property.

The owner of a stock of goods may testify to their value in a single sum after evidence has been introduced that he was the active manager of the business conducted with the stock, that he knew its value, that the goods and his inventory of them were burned, and that he cannot give the items of the stock in detail.

3. SAME—INSURANCE AS EVIDENCE OF VALUE.

The refusal of admission of evidence of the amount of insurance upon property upon the issue of its value is not reversible error.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Kansas.

N. H. Loomis (R. W. Blair and H. A. Scandrett, on the brief), for plaintiff in error.

W. F. Guthrie (Louis C. Boyle, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. About the middle of the afternoon on March 18, 1902, a fire burned the buildings and stock of goods of the defendant in error, Frank P. Lucas. The buildings stood along the north line of the right of way of the Union Pacific Railroad Company through the town of Wa Keeney, a village of about 700 inhabitants. They extended about 170 feet, and at the west end of them was a stable, with an open window on the south side of it, beneath which was a pile of manure and straw which Lucas had thrown out upon the right of way of the railroad company. He sued the company for negligence in setting the fire, which he alleged consisted in negligently operating a defective engine which drew 18 freight cars through the village at the rate of 40 miles per hour, and in carelessly permitting grass and other combustible material to remain upon its right of way. The railroad company

denied the charges against it, and averred that, if the plaintiff had sustained any damage, it had been caused by his own negligence. At the close of the trial the plaintiff withdrew the charge that the company had carelessly permitted combustible materials to accumulate and remain upon its right of way, and the court instructed the jury that they should not, in any event, find a verdict against the defendant on account of the condition of the right of way. There was a verdict and judgment against the railroad company, which this writ of error has been sued out to reverse.

There was an abundance of evidence that the fire was set by a spark which flew from the engine, that the engine set several fires on the day the property of the plaintiff was burned, and that an engine properly constructed and in good repair would not have thrown the sparks and set the fires which this engine did. The case was tried, and the court charged the jury on the theory that it was contributory negligence for the plaintiff to throw the straw and manure upon the right of way of the railroad company, and that, if his property would not have been burned had not this manure and straw been upon the right of way, he could not recover. The crucial issue of fact in the case became whether the fire was set in the pile of manure or in the dry grass and weeds some distance southwest of the stable on the right of way. Counsel for the defendant earnestly and persuasively contend that the court below erred because it did not grant their request to instruct the jury to return a verdict in favor of their client, and because after verdict it did not grant their motion to enter judgment for the defendant notwithstanding the verdict. But the evidence upon the question of fact which conditioned these requests is too conflicting and evenly balanced to warrant its withdrawal from the jury. There is evidence that all the dead grass and weeds upon the right of way had been burned off a few days before this accident, and there is evidence that there were bunches of weeds and grass upon the right of way upon the day of the fire. Several witnesses testify that the fire first caught in the pile of manure and straw by the side of the stable, and several testify as positively that it first caught in the dead grass and weeds upon the right of way southwest of the manure pile. There is substantial evidence upon each side of this issue, so that the court below could not have properly withdrawn the case from the jury on the ground that the evidence conclusively established the fact that the negligence of the plaintiff contributed to the injury.

Another argument of counsel here is that because the plaintiff at the close of the trial withdrew its charge of negligence on account of the condition of the right of way and the court instructed the jury that there could be no recovery against the defendant for negligence in permitting combustible material thereon, there remained no evidence in the case that there was any combustible material upon the right of way, and hence there was no foundation for the finding of the jury that the fire was set elsewhere than in the pile of manure and straw. The fallacy in this argument is that the withdrawal of the claim for a recovery on account of negligence

in caring for the right of way did not withdraw the testimony of witnesses that there were combustible materials upon the right of way which the sparks from the engine set on fire. As there was substantial evidence before the jury that there were weeds and grass upon the right of way when the engine passed through the town, that the fire was set in a few moments after its passage, that it was first seen burning in the combustible material southwest of the stable several feet distant from the pile of manure, whence it passed under the stable and set it on fire, the court properly refused to withdraw the case from the jury notwithstanding the fact that many witnesses contradicted this testimony. Where the substantial evidence upon a material issue of fact is conflicting, the question is for the jury, and not the court.

The court charged the jury that, although they might find that the defendant was guilty of some act of negligence alleged in the petition of plaintiff, and although they might find that defendant was guilty of some of the acts of negligence alleged in the petition of the plaintiff, yet if they believed from all the evidence that the plaintiff was guilty of contributory negligence in placing the pile of manure upon the defendant's right of way, and that the plaintiff's loss would not have occurred had it not been for such pile of manure, then they should find that the plaintiff was guilty of contributory negligence in the case, and that he could not recover. This charge is criticised because the court used the words "some act of negligence" and "some of the acts of negligence" alleged in the petition, when it is insisted it should have declared that, although the defendant was guilty of all the acts of negligence alleged in the petition, yet the plaintiff could not recover if he was guilty of the contributory negligence. The criticism is too refined and technical. The plain meaning of the court in this instruction was that there could be no recovery if the plaintiff was guilty of contributory negligence, whatever might have been the negligence of the defendant, and the jury could not, in our opinion, have understood the instruction in any other sense.

Exception was taken to the refusal of the court to give instructions requested by counsel for the defendant upon the question of contributory negligence. But the rule of law embodied in those instructions was carefully given by the court to the jury, and there was no error in its refusal to repeat them in the words of counsel's requests.

The court refused to instruct the jury that the defendant was under no obligation to remove any manure, hay, or other inflammable material which the plaintiff might have thrown out of his stable upon its right of way. But there was no error in the refusal to give this request, because the plaintiff withdrew his charge of negligence in the care of the right of way, and thus left this instruction without application to the case.

Upon the cross-examination of the plaintiff, after he had testified to the value of his buildings and of his stock of goods, the court refused to permit counsel for the defendant to prove by him the amount of insurance he carried upon his property, on the ground

that this evidence was immaterial. The theory and practice of insurers and insured is to make the limit of insurance much less than the value of the property, while owners are permitted to procure insurance in amounts far below this limit. The result is that the amount of insurance has no fixed or uniform relation to the value of the property it covers, and hence does not directly tend to disclose its value. Many cases may be conceived in which it might be material, in ascertaining the value of property, to disclose the amount of insurance which the owner carried upon it; such as those in which he is charged with fraud, misrepresentation, or deceit, or his good faith in some transaction is questioned. But there was nothing of that nature in this case, and the testimony offered here was too remote and indirect evidence of value to make its refusal reversible error.

It is assigned as error that the plaintiff was permitted to testify to the value of his stock of goods in a lump sum. But when this ruling was made evidence had been introduced that he was the active manager of the business which was conducted with these goods; that he knew their value; that they had been burned; that his last inventory, which had been carefully made, was destroyed by the same fire; and that he could not give the items of which the stock consisted in detail. In this state of the case there was no error in permitting him to state in a single amount his estimate of the value of the goods destroyed.

Another objection to his testimony is that he was permitted to state the value of the land and the buildings before the latter were burned and the value of the land after the buildings were destroyed, for the purpose of enabling the jury to estimate the damages which resulted from their destruction, although he was not shown to have been an expert in the values of real estate. The rule, however, which requires those who testify to the value of real estate to qualify themselves by proof of knowledge of market value derived from sales or purchases, does not apply to the owner of lands and buildings who has purchased and used them himself. His purchase, his ownership, and his use qualify him to give an estimate of their value. The plaintiff had testified that he had participated in the purchase of this property, that he had been engaged in business upon it for many years, that he resided in the village in which it was situated, that there were few sales of real estate in that town, and that he knew the value of the property. Under these circumstances he was qualified to testify to the jury upon this question.

There was no error in the trial of this case, and the judgment below is affirmed.

JORGENSEN v. YOUNG.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1905.)

No. 1,089.

1. BILL OF REVIEW—FILING—TIME.

A bill of review in a court of equity, not filed until more than two years after the judgment in the original suit was entered, and until long after the time for an appeal had expired, was too late.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 1101-1109.]

2. SAME—NEWLY DISCOVERED EVIDENCE.

In a suit to compel cancellation of a mortgage, defendant testified, in resistance of plea of payment, that his brother was not his authorized agent or attorney in fact, and had no power to act for him. After an adverse decree, plaintiff filed a bill of review alleging that such testimony was false, and was surmised by him so to be at the time it was given: that the falsity could be shown by powers of attorney of record, of which he at the time of the trial had no knowledge; and that the court would not have granted an adjournment to have enabled plaintiff to have searched the records, which were not easily accessible to the place of trial, but which had subsequently been found. *Held*, that such records were not newly discovered evidence sufficient to sustain the bill.

3. SAME—MATERIALITY.

In the absence of proof that the debt had in fact been paid, the existence or nonexistence of the powers of attorney was immaterial.

Appeal from the District Court of the United States for the First Division of the District of Alaska.

It appears from the record in this cause that one Burns, while the owner of a lot of land in the town of Juneau, Alaska, mortgaged it to C. W. Young (appellee in this suit), and then sold and conveyed the lot to James P. Jorgenson (appellant here), after which, to wit, on the 26th day of January, 1901, Jorgenson brought a suit in the District Court for the District of Alaska to compel Young to cancel the mortgage, upon the alleged ground that the debt, to secure which the mortgage was given, had been paid. Young filed an answer to that bill, denying the alleged payment, and also filed a cross-bill in the suit, setting up his mortgage, and praying a foreclosure thereof. That suit was tried on the 11th of January, 1902, and resulted in a decree of foreclosure, entered February 1, 1902. In April, 1904, Jorgenson presented to the same court a petition for leave to file therein a bill of review, in which he set up the commencement and ending of the former suit, and further alleged: "That since the time of the pronouncing of the said decree he hath discovered new matter of consequence in this cause, which is material, and which could not by ordinary diligence or prudence have been produced upon the trial of the said cause, and that the same is of such material consequence that, if the same was known to the court by way of evidence and proof upon the trial of the said cause, no decree whatever could have been entered for the defendant, but that the decree would have been favorable to the plaintiff." Based upon that petition, the court below granted Jorgenson leave to file a bill of review, which order was entered April 11, 1904, and on the same day he brought the present bill of review against Young, in which bill he set out, among other things, the bill, answer, and cross-bill in the original suit. The bill in the original suit alleged that on the 19th day of December, 1896, at the town of Juneau, Alaska, Burns executed to C. W. Young his promissory note for the sum of \$1,500, bearing interest at the rate of 1 per cent. per month, and at the same time and place executed to Young a mortgage upon the lot of land above referred to, as security for the payment of the note, which mortgage was duly recorded in the recorder's office of the Juneau District; that thereafter Burns paid the indebtedness, and that Young refused to cancel the mortgage or to acknowledge satisfaction of the debt, and retained the

note and mortgage, and continued to claim an interest in the land by reason thereof. The prayer of the original bill was for a judgment decreeing the debt satisfied and directing the cancellation of the mortgage of record. The answer to that bill denied the payment of the indebtedness, as security for which the mortgage was executed, and by his cross-bill filed in that suit Young set up the same note and mortgage, alleged that the debt had never been paid, prayed a decree foreclosing the mortgage, and also asked for personal judgment against Burns for the said sum of \$1,500, with interest thereon from the 19th day of December, 1896, at the rate of 1 per cent. per month, and for \$500 attorney's fee, and for the cross-complainant's costs and disbursements. The present bill of review alleges that Burns appeared and answered the cross-bill in the original suit, admitted the execution of the note and mortgage mentioned, and alleged, in defense: "That the note and mortgage so given, and each and every sum of money advanced or paid out by the said C. W. Young on account of the said mortgage and note of the said Archibald Burns, have been fully paid, and that the debt evidenced by the said note and mortgage has been paid and fully satisfied." The bill of review alleges that thereupon, and after issue had been joined upon the respective averments, the cause was heard before the court on the 11th day of January, 1902, when a decree was pronounced by the court to the effect that the original complainant take nothing by his suit, and further decreeing "a full, complete foreclosure of the mortgage set up in the defendant's cross-bill, adjudging to be due thereon the sum of \$2,255, finding that no part of the same had been paid by the mortgagor," and decreeing a sale of the mortgaged property. The bill of review then alleges that thereupon: "The plaintiff having been surprised upon the trial by the evidence therein given, and believing that important and material evidence had been suppressed, concealed, and kept from the plaintiff and the court, and that gross fraud and perjury had been committed by the defendant, began an investigation which revealed, and whereby he, the plaintiff, discovered, new evidence sufficient that if the same had been known or could have been known to him or established upon the former trial, such a decree could not have been rendered, and such evidence is abundantly sufficient to defeat any attempt on behalf of the defendant to sustain his claims set up in his cross-bill, which could not have been by ordinary diligence discovered so that the same could have been used upon the former trial. Thereupon, in order that the plaintiff receive the benefit of such newly discovered evidence, he was advised by his counsel that the only course to pursue was by some sort of motion in the court, requiring the defendants to show cause why the said decree should not be vacated and set aside. To that end and purpose, the plaintiff, through his counsel, John G. Heid, caused to be filed in this court a motion requiring the defendants to show cause why the said decree should not be set aside, and thereupon, and in support of the said motion, filed the following affidavit of John G. Heid." The affidavit of Heid is to the effect that he acted as attorney for Burns in the original suit, and that, prior to Jorgenson's purchase of the lot in question, one Frank W. Young, brother of C. W. Young, repeatedly stated to affiant that the mortgage debt in question had been paid, and repeatedly promised the affiant to satisfy the mortgage upon the record, and that he, Heid, so testified on the trial of the former suit, and that Jorgenson himself also testified on that trial that Frank W. Young had on several occasions made the same statement to him, Jorgenson, before his purchase of the lot. The affidavit of Heid also states that the original decree was occasioned by the willful fraud of C. W. Young, consisting, according to the statements of the affidavit, in this: that on the trial of the original suit C. W. Young testified in his own behalf that his brother, Frank, had no authority to collect or satisfy the mortgage debt in question, and that he was not, and had not been, his agent in making the statements in respect to the payment and satisfaction of the mortgage debt, whereas C. W. Young then well knew that his brother, Frank, had full charge of his business, and well knew that the mortgage debt had been paid and satisfied, and that his testimony was false; that C. W. Young then well knew that on January 2, 1895, he had given to his brother, Frank, a special written power of attorney authorizing him to satisfy any and all mortgages owned by the said C. W. Young, and that on the 15th day of May, 1895, he had

given his brother, Frank, a general power of attorney in writing, both of which powers were of record in the office of the recorder of the district; that the testimony of C. W. Young, given on the trial of the original suit, was willfully false, and was given for the fraudulent purpose of misleading the court, and obtaining a judgment in his favor and against Jorgenson. The bill of review is silent in respect to what, if any, disposition was made of the motion in the original suit to set aside the decree based upon the affidavit of Heid. The bill of review further alleges that the mercantile establishment and business of C. W. Young is situate not more than 100 feet from the business house of the complainant, and has been so situate for more than six years; that the complainant, both by observation and from direct communication with C. W. and Frank W. Young, recognized Frank as the representative and attorney in fact of C. W. Young; and that, "so believing and relying upon that fact, the plaintiff herein, upon the trial of the former suit, was surprised and disappointed when the said defendant testified that the said Frank W. Young was not his authorized agent or attorney in fact, and had no power to act for him." The bill of review further alleges that it was due to such observation and information on the part of the complainant that, at the time and prior to his purchasing the lot in question, he asked Frank W. Young in respect to the mortgage, who then and at other previous times told him that the debt had been paid, and promised him to satisfy the mortgage of record, upon which representations the complainant acted in making the purchase. The bill of review also alleges that the two powers of attorney from C. W. Young to Frank W. Young were of record at the time of the testimony of C. W. Young in the former suit, and then avers: "That the testimony so given by the said Charles W. Young was a surprise to the plaintiff herein, and was given on the trial, and the plaintiff had no opportunity to rebut the same, nor could he, under the circumstances, by the exercise of ordinary diligence, have secured such rebuttal testimony; that the records so kept in the District of Alaska by the said recorder are not kept in or near the courthouse where the said cause was being tried, and in order to investigate as to the truth of the said appointment of the said Frank W. Young it would have required an adjournment of the court, which the court would not have granted under the mere surmise of the counsel that such record did exist, but immediately after the passing of the said decree, and owing to the suspicions of this plaintiff as aforesaid, inquiry revealed the fact that the said power of attorney was of record, as the same is here exhibited in the affidavit of John G. Heid set forth in this bill; that therefore, and by reason of the facts as aforesaid, your orator doth charge that gross fraud and deceit were practiced upon him; that perjury was committed, and, without such fraud and perjury having been committed, the decree of this court could not and would not have been made as aforesaid, but that the truth in relation to such facts, had the same been known, as it could have been presented, would have prevented any decree in favor of the defendant, Charles W. Young, and would have warranted and authorized a decree in favor of the plaintiff." It is further averred in the bill of review that the mortgage debt was in fact paid, and that such fact is shown by the books of C. W. Young. A demurrer to the bill of review, based upon the grounds of the insufficiency of the bill, and the absence of Burns as a party thereto, was sustained by the court below, and, the complainant declining to amend, judgment was entered dismissing the bill, from which the present appeal is taken.

J. A. Hellenthal and L. S. B. Sawyer, for appellant.

R. W. Jennings, Warren Gregory, and W. H. Chickering, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge, after stating the case as above, delivered the opinion of the court.

We are of the opinion that the judgment of the court below was right, for several reasons. The judgment in the original suit was entered

February 1, 1902; the bill of review was not filed until April 11, 1904—long after the time for an appeal from that judgment had elapsed. The rule is well settled in courts of equity of the United States that a bill of review must ordinarily be filed within the time limited by statute for taking an appeal from the decree sought to be reviewed, where the review sought is not founded on matters discovered since the decree. *Thomas v. Brockenbrough*, 10 Wheat. 146, 6 L. Ed. 287; *Whiting v. Bank*, 13 Pet. 6, 10 L. Ed. 33; *Kennedy v. Bank*, 8 How. 586, 12 L. Ed. 1209; *Clark v. Killian*, 103 U. S. 766, 26 L. Ed. 607; *Blythe Co. v. Hinckley*, 111 Fed. 827, 49 C. C. A. 647. This bill is not founded on matters discovered since the original decree, for it shows upon its face that the complainant "surmised," when the alleged false testimony was given, that it was not true. It shows, moreover, that the facts which the complainant contends show it to have been false were, in part, matters of public record, of which the complainant had at least constructive notice, and of which he might have had actual notice by going to the recorder's office of the district. "The newly discovered evidence which may form the basis of such a review must be not only evidence which was not known, but also such as could not with reasonable diligence have been found, before the decree was made." *Hill v. Phelps*, 101 Fed. 650, 652, 41 C. C. A. 569, and cases there cited. The language of the Supreme Court in denying a petition to file a bill of review, in the case of *Dumont v. Des Moines Valley Railroad Co.*, 131 U. S. cix, 25 L. Ed. 520, is also pertinent. The court there said:

"This application is denied. The petitioners have not shown such diligence as will entitle them to reopen a litigation that has been carried on with so much pertinacity for a great number of years. The new matter relied upon consists principally of record evidence drawn from the archives of the government, which might as easily have been found at the time the controversy arose as now. The treaty was a part of the law of the land, and the maps and official reports have been on file in the proper government office, where they were discovered, for a quarter of a century. We are all of the opinion that, if a bill of review should be filed containing all the averments that are in the present petition, it ought not to be sustained. Clearly, then, leave ought not to be granted for a continuance of the litigation."

See, also, *United States v. Beebe*, 180 U. S. 343, 21 Sup. Ct. 371, 45 L. Ed. 563; *Bailey v. Willeford* (C. C.) 126 Fed. 807; *Atkinson v. Connor*, 56 Me. 546; *Brooks v. Belfast Co.*, 72 Me. 365.

Not only does the present bill show upon its face that the complainant suspected, while the alleged false testimony was being given, that it could be so shown by written power of attorney, but the only excuse given for not examining the records to see is that such records were not kept in or near the courthouse where the case was being tried, and that an investigation as to the truth of the testimony would have required "an adjournment of the court, which the court would not have granted under the mere surmise of the counsel that such record did exist." Such an excuse is hardly worthy of serious consideration. Besides, if the debt was not in fact paid, the existence or nonexistence of the power of attorney is immaterial. The real and only issue between the parties at the trial was whether or not the debt had been paid. Even if F. W. Young had been a witness upon that trial, and had testified upon that issue in favor of the complainant, the case made would only be one in

which his testimony was in contradiction of that given by C. W. Young, and would, as a matter of course, constitute no ground for a bill of review. It is but fair, too, to say that it is possible that the written powers of attorney from C. W. to F. W. Young, which appear to have been executed several years prior to the time of the trial of the former action, may have been revoked, and that C. W. Young's testimony on that trial may not, as a matter of fact, have been false. To all of which may be added that it does not appear what, if any, disposition was made of the motion made by the complainant in the former suit to vacate the decree now complained of, based upon the same grounds.

The judgment is affirmed.

BAILEY v. WILLEFORD.

(Circuit Court of Appeals, Fourth Circuit. February 21, 1905.)

No. 534.

FEDERAL COURTS—ENJOINING ENFORCEMENT OF STATE JUDGMENT—COMITY.

The defendant in an action at law in a state court, who was a nonresident of the state and might have removed the cause, went to trial in the state court instead, and, after an adverse verdict and the overruling of his motion for a new trial, appealed to the Supreme Court of the state, which affirmed the judgment. Thereafter he instituted a suit in equity in the same court to set aside the judgment and enjoin its enforcement, on the ground that it was procured by fraud and perjury. This suit was heard on motion for a preliminary injunction, which was denied. *Held*, that a federal court was justified in refusing to interfere by injunction to restrain collection of the judgment on practically the same ground that had been passed on by the state court, the application being supported by the same affidavits, with no additional evidence except such as was merely cumulative.

[Ed. Note.—Federal courts enjoining proceedings in state courts, see notes to *Garner v. Bank*, 16 C. C. A. 90; *Trust Co. v. Grantham*, 27 C. C. A. 575; *Copeland v. Bruning*, 63 C. C. A. 437.

Conclusiveness of judgments between state and federal courts, see notes to *Railroad Co. v. Morgan*, 21 C. C. A. 478; *Bank v. Memphis*, 49 C. C. A. 468.]

Goff, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Western District of North Carolina.

For opinion below, see 126 Fed. 803. See, also, 131 Fed. 242.

Thomas J. Jerome and T. P. Cothran, for appellant.

Robert B. Redwine and A. M. Stack, for appellee.

Before GOFF, Circuit Judge, and MORRIS and PURNELL, District Judges.

MORRIS, District Judge. This is a bill of complaint, filed October 2, 1903, in the United States Circuit Court for the Western District of North Carolina, in equity, by P. S. Bailey, a citizen of South Carolina, against Thomas F. Willeford, a citizen of North Carolina. The object of the bill was to obtain an injunction perpetually restraining the defendant, Willeford, from enforcing a judgment for \$5,000, which

he had obtained against the complainant in the superior court of Union county, N. C., at the October term of said court, 1902, and for a decree declaring the judgment null and void because obtained by collusion, fraud, conspiracy, and perjury. The cause of action upon which the judgment for \$5,000 was recovered was the injury done by Bailey, the defendant in that action, to the plaintiff, by the defendant enticing the plaintiff's 17 year old daughter to leave her father's home and service in Union county, N. C., and go to South Carolina, where, as alleged, the defendant harbored, seduced, and debauched her. Bailey, the defendant, denied all the allegations of the complaint, and a great deal of testimony was adduced on both sides. The jury found a verdict for the plaintiff for \$5,000 on October 13, 1902. The record then contains the following:

"October, 1902, Thos. F. Willeford vs. P. S. Bailey. Motion of defendant to set aside verdict. Motion overruled. Judgment for plaintiff. Defendant excepts, and appeals to Supreme Court. Notice of appeal given in open court; notice waived. Sixty days allowed defendant to serve appeal; sixty days thereafter to serve counterclaim. Bond fixed in sum of \$50. Bond to stay execution in sum of \$6,000."

Appeal was entered, and the bond prescribed by the court to stay execution was given, and the case was taken to the Supreme Court of North Carolina, and that court, April 21, 1903, affirmed the judgment. On May 9, 1903, Bailey instituted an action in the superior court of Union county, N. C., in equity, to set aside the judgment upon the ground of newly discovered evidence showing that Willeford had obtained the judgment by fraud in procuring his daughter to commit perjury at the trial. Great numbers of affidavits were filed in that action on behalf of Bailey, and a great number of counter affidavits on behalf of Willeford, and of some of the affiants it may be said that in some affidavits they swore favorably to one side, and in other contradictory affidavits they swore favorably to the other side. The case on the motion for an injunction was most fully and carefully prepared for presentation to the court, and was heard August 8, 1903, nearly a year after rendition of the verdict, and on April 20, 1903, the superior court of Union county entered an order refusing to set aside the verdict or to enjoin execution on the judgment. Thereupon Bailey gave notice of an appeal. But the appeal was abandoned, and Bailey filed in the case, October 8, 1903, a paper stating he took a non pros. Meanwhile, on October 2, 1903, he had instituted this suit in equity in the United States Circuit Court. The allegations and the affidavits relied upon in this case to show the perjury of Willeford and his daughter are in substance the same affidavits which were relied upon in the case instituted to impeach the verdict in the superior court of Union county, and have reference to the same occurrences detailed in the former affidavits and in the testimony adduced on both sides in the original jury trial. The affidavits filed in this proceeding, which were not filed in the proceeding in the state court, are but cumulative in their character. The charges of fraud made in this proceeding are substantially the same made in the proceeding to vacate the judgment instituted, heard, and decided in the state court, and are supported substantially by the same evidence, with

some additional affidavits of a cumulative character to support the same charges of perjury and fraud. The facts stated in the affidavits are in every way discreditable to the principal parties concerned, and ill savored, and it seems not necessary to rehearse them here, as they are sufficiently set forth by Judge Simonton in his opinion in the Circuit Court, reported in 126 Fed. 803.

If the proceeding in equity in the state court to impeach the judgment was a binding adjudication against Bailey, then there could be no question but that he would be debarred from raising the same question again in any other court. It is urged, however, very strenuously in his behalf that the hearing in that case was only upon the question of granting a preliminary injunction, and, when that was refused, Bailey dismissed the suit, so that it was not a final hearing and does not conclude him as *res judicata*. But what was heard and decided was the very same matter which was brought to a hearing in the Circuit Court, and upon substantially the same allegations and affidavits, invoking precisely the same remedy as is prayed for in this case. The question whether the testimony given by Willeford's daughter was truthful or perjured was the vital issue in the jury trial and in the motions for a new trial, and in the proceedings in the state court to impeach the judgment. Under these circumstances, it is obvious that the judge of the Circuit Court was called upon to be most guarded in his scrutiny of the application made to him for an injunction. It may be that the matter was not in a strict sense *res judicata*, but it had been fully heard in the state court upon the same affidavits, and decided against Bailey. The defendant produced at the jury trial as witnesses two white men, who testified positively to Willeford's daughter's misconduct with each of them prior to the time when she was alleged to have gone to South Carolina at Bailey's instance, and also the testimony of several colored witnesses, who gave testimony tending to corroborate these statements, so that the question of the daughter's character and credibility was a distinct and vital issue at the jury trial. In the proceedings in the state court to impeach the judgment, Bailey produced the affidavit of Willeford's daughter to the effect that she had sworn falsely in her testimony before the jury, and Willeford produced her subsequent affidavit that she had made the affidavit produced by Bailey by his persuasion, and while away from her home and under his dominating control in South Carolina, and that it was not true, and that on a second trial she would testify as she had testified on the first trial. It seems obvious that there was no conclusive and incontrovertible proof of fraud or perjury presented to the Circuit Judge, and that the very issue of fraud and perjury had been presented to and passed upon by the jury. *U. S. v. Throckmorton*, 98 U. S. 61-66, 25 L. Ed. 93.

In the jury trial it had been determined by the denial of a motion for a new trial that the jury had not mistaken the facts, on the appeal to the Supreme Court of North Carolina it had been determined that the trial court had made no mistake in the law, and by the action of the state court in the proceeding to impeach the judgment upon newly obtained testimony since the trial it had been ruled that the newly obtained affidavits did not entitle Bailey to relief by injunction. It is plain, therefore, that Bailey was seeking in the federal court to obtain an injunction

on a preliminary hearing because of matters which had been already heard and decided against him in the state court—the tribunal to which he had submitted his rights—and this in the face of the fact that Bailey could at the first have removed the case, because of diversity of citizenship, from the trial court to the federal court, or, if he afterwards desired the federal court to consider the effect of his newly obtained evidence, could have filed his bill in equity in the federal court. It is further to be borne in mind that this is not a proceeding looking to a new trial, which the federal court could not direct, but to an absolute annulment of the judgment and of the cause of action. We think that under all the circumstances it cannot be said that the Circuit Judge was wrong in holding that before he granted an injunction the case must be a strong one, and the newly discovered evidence not merely cumulative and corroborative, and that to charge conspiracy was merely to give a name to the same transactions which had been examined into in the trial court. As was said in *Crim v. Handley*, 94 U. S. 652-658, 24 L. Ed. 216:

"Frequent applications to enjoin judgments were made in equity before the practice of awarding new trials in courts of law. Until the practice of granting new trials in courts of law was introduced, every reason existed why equitable relief should be afforded; but as the courts of law now exercise that power very liberally, especially in case of fraud or unavoidable accident, a resort to equity is seldom necessary or successful."

The Circuit Judge held that the complainant, Bailey, had not made out a case for interference by the Circuit Court, and refused the motion for an injunction, and his action is affirmed.

GOFF, Circuit Judge, dissents from the opinion and judgment in this case.

A. KLIPSTEIN & CO. v. ALLEN-MILES CO. et al.

(Circuit Court of Appeals, Fifth Circuit. January 11, 1905.)

No. 1,359.

1. BANKRUPTCY—PROVABLE DEBTS—RELEASE.

Where the debt for which plaintiff sued was provable in bankruptcy, and defendant was insolvent at the time suit was brought, and had since been insolvent, its discharge in bankruptcy pending such suit released it from liability, as provided by Bankr. Act July 1, 1898, c. 541, § 63, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447].

2. SAME—GARNISHMENT.

Where the debt sued on in garnishment proceedings was discharged pending suit by proceedings in bankruptcy against the debtor, the plaintiff could not have judgment thereon against the debtor.

3. SAME—BANKRUPT ACT—CONSTRUCTION.

Bankr. Act July 1, 1898, c. 541, § 16, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], providing that the liability of a person who is in any manner a surety for a bankrupt shall not be altered by a discharge of the bankrupt, refers only to co-debtors, guarantors, or sureties for the bankrupt on the original debt from which release is given by the discharge, and does not apply to the liability of a bankrupt's surety on a bond given to discharge a garnishment in a suit against the bankrupt

on a provable debt, pending at the time bankrupt proceedings were instituted.

4. SAME.

Civ. Code Ga. 1895, § 4719, provides that if the court shall decide that the fund in the hands of a garnishee was subject to garnishment had the garnishment not been dissolved the court shall then render judgment against the defendant and his securities. *Held*, that the phrase "subject to garnishment," as so used, referred to such fund as might be brought in subjection to garnishment, and hence applied only to demands resting in contract, which the defendant could enforce in an action at law.

5. SAME—JUDGMENT AGAINST DEBTOR—SURETIES.

Under Civ. Code Ga. 1895, § 4726, providing that plaintiff shall not have judgment against a garnishee until he has obtained judgment against the defendant, no judgment will be rendered against a defendant who had been discharged from the debt sued on in bankruptcy proceedings pending the garnishment, for the purpose of charging his sureties on a bond given to discharge the garnishment, conditioned for the payment of the judgment that should be rendered in the garnishment proceedings.

In Error to the Circuit Court of the United States for the Northern District of Georgia.

On the 10th day of December, 1902, the plaintiff brought suit against the Allen-Miles Company on complaint and summons, and on the 26th day of February, 1903, sued out a writ of garnishment, which was directed to and served on the Fourth National Bank of Atlanta, Ga., as the debtor of the said defendant. On said 26th day of February, 1903, the defendant gave bond under the provisions of the garnishment law of Georgia, with the Fidelity & Deposit Company of Maryland as security, by the terms of which it was provided that should the said defendant, or said Fidelity & Deposit Company, security, pay to the said plaintiff "the judgment that shall be rendered on said garnishment proceedings, then the bond to be void; otherwise of full force and effect." On the 28th day of May, 1903, the garnishee answered an indebtedness to the Allen-Miles Company of \$53,579.98. Subsequently, on the 26th day of June, 1903, a petition in involuntary bankruptcy was filed against the said defendant, and on the 13th day of July, 1903, it was adjudged an involuntary bankrupt, and within 12 months thereafter was discharged as a bankrupt, as provided by the bankrupt act. This discharge was, among other things, pleaded in bar to this suit. It was agreed in writing by the parties that the account sued on in the case was a claim that was provable in bankruptcy; that at the time the garnishment was sued out and served on the garnishee the defendant Allen-Miles Company was then, and has since that date been, insolvent. It was also understood and agreed that no verdict and judgment in the case was to be rendered against the Allen-Miles Company, unless under the law and the evidence a verdict and judgment could be rendered against said company after a final discharge in bankruptcy, the truth of which was fully admitted on the trial of the case. The court directed a verdict in favor of the defendant the Allen-Miles Company, and refused to enter judgment against the Fidelity & Deposit Company, as surety aforesaid, to which action of the court the plaintiff excepted, and now assigns the same as error.

The following is the opinion of the court below:

PER CURIAM. The question for determination now, without reference to the other questions in the case, will, if determined in favor of the plaintiff, necessarily control the case. That question is this: It is admitted as a fact in the case that the Allen-Miles Company has been discharged in bankruptcy, and that within four months prior to the institution of the bankruptcy proceedings against the Allen-Miles Company garnishment proceedings were taken out and garnishment served on the Fourth National Bank, which garnishment was dissolved by a bond signed as surety by the Fidelity & Deposit Company of Maryland. The verdict and judgment asked for here against the Allen-Miles Company is to be formally entered for the purpose of taking

judgment finally on the bond given to dissolve the garnishment. I think the case is controlled very largely by the peculiar statute of Georgia with reference to garnishments and the dissolution of the same, contained in Civ. Code 1895, §§ 4717-4719. The case of *Garden v. Crutchfield*, 112 Ga. 274, 37 S. E. 368, clearly states the rule which is to be observed in taking judgment in the case of a bond given to dissolve garnishment. In the opinion in that case the court discusses the law prior to the act of 1885, and mentions the fact that under the old law the filing of a bond relieved the garnishee from all liability with regard to service of summons and the garnishee's right to pay over the money, or turn over the property in his hands to the defendant, no answer being required of the garnishee, and as to the further state of the old law that the dissolving bond made the principal and sureties liable for whatever judgment might be recovered in the suit, without regard to the amount of money or property in the hands of the garnishee. The court then states that the purpose of the act of 1885 was to limit the liability of the defendant and sureties on the dissolving bond to an amount which would represent the money or property in the hands of the garnishee. The court then proceeds, as pertinent to the present question, and says: "The bond under the present law is conditioned for the payment of the judgment that shall be rendered on said garnishment; and it has been held that a judgment of the garnishee is a condition precedent to a judgment on the bond given to dissolve the garnishment" (citing *Linder v. Benson*, 78 Ga. 116; *Whitehead v. Patterson*, 88 Ga. 748, 16 S. E. 66; *Small v. Mendel*, 96 Ga. 532, 23 S. E. 834). "The statute makes it the duty of the garnishee to file his answer notwithstanding the garnishment has been dissolved, and the amount of the judgment upon the bond given to dissolve the garnishment is dependent upon the judgment rendered on the garnishment proceeding. When the garnishee files his answer, it becomes the duty of the court to determine whether the fund or property which the answer shows was in the hands of the garnishee at the date of the service, or which came into his hands between the date of the service and the date of his answer, would have been subject to the garnishment if it had not been dissolved; and, if so, the court should enter a judgment to that effect, stating in the judgment the amount that the garnishee would have been held liable for in the event the garnishment had not been dissolved. Upon the rendition of a judgment of this character, the court has authority to enter a judgment against the defendant and the sureties on the bond given to dissolve the garnishment." This clearly shows, therefore, that, where a bond has been given to dissolve a garnishment in Georgia since 1885, three judgments in effect are necessary to reach the sureties on the dissolving bond. There must first be a judgment in the main suit against the defendant; then there must be a judgment finding that the garnishee had in his hands at the time the garnishment was served, or between that time and the date of the answer, funds or effects belonging to the defendant, and the amount thereof; then a judgment against the defendant and the sureties on the bond given to dissolve the garnishment.

The condition of the bond dissolving the garnishment here is that the surety shall pay "the judgment that shall be rendered on said garnishment proceeding." By the bankrupt act of 1898 (Act July 1, 1898, c. 541, § 67f, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3450]) it is perfectly clear that, if no bond had been given, this garnishment proceeding and the lien obtained thereby, being within four months of the institution of the bankruptcy proceedings, would have been dissolved. So much is admitted by counsel for the plaintiff in this case. The contention is that the giving of the bond to dissolve the garnishment in effect ended the garnishment proceedings, substituted the bond therefor, and the surety on the dissolving bond became simply a surety for the Allen-Miles Company, and liable as a surety under section 16 of the bankruptcy act (30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]). This is an interesting question, and one not entirely free from difficulty. In my judgment, however, the fact that under the statutes of Georgia it is necessary to have a judgment fixing the liability of the garnishee is controlling against the plaintiff. In order to get a judgment finding the fund in the hands of the garnishee subject to the garnishment, it seems to me that the garnishment proceeding must be treated as a live and existing proceeding, and that it certainly is not, under section 67f of the bankruptcy act. If, as was true under the old law in

Georgia, a bond had been given for whatever judgment might have been recovered in the main suit, and all that was necessary to do after such judgment in the main suit was obtained was to enter up judgment against the principal and sureties on the bond, even then an interesting question would be presented as to whether, under the practice in Georgia, a formal judgment in case of discharge in bankruptcy could be entered against the principal defendant solely for the purpose of obtaining a judgment on the bond dissolving the garnishment. But the difficulties under the present garnishment law would not then exist, and the only question would be as to the right to take a mere formal judgment in Georgia for the purpose of reaching the surety.

The fact that, notwithstanding the giving of the bond to dissolve the garnishment, the garnishee is required to answer for the purpose of fixing the amount of liability on the bond, shows that the garnishment proceeding is still alive, and is not superseded by the giving of the bond in a sense which, it seems to me, would be necessary in order to prevent section 67f of the bankruptcy act from operating on the proceeding, and make the situation such that it would be controlled by section 16 of the bankruptcy act. I think, in view of this peculiar statute, it would be impossible for the plaintiff to obtain a judgment on the bond and against the surety on the bond, because of the necessity of going through the intermediate proceedings against the garnishee, without reference to the question of whether it could be done, even if this intermediate proceeding was not in the way, and fatal to the plaintiff's contention. If no judgment could be obtained on the bond, then the court would not allow a mere formal verdict and judgment here (supposing that the jury should agree that the plaintiff was entitled to recover), where it would have no effect afterward. The purpose of the verdict and judgment sought to be obtained now is a basis for a judgment against the surety on the dissolving bond by virtue of the garnishment proceeding, and, that having fallen by the provisions of the bankruptcy act, in my opinion no such verdict and judgment could be entered here.

I think that the two cases cited by counsel for the defendant, one decided by the Supreme Court of Michigan (*Bryant v. Kinyon*, 86 N. W. 531, 53 L. R. A. 801), and the Mississippi case of *Goyer Co. v. Jones*, 30 South. 651, are very strong authorities in favor of the defendant's contention, even if the law in Georgia had been as it was before the act of 1885, with reference to garnishment. This is my view of the matter, gentlemen. I will have this filed, so that there may be no question about what the ruling is.

Shepard Bryan and H. A. Alexander, for plaintiff in error.

Rosser & Brandon, for defendants in error.

Before SHELBY, Circuit Judge, and TOULMIN, District Judge.

TOULMIN, District Judge. The main question presented for our consideration is whether the plaintiff was entitled to a judgment against the defendant the Allen-Miles Company, without which he could not have judgment against the garnishee and obtain judgment against the Fidelity & Deposit Company, security, on the dissolving bond in the garnishment proceeding. The condition of the bond is for the payment of the judgment that shall be rendered on said garnishment proceedings. Therefore a judgment against the garnishee is a condition precedent to a judgment on the bond to dissolve the garnishment. "The plaintiff in garnishment is not entitled to enter a judgment upon the bond given by the defendant to dissolve the garnishment until the plaintiff shall obtain the judgment of the court where said garnishment is pending against the property or funds against which garnishment was issued." *Whitehead v. Patterson*, 88 Ga. 748, 16 S. E. 66. Section 4726 of the Georgia Code (Civ. Code 1895) provides that "the plaintiff shall not

have judgment against the garnishee until he has obtained judgment against the defendant." The debt for which the plaintiff sues was a provable one in bankruptcy. The defendant Allen-Miles Company was insolvent at the time the suit was brought, and has since been insolvent. Its discharge in bankruptcy released it from all provable debts. Bankr. Act July 1, 1898, c. 541, § 63, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447]. The debt sued on having been discharged, and the remedy to enforce its payment destroyed, by the proceedings in bankruptcy, the plaintiff cannot have judgment on it against the defendant. *Mutual Reserve Fund Life Ass'n v. Beatty*, 2 Am. Bankr. Rep. 259, 93 Fed. 747, 35 C. C. A. 573; *Collier on Bankruptcy* (4th Ed.) 176; *Goyer v. Jones* (Miss.) 8 Am. Bankr. Rep. 437, 30 South. 651; *Brandenburg on Bankruptcy*, § 415. "The cases are numerous in which it has been held—and, we think, correctly—that, if one is bound as surety for another to pay any judgment that may be rendered in a specified action, if the judgment is defeated by the bankruptcy of the person for whom the obligation is assumed, the surety will be released. The obvious reason is that the event has not happened on which the liability of the surety was made to depend. Of this class of obligations are the ordinary bonds in attachment suits to dissolve an attachment, appeal bonds, and the like." *Wolf v. Stix*, 99 U. S. 8, 25 L. Ed. 309.

There are three judgments necessary to fix the liability of the security on the dissolving bond: (1) Judgment against the defendant; (2) judgment against the garnishee, which decides that the fund in his hands is subject to garnishment; and (3) judgment against the security. The question is not whether the discharge of the defendant released the liability of the surety, but whether the discharge prevented the happening of the contingency upon which the liability of the surety was to arise. If no judgment can be rendered against the defendant because of the discharge in bankruptcy, then no liability exists on the part of the surety. "The discharge of the bankrupt prevents the surety from incurring liability, rather than releases him." *Odell v. Wootten*, 4 N. B. R. 183, s. c., 38 Ga. 225. The contention of the plaintiff in error is that the discharge in bankruptcy of the principal debtor, the Allen-Miles Company, does not affect the liability of his surety, the Fidelity & Deposit Company, and that the lower court should have entered a special or qualified judgment against the Allen-Miles Company in order to charge the surety. To sustain this contention he invokes section 16, Bankr. Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], which provides that "the liability of a person who is a co-debtor with, a guarantor, or in any manner a surety for a bankrupt, shall not be altered by a discharge of the bankrupt." The liability of the surety on the dissolving garnishment bond is not altered by the discharge of the bankrupt defendant, but the discharge prevents the happening of the contingency on which that liability depends. As said by the court in the case of *Odell v. Wootten*, supra, "The discharge prevents the surety from incurring the liability." Besides this, the garnishment proceedings being had within four months prior to the bankruptcy proceedings, the surety is relieved not because of the discharge of the debtor, but because his bankruptcy avoided the lien acquired by the garnishment and

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destroyed the remedy by which a judgment could be recovered against the defendant, which is indispensable to make the lien of any avail to the plaintiff. Moreover, we think that section 16 of the bankrupt act manifestly refers to co-debtors, guarantors, or sureties for the bankrupt on the same or original debt—the debt on which the release is given by the discharge. *Brandenburg on Bankruptcy*, § 412; *In re De Long*, 1 Am. Bankr. Rep. 66; *Abendroth v. Van Dolsen*, 131 U. S. 66, 9 Sup. Ct. 619, 33 L. Ed. 57.

No statute of Georgia, or practice in that state, authorizing the entry of a special or qualified judgment, has been brought to our attention, and we understand the counsel for the plaintiff in error to concede there is none. He, however, calls special attention to the case of *Hill v. Harding*, 130 U. S. 699, 9 Sup. Ct. 725, 32 L. Ed. 1083, as authority to the proposition that special judgments are, under some circumstances, rendered against a bankrupt defendant in order to charge his sureties. There are cases which, under certain circumstances, authorize such judgments, but our opinion is they have no application to the case at bar. In *Re Marshall Paper Co.*, 4 Am. Bankr. Rep. 468, 102 Fed. 872, 43 C. C. A. 38; *Id.* (D. C.) 95 Fed. 419—it was held that the fact that a bankrupt corporation is granted a discharge does not free the directors or stockholders from their individual statutory liability for its debts and contracts. Indeed, the express provision of the bankrupt act forbids that the secondary liability of the officers, stockholders, or directors of a corporation under a state statute should be affected by a corporation's discharge in bankruptcy. Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]; *In re Marshall Paper Co.*, *supra*. In *Hill v. Harding*, 130 U. S. 699, 9 Sup. Ct. 725, 32 L. Ed. 1083, the court held:

"If an attachment of property in an action in a state court is dissolved by the defendant's entering into a recognizance, with sureties, to pay, within 90 days after any final judgment against him, the amount of that judgment, and the defendant, after verdict against him, obtains his discharge in bankruptcy upon proceedings commenced more than four months after the attachment, the bankrupt act does not prevent the state court from rendering judgment against him on the verdict, with a perpetual stay of execution, so as to leave the plaintiff at liberty to proceed against the sureties." "Such attachment being recognized as valid by the bankrupt act [Rev. St. § 5044], a discharge in bankruptcy does not prevent the attaching creditors from taking judgment against the debtor in such limited form as may enable them to reap the benefit of their attachment. When the attachment remains in force, the creditors, notwithstanding the discharge, may have judgment against the bankrupt, to be levied only upon the property attached. *Peck v. Jenness*, 7 How. 612, 623, 12 L. Ed. 841; *Doe v. Childress*, 21 Wall. 642, 22 L. Ed. 549. When the attachment has been dissolved, in accordance with the statutes of the state, by the defendant's entering into a bond or recognizance, with sureties, conditioned to pay to the plaintiffs, within a certain number of days after any judgment rendered against him on a final trial, the amount of that judgment, the question of whether the state court is powerless to render even a formal judgment against him for the single purpose of charging such sureties * * * depends upon the extent of the authority of the state court under the local law."

It will be observed that in the last case cited the attachment was levied and a verdict rendered against the defendant more than four

months before the bankruptcy proceedings were commenced, and, the attachment being recognized as valid by the bankrupt law, it was held that a discharge in bankruptcy of the defendant did not prevent a limited judgment being subsequently had against him in favor of the plaintiff, to enable him to reap the benefit of his attachment if the local law of the state in which the action was brought authorized such formal judgment. The facts in the case at bar clearly distinguish it from the cases cited. Section 4719 of the Georgia Code (Civ. Code 1895) provides that, in the event the court shall decide that the fund in the hands of the garnishee was subject to garnishment had the garnishment not been dissolved, then the court shall render judgment against the defendant and his securities. The counsel for plaintiff in error, in his brief, concedes that if the phrase "subject to garnishment," used in the statute, means "in subjection to garnishment," then the court below was right in deciding against the plaintiff. Our opinion is that the phrase "subject to garnishment" means or refers to the class of fund or property which can be reached by garnishment; that the fund "subject to garnishment" means such fund as may be brought under the operation of or "in subjection" to garnishment. Only such demands as lie in contract, and which the defendant can enforce in an action at law, can be reached by garnishment. *Jones' Adm'r v. Crews*, 64 Ala. 368; *Craft v. Summersell*, 93 Ala. 430, 9 South. 593. The condition of the bond dissolving the garnishment is for the payment of the judgment that shall be rendered on the garnishment proceedings. This must be taken to mean for the payment of such a judgment as could have been rendered against the garnishee if the bond had not been given. *Guilford v. Reeves*, 103 Ala. 301, 15 South. 661; *Collins v. Baldwin*, 109 Ala. 402, 19 South. 862. No judgment could have been rendered against the garnishee on the garnishment proceedings if the bond had not been given, because such proceedings were invalidated by the adjudication in bankruptcy. In *re McCartney* (D. C.) 109 Fed. 621.

The judgment of the Circuit Court is affirmed.

THE WESTPORT.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1905.)

No. 1,115.

SHIPPING—INJURIES TO SEAMEN—NEGLIGENCE OF MASTER—FELLOW SERVANTS.

Libelant was injured by the breaking of the capstan of a vessel while it was being used to heave the vessel carrying a deck load of lumber alongside a wharf at low tide. The master superintended the navigation of the vessel from the bridge, and libelant alleged that the negligence consisted in the master giving orders to take additional turns of a hawser around the capstan, instead of requiring the hawser to be removed to the bitts of the vessel provided for such maneuvers. *Held*, that the negligence of the captain in giving such orders, if any, was in the ordinary navigation of the vessel, in which he was libelant's fellow servant.

[Ed. Note.—Who are fellow servants, see notes to *Northern Pac. R. Co. v. Smith*, 8 C. C. A. 668; *Flippin v. Kimball*, 31 C. C. A. 286.]

Appeal from the District Court of the United States for the Northern District of California.

For opinion below, see 131 Fed. 815.

Goodfellow & Eells and C. H. Wilson, for appellants.

F. R. Wall, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This was a libel in rem against the American steamer Westport to recover damages for serious personal injuries sustained by the libelant upon the breaking and carrying away of the capstan of the steamer while he was serving as a seaman on board of her. The libel alleges that while the Westport was being warped alongside of the wharf at San Pedro, Los Angeles county, Cal., her master gave the libelant orders to take additional turns of the hawser around the capstan, and that libelant took two such additional turns as ordered, and that as he was about to leave the capstan it broke and carried away, "because said capstan was unsafe, unsound, insufficient, and unfit for the purpose for which at said time it was being used; that the master and owners of said vessel had knowledge of the unsafe, unsound, insufficient, and unfit condition of said capstan, and that this libelant had no such knowledge"; that by the breaking and carrying away of the capstan the libelant was very seriously injured, in particulars specified in the libel. The libel further alleges that the libelant was, "through the negligence of the master and of the officers of said steamer, placed in a dangerous position, and was, in the manner already described, seriously crippled and maimed." It is further alleged therein that all of the injuries received by the libelant were received without any fault or negligence on his part, and that they were caused wholly by the negligence of the owners and master of the vessel. The claimants filed their claim, and made answer to the libel, in which, among other things, they denied that while the steamer was being warped alongside the wharf her master gave the libelant orders to take additional turns around the capstan, and denied that the libelant took two or any number of additional turns around it, and, while admitting that the capstan broke and carried away, denied that such breaking and carrying away was because it was unsafe, unsound, insufficient, or unfit for the purpose for which at any time it was being used. The answer also denied that the master or owners of the steamer had any knowledge of the unsafe, unsound, insufficient, or unfit condition of the capstan, but admitted that the libelant had no such knowledge. The answer also put in issue the alleged negligence on the part of the master and owners of the steamer in question, and alleged that the injuries sustained by the libelant were occasioned by his own neglect to obey the proper orders of the master, or by the neglect of his fellow servants. The case came on for trial on testimony previously taken before a commissioner, and on testimony offered in open court, and resulted in a decree in favor of the libelant and against the claimants (who are the appellants here) for the sum of \$4,500.

The case shows that the steamer in question arrived at San Pedro with a deck load of lumber, stacked about 12 or 13 feet high. When

she arrived the tide was low, and the master had difficulty in bringing her alongside the wharf. For that purpose he caused a hawser to be carried from the stern of the vessel and made fast to the wharf, and, by alternately backing and starting forward her engines, endeavored to bring the steamer alongside the wharf. As the vessel rested, in part at least, upon the mud, that was a matter of some difficulty. The master directed the operations from his place on the bridge. The libellant and other members of her crew were on the deck of the stern of the vessel, behind the lumber, and neither they nor the capstan was within view of the captain. The second mate of the vessel stood on the lumber, immediately above libellant and the other seamen, for the purpose of transmitting the orders of the captain. The hawser running to the wharf from the vessel had been made fast to the vessel's bitts. The backward and forward motion of the vessel had slackened the hawser, and the captain ordered the men to take the hawser to the capstan and take in the slack. It is contended by the appellants that, after the slack had been so hauled in, the master ordered the libellant and the other seamen working with him to remove the hawser from the capstan and make it fast to the bitts. This order is disputed by the libellant, who claims that the order was that additional turns of the hawser be taken around the capstan. After a sufficient interval to perform either of these orders had elapsed, the master signaled the engineer to start the engines ahead, then stop the engines and put them full speed astern, by which such a strain was put upon the hawser that the capstan carried away, causing the injuries to the libellant complained of.

Upon certain points the evidence is without conflict. It is undisputed that the hawser was not removed from the capstan to the bitts after the slack had been taken in; it is undisputed that the strain put upon the hawser by the backing of the vessel carried the capstan away and inflicted the injuries complained of; and it is undisputed that the function of the capstan was not the bearing of any such strain, but that its office was the hauling in of the slack of a line, or other like service; that it is but a small affair, operated by handles at the side, and which, by its revolutions, winds up a rope or chain where the strain is not great. It is also a fact that the record contains no evidence that the capstan in question was unsafe, insufficient, or unfit for any service for which it was intended; but, on the contrary, shows, without conflict, that the libellant, with the other seamen working with him, had, by means of this capstan, drawn in the slack of this particular hawser, for which the hawser had been, by the master's order, transferred from the bitts to the capstan. For heavy strains, such as the warping or pulling of a vessel, the bitts are provided; and such is the undisputed evidence in the present record. It is not claimed that the bitts of this vessel were insufficient for that purpose. In so far, therefore, as the equipment of the steamer is concerned, it is impossible to see where her owners were negligent. Nor is it claimed that the officers of the vessel were in any respect incompetent. Nor does the evidence show that the place where the libellant was injured was unsafe, except in so far as the improper use of the capstan for the pulling of the vessel out of the mud and alongside of the wharf made it so. The whole case, therefore, turns upon the improper use of the capstan for that purpose. As has been said, the

evidence is without conflict that in the warping operation the hawser was first made fast to the bitts, and that in the backward and forward motion of the vessel the hawser had slackened, for which reason the master ordered the hawser transferred from the bitts to the capstan, and the slack taken in, which was done. At this point the conflict arises.

Upon the part of the claimants it is contended that, before any strain was put upon the hawser by backing the steamer, the master ordered the hawser taken from the capstan and made fast to the bitts; and it is insisted on their behalf that if that order had been obeyed the accident would not have occurred, and that therefore the proximate cause of the injury received by the libelant was the disobedience of that order by himself and the other seamen. The libelant testified that, after the slack was taken in, the captain ordered him and the other seamen working with him to make the hawser "good and fast, and take more turns, because the line was slack around the capstan, so we obeyed orders and went over and started to take some more turns. At the time we were working there with the turns, the capstan carried away and struck me." In this respect the libelant was corroborated by the testimony of two of the other sailors. Capt. Seel, characterized by the court below as "an intelligent and apparently disinterested witness," testified, in behalf of the claimants, that the order actually given by the master was to "heave tight and make fast to the bitts." In speaking of the order as testified to by Capt. Seel, the court below said:

"This certainly was not an absolute command to take the hawser from the capstan and make it fast to the bitts. But assuming that the last order given was to the effect that the hawser should be removed from the capstan and made fast to the bitts, it was negligence upon the part of the master, with his knowledge of the defective condition of the capstan, to put a strain upon the hawser without knowing that his order had been conveyed to the men and obeyed. The hawser had been taken to the capstan by the direction of the master, and the place where the libelant was working thus rendered unsafe in the event that any strain should be placed upon the hawser while it was on the capstan. Under such circumstances it was the duty of the master to have ascertained, before he backed the steamer, that his orders had been executed, thus making it safe for the libelant to remain in the place where he was working. The owners of the steamer owed to the libelant the positive duty of providing him a safe place in which to work, and they are responsible for the failure of the master to discharge it. For these reasons, and also because, upon consideration of all the evidence, I believe the allegations of the libel as to the manner and cause of the accident are sustained, a decree must be entered in favor of the libelant."

As has already been said, there was no evidence that the place where the libelant was hurt was unsafe, unless the improper use of the capstan, for the purpose of hauling the vessel from the mud alongside the wharf, made it so. And if it be true that the master did undertake to accomplish that result by means of the capstan, as testified by the libelant and by two of the other sailors, while it would show gross negligence upon the part of the master, it would be the negligence of a fellow servant of the libelant, for which the owner would not be liable. The case of *Olson v. Oregon Coal & Navigation Company*, 104 Fed. 574, 44 C. C. A. 51, was a libel for damages for personal injuries sustained by the libelant in a fall through an open hatchway on the deck of the steamer

Empire, on which he was employed in the capacity of ship carpenter. It was alleged, among other things, that on the voyage of the steamer from San Francisco to Coos Bay, in the state of Oregon, she had no cargo on board, and was, by reason of that fact, "liable to sudden, unusual, and violent motions when in waters agitated by the winds"; that at the time of her departure the bar of the harbor of San Francisco was breaking badly, and that, although there were covers on board the vessel for the hatches, the ship crossed the bar with her after hatch open, thereby making the deck of the steamer unsafe and dangerous; and that while the libellant was performing his duty upon the steamer as ship carpenter, in going from the after part of the vessel to the forward part, he, without any fault on his part, was thrown from his feet by a roll of the steamer, and, by reason of the after hatch being uncovered, he was thrown down that hatch, and fell a distance of about 30 feet onto the shaft alley of the steamer, and thereby sustained very serious and permanent injuries. This court, in considering the case, said:

"As the defendant is alleged to be a corporation, it is, of course, obvious that it could only operate the ship through its agents or servants, so that the negligence with which it is charged must necessarily have been the personal negligence of some one employed by it. Assuming, therefore, that the mere leaving open of the hatch, under the circumstances stated, can be properly held to have been negligence, it must necessarily have been the negligence of some officer or member of the crew of the ship. Assuming, further (for it is not so alleged), that it was the negligence of the captain, it was no more than negligence in the ordinary navigation of the ship, in which common employment all of the members of the ship's company were engaged. In matters of that kind the maritime law makes no account of mere ordinary negligence. In *Quinn v. Lighterage Co.* (C. C.) 23 Fed. 363, the negligence by which the libellant was injured was the immediate act of the master of the ship, namely, his premature order in setting the winch in motion. In that case the owners were held not liable, because that act was not one that the captain had done in his character as the representative of the owners, but was an act that any other co-servant in the same employment might have performed. 'The true inquiry,' said Judge Wallace, 'is whether the character of the act of the captain was one which it was incumbent upon the defendant [the owners] to see properly performed.' The owner, who is usually ashore, and in this case was a corporation, cannot, in the nature of things, see to the details of navigation. The officers and crew are employed for that purpose, and it would be quite as reasonable to hold the owner responsible for the negligent handling of a rope or sail as for the failure to close a hatch. It is undoubtedly true that the master represents the owner in respect to the personal duties and obligations which the latter owes to the seamen, such, for instance, as the maintenance of the ship and her apparel in a safe and seaworthy condition, procuring repairs and supplies, the supplying of the crew with sufficient food, and with medical attendance and care in case of injury or sickness, and for his neglect in any of those particulars the owner is liable. The cases of *Gabrielson v. Waydell* (C. C.) 67 Fed. 342; *The A. Heaton* (C. C.) 43 Fed. 592; *Anderson v. The Renee* (D. C.) 14 Sawy. 476, 46 Fed. 805; and *The Chandos* (D. C.) 6 Sawy. 546, 4 Fed. 645—were cases of that character. 'The navigation of a ship from one port to another constitutes,' as said by Judge Brown in *The City of Alexandria* (D. C.) 17 Fed. 390, 'one common undertaking or employment, for which all the ship's company, in their several stations, are alike employed. Each is in some way essential to the other in furtherance of the common object, viz., the prosecution of the voyage.' It is very clear that upon common-law principles the owner would not be liable for an injury sustained by one of such employes by reason of the negligence of one of his co-employes, whatever his grade in the common employment. In the recent case of *Railroad Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181, where the case of *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, 28

L. Ed. 787, was finally and squarely overruled, the Supreme Court announces the true rule to be, both upon principle and authority, 'that the employer is not liable for an injury to one employé occasioned by the negligence of another engaged in the same general undertaking; that it is not necessary that the servants should be engaged in the same operation or particular work; that it is enough to bring the case within the general rule of exemption if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes; or, in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end.' It is true that the present case is to be determined, not by the common law, but by the rules of the maritime law; but that law, as was shown very clearly, we think, by Judge Brown in the case of *The City of Alexandria*, supra, is, in respect to the facts here presented, the same. See, also, the cases of *The Queen* (D. C.) 40 Fed. 694; *The Frank and Willie* (D. C.) 45 Fed. 494; *The City of Norwalk* (D. C.) 55 Fed. 98; *Steamship Co. v. Merchant*, 133 U. S. 375, 10 Sup. Ct. 397, 33 L. Ed. 656."

What was decided here in the case of *Olson v. Oregon Coal & Navigation Co.* is equally applicable to the improper use of a hawser upon a capstan instead of the bits of a steamer, and, if proven as contended on behalf of the libellant in the present case, would be but the negligence of the master in the ordinary navigation of the ship, in which the two were fellow servants. This view renders it unnecessary to determine any other question argued by counsel. For the reasons stated, we feel obliged to reverse the judgment, grievous and permanent as the libellant's injuries undoubtedly were.

The judgment is reversed, and the cause remanded to the court below with directions to dismiss the libel at the libellant's cost.

MEYER BROS. DRUG CO. v. PIPKIN DRUG CO.

(Circuit Court of Appeals, Fifth Circuit. March 21, 1905.)

No. 1,346.

1. BANKRUPTCY—PETITION FOR REVIEW—INFORMALITIES IN PROCEDURE.

A petition to the Circuit Court of Appeals to revise in matter of law an order made by the District Court in bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], will not be dismissed because it was not allowed by a judge, nor because the transcript is not certified and does not contain the pleadings or evidence on which the matter was heard by the referee, nor because it was not filed until three months after the order was entered, in the absence of any rule of court governing such matters, and where it does not appear that prejudice has resulted to any party in interest.

[Ed. Note.—Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

2. SAME—PREFERENTIAL TRANSFERS OF PROPERTY—UNRECORDED CHATTEL MORTGAGE.

Under the settled law of Texas, by which the failure to record a chattel mortgage as provided by Rev. St. Tex. 1895, art. 3323, does not affect its validity as between the parties, or as against general creditors of the mortgagor, having no lien, such a mortgage is not one which is required to be recorded, within the meaning of Bankr. Act July 1, 1898, c. 541, § 60a, as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1903, p. 416]; and a chattel mortgage given in good faith more

than four months before the bankruptcy of the mortgagor does not constitute a preferential transfer, under said section, although it was not recorded until within such time.

Petition for Revision of Proceeding of the District Court of the United States for the Eastern District of Texas, in Bankruptcy.

For some time prior to October 17, 1902, the Pipkin Drug Company was doing a drug business in Beaumont, Tex. On that date said company desired L. B. and S. W. Pipkin, resident citizens of Jefferson county, Tex., who were not members of, and had no business connection with, it, to become accommodation indorsers for said company in the sum of \$2,500, and, to indemnify them in so doing, offered them a chattel mortgage on certain trade fixtures used in the drug store in Beaumont. The Pipkins indorsed the paper, and, in pursuance of its promise, on November 22, 1902, the company gave the chattel mortgage, which was executed and delivered on that date. There is no proof of insolvency of the drug company at that time, or of any fraudulent purpose in making the mortgage on the part of either the drug company or the Pipkins. On June 2, 1903, the chattel mortgage to the Pipkins was filed for record in the county clerk's office of Jefferson county, Tex., where the property was situated. An involuntary petition in bankruptcy was filed against the Pipkin Drug Company in the District Court for the Eastern District of Texas, at Beaumont, on the 24th day of June, 1903, upon alleged grounds and acts having no connection whatever with this mortgage or transaction. When the note for \$2,500 which they had indorsed fell due, L. B. and S. W. Pipkin were compelled to pay and did pay the same in full, and afterwards assigned to the Meyer Bros. Drug Company, for a valuable consideration, their claim against the Pipkin Drug Company. On July 20th, 1903, the Pipkin Drug Company was adjudged bankrupt. In due form, the Meyer Bros. Drug Company presented its claim and security under said chattel mortgage to the referee for allowance and adjudication as a secured claim. A contest was filed by R. E. Smith, the trustee of said estate, and, on hearing before the referee, the claim of the Meyer Bros. Drug Company was allowed for the full amount, but the chattel mortgage was held invalid, because, though it was executed and delivered more than four months prior to the filing of the petition and the adjudication of bankruptcy, it had not been filed for record until within said period. This action and decree of the referee was taken by the Meyer Bros. Drug Company before the honorable District Court for the Eastern District of Texas, at Beaumont, for rehearing and revision; and the said court entered its judgment, in all things affirming the decision of the referee, for the reasons assigned by him in his conclusions of law. The Meyer Bros. Drug Company has brought the petition to superintend and revise in matter of law the proceedings of the said referee and of the said District Court in the premises, and asks to have so much of said orders and judgment as declare the invalidity of the mortgage set aside, and to have the said mortgage adjudged and enforced as a valid security existing for its benefit.

Jno. C. Townes and E. E. Townes, for petitioner.

H. M. Whitaker, for respondent.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts). The trustee of the bankrupt's estate moves to dismiss this petition to revise because it was not allowed by any judge of this or the lower court; no bond has been given; the transcript of the record filed is not certified by the clerk of the lower court; the transcript does not contain the pleadings upon which the issues were tried, nor show who are the proper parties to this proceeding; the transcript does not contain the evidence upon which the findings of the referee were based; the petition to revise was

filed more than three months after the entry of the judgment below; and, lastly, because no supersedeas has been granted.

In our opinion, none of these grounds are well taken. The statute allows the petition to revise to be filed on due notice, but provides no other regulations. This court has made no rules as to any of the requisites or formalities referred to in the motion to dismiss.

As to the time elapsed between the decision of the court below and the filing of the petition, we are not prepared to say that there has been unreasonable delay. See *In re New York Economical Printing Co.*, 106 Fed. 839, 45 C. C. A. 665; and, for a discussion of the whole subject, see *Loveland on Bankruptcy*, 812, and authorities there cited. There is no suggestion that pending the delay the proceeds of the mortgaged property have been distributed, or that any party's rights have suffered.

The question presented by the petition is whether the mortgage of petitioners, which was granted on the 22d day of November, 1902, filed for registration on the 2d day of June, 1903, constitutes such a preference as falls within the meaning of section 60a of the bankrupt law (Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1903, p. 416]), which is as follows:

"(a) A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

This depends upon whether or not the mortgage in question was one which was required by law to be recorded or registered. The requisites of the Texas law with reference to registration of chattel mortgages are contained in article 3328 of the Revised Statutes of 1895, as follows:

"Every chattel mortgage, deed of trust, or other instrument of writing intended to operate as a mortgage of or lien upon personal property, which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the property mortgaged or pledged by such instrument, shall be absolutely void as against the creditors of the mortgagor or person making same, and as against subsequent purchasers and mortgagees or lien holders in good faith, unless such instrument, or a true copy thereof, shall be forthwith deposited with and filed in the office of the county clerk of the county where the property shall then be situated, or if the mortgagor or person making the same be a resident of this state, then of the county of which he shall at that time be a resident."

This statute has been construed in the Supreme Court of the state of Texas to mean that an unrecorded chattel mortgage shall be void only against lien creditors of the mortgagor, or subsequent purchasers and mortgagees or lienholders in good faith; and, as between the parties to the chattel mortgage and against all ordinary creditors, the record is immaterial. *Grace v. Wade*, 45 Tex. 527; *Overstreet v.*

Manning, 67 Tex. 663, 4 S. W. 248. And this may be considered as the established jurisprudence of the state of Texas.

As the case was presented before the referee and before the lower court, there was no question made that the rights of any lien creditors of the bankrupt or any subsequent purchasers or mortgagees were in any wise affected by the rights claimed under the chattel mortgage. We think it follows that the chattel mortgage in this case was valid between the bankrupt and the holders thereof, and as to all parties shown to be interested in the bankrupt's estate, whether the said mortgage was recorded or not. It cannot be said, therefore, that the mortgage was one required by law to be registered or recorded under section 3328 of the Revised Statutes of Texas of 1895, nor that the granting of said mortgage constituted a preference within four months, under section 60a of the bankrupt law.

The petition for revision is allowed, and the judgment of the referee and the judgment of the District Court affirming the same, filed December 16, 1904, are reversed; and judgment is now rendered that the claim of the Meyer Bros. Drug Company, as assignee of L. B. and S. W. Pipkin, to the mortgage lien asserted by them upon the funds in the hands of the trustee, and resulting from the sale of the mortgaged property, be, and the same is, allowed, as in all respects valid and just.

AMERICAN WOODWORKING MACHINERY CO. v. AGELASTO.

(Circuit Court of Appeals, Fourth Circuit. February 21, 1905.)

No. 568.

LIEN—SUPPLIES FURNISHED TO MANUFACTURING COMPANY—VIRGINIA STATUTE.

Under Code Va. Supp. 1898, § 2485, providing that "all persons furnishing supplies to a mining or manufacturing company necessary to the operation of the same shall have a prior lien upon the personal property of such company other than that forming part of its plant," etc., supplies necessary to the operation of a manufacturing establishment are such as pertain to its output, and do not include material or machinery necessary to the construction, equipment, and completion of its plant, and for the latter the statute gives no lien.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk, in Bankruptcy.

P. A. Agelasto and Simon L. Adler, for appellant.

Edward R. Baird, Jr., for appellee.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

BOYD, District Judge. The Chesapeake Furniture & Woodworking Company was a corporation under the laws of the state of Virginia, organized in the year 1901, for the purpose of manufacturing furniture and other articles from wood. Its plant was located in the city of Norfolk, Va., where suitable buildings were erected to carry on its business. On the 3d of September, 1901, the American Woodwork-

ing Machinery Company, of New York, contracted with the Chesapeake Company to furnish certain woodworking machinery for the equipment of the latter's plant. This machinery was delivered and placed in the mill of the Chesapeake Company during the years 1901 and 1902, and, within 90 days after the last item of the account for it was due, the American Company duly filed and recorded its claim in the corporation court of Norfolk for the sum of \$3,355.62, under section 2485 of the statutes of Virginia, as a prior lien upon the property of the Chesapeake Company for supplies furnished said company necessary to its operation. Afterwards the Chesapeake Company, in an involuntary proceeding, at the instance of creditors, was adjudged bankrupt; and the American Company offered, before the referee, to prove its claim against the bankrupt estate, with a prior lien on the bankrupt's property, for the amount hereinbefore stated. Other creditors objected to the lien and priority claimed by the American Company on the ground that the machinery sold by it to the Chesapeake Company was not "supplies," such as contemplated by the Virginia statute. The referee so held. This decision of the referee was affirmed by the court in bankruptcy of the Eastern District of Virginia, and the American Company appealed to this court.

The Virginia statute under which this controversy arises is the following paragraph of section 2485, Supplement to the Code of Virginia of 1898:

"All persons furnishing supplies to a mining or manufacturing company, necessary to the operation of the same, shall have a prior lien upon the personal property of such company, other than that forming part of its plant, to the extent of the money due them for such supplies, and also a lien upon all the estate, real and personal, of such company, which said last lien, however, upon all such real and personal estate, shall be subject and inferior to any lien by deed of trust, mortgage, hypothecation, sale or conveyance, made or executed, and duly admitted to record prior to the date at which such supplies are furnished."

In the claim for lien filed by appellant, a description of the property sold to the Chesapeake Company is given as "certain machinery to be used for the purpose of cutting, sawing, molding, planing, sanding, and woodworking in all of its various ways"; and we find, from the facts stated in the record, and the testimony of the witnesses examined before the referee, that this machinery was all bought under one contract, though furnished at different times, and that it was all in the mill of the Chesapeake Company, and being used by it in carrying on its business as manufacturer of furniture, and so forth, at the time when the claim for lien was recorded, and also at the time when the Chesapeake Company was adjudged bankrupt. The question for our determination, therefore, is whether or not this machinery was "supplies necessary to the operation" of a manufacturing company, such as contemplated by the Virginia statute from which the foregoing paragraph is quoted. In the court below, and here also, the appellee has insisted that the machinery furnished by the American Company, when installed in the factory structure of the Chesapeake Company, became fixtures. The appellant opposed this view, and emphasized the fact that much of the machinery consisted of movable machines, which were not attached to the building, and therefore were not fixtures.

Unquestionably the machinery was particularly adapted to the purposes of the freehold, and without it, or some other of like character, it would have been impossible for the Chesapeake Company to operate its mill. In *Haskin Wood, etc., Co., v. Cleveland, etc., Co.*, 94 Va. 447, 26 S. E. 880, it is held:

"The true rule for determining when the machinery and apparatus of a manufactory form a part of the realty is that where the machinery is permanent in its character, and essential to the purposes for which the building is occupied, it must be regarded as realty, and passes with the building, and that whatever is essential to the purposes for which the building is used will be considered as a part thereof, although the connection between them is such that it may be severed without physical or lasting injury to either."

A number of Virginia authorities are cited in support of this principle. If we were to apply the rule laid down in this case, we would be warranted in holding that under the Virginia law the machinery in question was fixtures, that it became a part of the building or structure which was permanently annexed to the freehold, and that, if the appellant was entitled to a lien at all, his right was under section 2475 of the Virginia Code of 1887 [Va. Code 1904, p. 1236], which provides:

"All artisans, builders, mechanics, lumber-dealers, and other persons performing labor about, or furnishing materials for the construction, repair, or improvement of any building or structure, permanently annexed to the freehold * * * shall have a lien, if perfected as hereinafter provided, upon such building or structure, and so much land therewith as shall be necessary for the convenient use and enjoyment of the premises. * * *"

But the appellant lost any right which it may have had to a lien under this section by failure to make record within the prescribed time, and therefore the construction and application of the section are not now before us.

We do not deem the question of fixtures as one of importance in the present case; nor do we consider it material to the determination of the question here involved whether the machinery, when it was installed in the building, assumed the character of fixtures or not. Our opinion is that the site, the structure, the motive power, and the machinery, whether the last be movable or immovable, combine to constitute the manufacturing plant, and the operations as manufacturer cannot begin until the plant is thus complete, or, in common parlance, until the plant is "a going concern." Then, and not until then, it becomes necessary to have supplies for operating. The supplies necessary for the operation of a manufacturing establishment are such as pertain to the production of its output, and do not include material or machinery necessary for the construction, equipment, and completion of the plant. The Court of Appeals for the state of Virginia, in the case of *Boston Blower Co. v. Carman Lumber Co.*, 94 Va. 99, 26 S. E. 390, has clearly drawn this distinction. In passing upon the question of lien rights which accrue to parties under the Virginia law, the court in that case said:

"Sections 2475 to 2484 [Code 1887; Va. Code 1904, pp. 1236-1246], both included, are designed for the protection of those who perform labor or furnish materials for the construction or repair of the subject upon which the lien is assigned. Sections 2485 and 2486 [Va. Code 1904, pp. 1246-1249] are for the protection of those who furnish the labor or supplies necessary to the operation of the enterprises enumerated in those sections."

We think that, in determining what are necessary supplies for the operation of a manufacturing company, the line of demarkation is between that which is required to put the plant in a condition to operate, and that which is necessary for use in producing its manufactured articles after it is in such condition. The machinery for which the appellant's claim is made in this case comes under the former, and not the latter, head. We conclude, therefore, that the appellant is not entitled to a lien under section 2485 of the Virginia statute.

The judgment of the District Court of the United States for the Eastern District of Virginia, sitting in bankruptcy, is affirmed.

COLUMBIA AVENUE TRUST CO. v. MacAFEE CO. et al.

(Circuit Court of Appeals, Fifth Circuit. April 4, 1905.)

No. 1,416.

CHATTEL MORTGAGE—FORECLOSURE—INTERLOCUTORY DECREE—APPEAL.

Where, in a suit to foreclose a mortgage and trust deed on a railroad contractor's outfit, a railroad company intervened after the appointment of a receiver, and claimed a prior right to use such outfit under a contract with the mortgagor, a decree declining to determine the intervenor's right in limine, but permitting intervenor to use the outfit pending the litigation, on conditions prescribed, was interlocutory only, and unappealable.

Appeal from the Circuit Court of the United States for the Northern District of Alabama.

W. I. Grubb, Walker Percy, and Boykin Wright, for appellant.
Jno. P. Tillman, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This is a bill to foreclose a mortgage and trust deed on a railroad contractor's outfit, wherein a receiver was prayed for and duly appointed. After the appointment of the receiver the Birmingham Air Line Railway Company filed an intervening petition, setting out a contract between the MacAfee Company and itself for the construction of certain parts of its railway line, wherein the said contractor's outfit was to be duly used, and claiming that under said contract the railway company was entitled to the use of the outfit, mules, tools, and machinery until the contract should be completed, and praying to be made a party defendant to the bill of complaint, and have adjudicated its rights, etc. Thereafter, in the Circuit Court, the following decree was rendered:

"In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

"Columbia Avenue Trust Company v. The MacAfee Company.

"In this cause, which is a bill by the mortgagee to foreclose a mortgage on certain machinery and plant, a receiver having been appointed by the court pending foreclosure, and having taken possession of the plant, which is of large value, and now lying unused on the line of the Atlanta & Birmingham Air Line Railway, and the case not being ripe for final decree, on account

of the intervention of the Atlanta & Birmingham Air Line Railway, which intervenes and sets up by petition that under its contract it had a prior right to hold and use said machinery, and to finish an uncompleted work which the mortgagor had undertaken for it, and that the mortgagee took with notice of the intervener's rights, and that the court's taking possession by the receiver, thereby preventing the intervener from asserting its rights, will work a great hardship upon it, all of which matters are litigated, thereupon said intervener asks an order to have the property turned over to it in accordance with its alleged rights under the contract; and the court, being of opinion that it ought not in limine to decide upon that question, or upon the rights of the parties with reference thereto, and without passing upon the rights of the parties, or deciding anything as to the equities of any of the parties in this respect, declines at this time to grant the prayer of said petition; reserving for further decree whatever may be ascertained to be equitable and right in the premises. Thereupon the intervener asks the court, in open court, upon its petition (no testimony being, under the circumstances, introduced), to allow it to run or use the plant, outfit, and machinery upon such terms as to the court may seem equitable and just; and it appearing to the court that it is to the interest of all parties and for the conservation of the property that said plant, outfit, and machinery in the hands of the receiver shall be used, and not be idle, and that it might work great hardship, if the rights claimed by the intervener turn out to be well founded, to deny it such use of the said plant, etc., and cannot work harm to the mortgagor or to the mortgagee to permit the use of said property by the intervener upon the terms and conditions hereinafter stated, it is therefore ordered, adjudged, and decreed, against the objection of the complainant and defendant in said bill, that the receiver appointed herein permit the use of said plant, equipments, and outfit and tools and other property claimed under complainant's mortgage, now in his possession, upon the following terms and conditions:

"(1) That the intervener and receiver shall each forthwith select some competent person, whose duty it shall be together to take an inventory of all the property, accompanying it with a statement of the condition of said property and its value, which shall be filed with the clerk of this court. If they cannot agree, the two persons so selected shall select a third person, each of whom shall report his opinion as to the condition and value of the property. In event of the failure of either of the parties to select an appraiser, or of the appraisers to agree among themselves upon a third person, either of them shall apply to the court, which will thereupon supply the appraiser or appraisers.

"(2) Upon the completion of said inventory and appraisement, the receiver is directed to permit the use of the plant, outfit, equipment, and tools, and to turn the same over to the Atlanta & Birmingham Air Line Railways, upon being notified by the clerk of this court that said railway company has executed bond as prescribed herein.

"(3) It is further ordered that said Atlanta & Birmingham Air Line Railway, before taking possession of any of the property, shall execute bond in the sum of one hundred and fifty thousand dollars, with approved surety, to be approved by, and be payable to, the clerk of the Circuit Court of the United States for the Southern Division of the Northern District of Alabama, or his successors in office, conditioned as follows:

"(a) To return said property, when ordered by the court, in as good condition as when received, ordinary wear and tear excepted, and to pay such compensation for the use thereof as may be adjudged by the court to be reasonable and proper, if it be finally decided that the railway company is not entitled to use said property without compensation, subject to the right of appeal from the amount of compensation so decreed, if any, and, also, subject to like right of appeal, to pay such damages as may be assessed by the court for any loss or damage to the property occasioned by the negligence of said railway company, its officers or employes, in the use of said machinery, or from the failure to properly care for the same, or from accidents incident to the business, and for the sum found to be due for compensation, if any be found to be due, and also the amount which may be assessed as damages for any default in the conditions herein prescribed, without the intervention

of a jury, on summary motion, on such notice as may be prescribed by the court, without prejudice, however, to any other remedy it may have.

"(b) It is further ordered that the receiver shall have the right, by himself, or an inspector of his appointment, to go upon the work where the said equipment, outfit, tools, and plant are being used or cared for, to report upon the manner in which it is being used and cared for, and report from time to time to the court, if there be any lack of care or attention in the use or care of such machinery, in which event the court reserves the right to make such further orders as may be proper, in the discretion of the court.

"(c) For the present, and until the further order of the court, the receiver shall appoint one inspector, who shall be paid not exceeding one hundred dollars per month, in watching and reporting upon the use of the property, which inspector shall be paid by the railway company at the end of each month, as other employes are paid. The duty of such inspector is solely confined to watching and caring for the property, and reporting thereon.

"(d) It is further ordered, adjudged, and decreed that this order, which simply relates to the conservation of the property in the hands of the court, shall in no wise affect, or be deemed in any manner a decision in any way upon, the conflicting claims, rights, or equities of the parties herein, all of which matters are reserved for future and further decree in this cause.

"This April 21, 1904.

Thos. G. Jones, U. S. Judge."

From this decree the Columbia Avenue Trust Company prosecutes this appeal, and the appellees move to dismiss because the same is not a final decree, nor a decree within the appellate jurisdiction of this court. An inspection of the decree shows that it is in no respect a final decree. The court does not pass upon or decide upon the rights of any of the parties; does not discharge the property from the custody and control of the court, through its receiver; nor, in fact, do anything else than provide for the preservation and safe custody of the property pending the litigation, reserving all issues for future disposition. It is needless to say that the decree contains no interlocutory order, such as the granting of an injunction or the appointment of a receiver, from which, under proper circumstances, an appeal lies to this court.

The motion is granted, and the appeal is dismissed.

KNIGHT et al. v. LUTCHER & MOORE LUMBER CO. et al.

(Circuit Court of Appeals, Fifth Circuit. April 4, 1905.)

No. 1,401.

1. FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP—ALLEGATION AS TO CORPORATION.

The allegation, as to a corporation, for the purpose of showing a federal Circuit Court's jurisdiction on the ground of diverse citizenship, that it is a citizen of a certain state, is not enough. It should be shown it was created by the laws of that state.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 880.

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

2. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.

In a suit for an undivided half interest in a single tract of land alleged to be wrongfully withheld by the two defendants, there is no separa-

ble controversy, so as to allow removal to the federal Circuit Court, though the citizenship of plaintiffs and of only one of defendants is diverse.

[Ed. Note.—Separable controversy ground for removal of cause to federal court, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Valleytown Mineral Co.*, 35 C. C. A. 155.]

In Error to the Circuit Court of the United States for the Western District of Louisiana.

A. J. Murff (M. J. Cunningham and Murff & Webb, on the brief), for plaintiffs in error.

J. D. Wilkinson and Mason Williams (T. Alexander, on the brief), for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This action was brought by the plaintiffs in error against the defendants in error in the Twelfth Judicial District court of Louisiana to recover an undivided one-half interest in certain real estate described in the petition. On the application of the defendants in error the cause was removed from the state court to the United States Circuit Court. It was there tried, and judgment entered for the defendants in error, and thereupon the case was brought to this court by the plaintiffs on writ of error. The case was removed to the Circuit Court on the ground that it was a controversy between citizens of different states. No claim to remove the case was asserted on any other ground.

It has been often decided, and has recently been repeated by the Supreme Court in *Thomas v. Board of Trustees*, 195 U. S. 207, 25 Sup. Ct. 24, that, "when jurisdiction depends upon diverse citizenship, the absence of sufficient averments, or of facts in the record, showing such required diversity of citizenship, is fatal, and cannot be overlooked by the court, even if the parties fail to call attention to the defect, or consent that it may be waived." It is well settled that when the ground of removal is diversity of citizenship the party to the suit on one side, whether consisting of one or more persons, must have a citizenship different from that of the party on the other side, whether consisting of one or more persons. 25 Stat. 434, § 2 [U. S. Comp. St. 1901, p. 509]; *Wilson v. Oswego Township*, 151 U. S. 62, 14 Sup. Ct. 259, 38 L. Ed. 70. The petition for removal shows that the plaintiffs are all citizens of the state of Louisiana, and it shows that Henry J. Lutchter, one of the defendants, is a citizen of the state of Texas, and it is alleged as to the other defendant: "The Lutchter & Moore Lumber Company was at the time of the commencement of this suit, and still is, a citizen of the state of Texas, and of no other state, residing in the city of Orange, in said state." We have carefully examined the record to see if other portions of it will correct this defective averment. We find in the petition filed by the plaintiffs in the state court a reference to the "Lutchter & Moore Lumber Company, a corporation, domiciled at Orange, Texas." The question, therefore, presented

by the record, is whether or not these averments are sufficient to confer jurisdiction upon the Circuit Court.

The jurisdiction of a Circuit Court of the United States is limited in the sense that it has no jurisdiction except that conferred by the Constitution and laws of the United States. There is no claim that the court has jurisdiction of this case except upon the ground that it is a "controversy between citizens of different states." A suit by or against a corporation in a court of the United States is regarded as brought by or against its stockholders, all of whom are, for the purposes of jurisdiction, conclusively presumed to be citizens of the state which created the corporation. It follows that, to confer jurisdiction in this case, it should appear affirmatively from the record that the Lutchter & Moore Lumber Company is a corporation created by a state whereof the adverse parties are not citizens. *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207. Where a corporation is sued, it is not enough, in order to give jurisdiction, to say that the corporation is a citizen of a state, naming it. It must appear by proper averment that the corporation was created by the laws of the state, for in no other way can it be, for the purposes of jurisdiction, a citizen of a state. *Lafayette Insurance Co. v. French*, 18 How. 404, 15 L. Ed. 451; *Frisbie v. Chesapeake & Ohio Ry. Co.* (C. C.) 57 Fed. 1; *New York, etc., R. Co. v. Hyde*, 56 Fed. 188, 5 C. C. A. 461; *Lonergan v. Illinois Central R. Co.* (C. C.) 55 Fed. 550; *Pennsylvania v. Quicksilver Co.*, 10 Wall. 553, 19 L. Ed. 998. If it had been shown by the petition for removal, or in any other part of the record, that the Lutchter & Moore Lumber Company was, when the suit was begun, and still is, a corporation duly organized (or created, incorporated or chartered) under the laws of Texas, such averment would have been sufficient to have conferred jurisdiction upon the United States Circuit Court. To meet the requirement of the decisions of the Supreme Court to confer jurisdiction, it must appear that the corporation was created under the laws of the state. *Moon on the Removal of Causes*, § 163, and authorities there cited; *Carter on Jurisdiction Fed. Courts*, 195. There is no suggestion in the record that there is in the suit a separable controversy, but in the brief filed that claim is made. The suit is for an undivided one-half interest in a single tract of land alleged to be wrongfully held by the two defendants. In such case there is no separable controversy. *Moon on the Removal of Causes*, 406, § 143, and cases cited in note 3. The record failing to affirmatively show the jurisdiction of the Circuit Court, that court should have remanded the case to the state court. The costs should be awarded against the party wrongfully removing the cause. *M. C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462.

The judgment of the Circuit Court is reversed, with costs against the defendants in error, and the case is remanded to the Circuit Court, with instructions to proceed according to law and in conformity to the opinion of this court.

ROGERS et al. v. DE SOTO PLACER MIN. CO.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1905.)

No. 1,103.

BANKRUPT'S PETITION—VERIFICATION BY ATTORNEY.

An involuntary bankruptcy petition, containing a verification by petitioners' attorney in which he stated on oath that he was such attorney, that the statements contained in the petition were true, and that the reason why the verification was made by him, instead of the petitioners in person, was because the petitioners were all without the district, and for that reason unable to verify the petition, and that he was duly authorized to institute and conduct the proceedings, was sufficiently verified under Bankr. Act July 1, 1898, c. 541, § 18, subd. "c," 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429], providing that all pleadings setting up matters of fact shall be verified under oath.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 123.]

Appeal from the District Court of the United States for the Second Division of the District of Alaska.

The record shows that the appellants filed, on the 7th day of April, 1904, in the court below, their amended petition to have the appellee declared bankrupt, the petition being verified by one of the attorneys for the petitioners, whose affidavit was as follows:

"United States of America, District of Alaska—ss.:

"James W. Bell, being first duly sworn, deposes and says: That he is an attorney at law, duly admitted to practice, and is actively engaged in the practice of law before the United States District Court for the District of Alaska, second Division; that he has full authority to appear for the above-named petitioners in the above-entitled matter; that he has read the foregoing amended petitions, knows the contents thereof, and believes the same to be true; that affiant's knowledge of the matters and things set forth in said petition are derived from statements under oath received from petitioners from Seattle, Washington, during the present winter, and from certified copies of the records of respondent's properties in the District of Alaska. Affiant makes this verification for the reason that said petitioners are not now within the jurisdiction of this court, and are unable to make this verification.

"Jas. W. Bell.

"Subscribed and sworn to before me this 4th day of April, 1904.

"[Notarial Seal.]

Viola C. Orton,

"Notary Public in and for the District of Alaska."

This verification having been held insufficient by the court below, the petitioners, on the 9th of April, 1904, filed a second amended petition, verified as follows:

"United States of America, District of Alaska—ss.:

"James W. Bell, being first duly sworn, on his oath deposes and says: That he is the attorney for the petitioners named in the foregoing amended petition, and that the statements therein contained are true; that the reason why this verification is made by affiant, instead of by said petitioners in person, is because said petitioners are all without the District of Alaska, and for that reason unable to verify said petition; that affiant is an attorney of this court, and has been duly authorized to institute and conduct the proceedings herein.

"Jas. W. Bell.

"Subscribed and sworn to before me this 9th day of April, 1904.

"John H. Dunn,

"Deputy Clerk, U. S. District Court, District of Alaska, 2d Div., Residing at Nome."

The respondent thereupon moved the court "to dismiss these proceedings, and that the petition of petitioners be stricken, upon the ground that the

second amended petition is not verified according to law." which motion was granted by the court, and the proceedings dismissed, and a judgment of dismissal entered, from which the appeal is taken.

James W. Bell, Ira D. Orton, Ira M. Campbell, Thomas H. Breeze, and W. H. Metson, for appellants.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge, after stating the case as above, delivered the opinion of the court.

There is, we think, no doubt of the sufficiency of the verification in question. The only requirement of the bankruptcy act relative to verification of pleadings is found in section 18, subd. "c," Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]: "All pleadings setting up matters of fact shall be verified under oath." Here was a verification by the attorney of the petitioners, made because of their absence from the District of Alaska, and their consequent inability to verify it, and based upon his knowledge of the facts. We can conceive of no good reason why such a verification is not good under the circumstances stated in the affidavit, and it has been held sufficient by a number of the federal courts.

Thus, in the Matter of Herzikopf (D. C.) 118 Fed. 101, it was said by Judge Wellborn:

"The verification to the creditors' petition is, on its face, sufficient. In re Chequasset Lumber Co. (D. C.) 7 Am. Bankr. Rep. 87, 112 Fed. 56. See, also, In re Simonson (D. C.) 1 Am. Bankr. Rep. 197, 92 Fed. 904, and Bank v. Craig (D. C.) 6 Am. Bankr. Rep. 381, 110 Fed. 137. The bankrupt act does not require a petition in involuntary bankruptcy to be verified by the creditor personally, although, where the creditor is present, and the facts are within his knowledge, he doubtless ought to make the verification. Section 1 of said act, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419], however, contains this definition: 'Creditor shall include any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy.'

"General Order No. 4, 89 Fed. iv, which is in line with said definition, is as follows: '(4) Conduct of Proceedings. Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counsellor authorized to practice in the Circuit or District Court. The name of the attorney or counsellor, with his place of business shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney.'

"This order seems to give to the attorney of a bankrupt or creditor power to do any act in the bankruptcy matter which the bankrupt or creditor might do personally, and requires no other evidence of his authority than the fact of his admission to practice in the Circuit or District Court. The title or headlines to Form No. 20 in bankruptcy (89 Fed. xxxvii) is as follows: 'General letter of attorney in fact when creditor is not represented by an attorney at law.' No form of authorization whatever is prescribed for an attorney at law, and this, presumably, for the reason that the fact of his being a practitioner of the court is all the evidence of his authority which the law requires.

"Loveland, in his work on Bankruptcy, at page 152, says: 'The petition should be signed by the petitioning creditor or creditors, or their attorney

or agent. It must be verified as to matters of fact by an affidavit under oath. Neither the statute nor the general orders require the petition to be signed or verified by the petitioners personally. It therefore seems that an attorney or an agent who has knowledge of the facts may make the oath. The rule was otherwise under the act of 1867.

"That part of the bankrupt act of March 2, 1867, as amended in 1874, referred to by Loveland, is as follows: 'And the petition of creditors under this section may be sufficiently verified by the oaths of the first five signers thereof, if so many there be. And if any of said first five signers shall not reside in the district in which such petition is to be filed, the same may be signed and verified by the oath or oaths of the attorney or attorneys, agent or agents, of such signers.' 18 Stat. pp. 181, 182, c. 390.

"Read in the light of this clause, the case of *In re Sargent*, 21 Fed. Cas. 495 (No. 12,361), cited by the referee herein, in so far as it holds that where a verification is made by an attorney at law his authority must be shown, means only that it should be made to appear by the affidavit, or otherwise, that the petitioning creditor is a nonresident of the district; and this fact, by the way, does appear from the affidavit in the case at bar. Moreover, said affidavit being positive in its terms, and not upon information and belief, it must be assumed that the facts were within the knowledge of the affiant, and this fulfills the requirement mentioned by Loveland in the quotation above given."

In the Matter of Vastbinder (D. C.) 126 Fed. 418, the court said:

"There can be no doubt as to the right of an attorney in fact to make the necessary oath, where the facts are within his own knowledge, and this will be assumed where the oath is in positive terms."

To the same effect are the cases *In re Chequasset Lumber Company* (D. C.) 112 Fed. 56, and *In re Hunt et al.* (D. C.) 118 Fed. 282.

The judgment is reversed, and cause remanded for further proceedings in accordance with law.

SEABOARD AIR LINE RY. v. RICHARD.

(Circuit Court of Appeals, Fifth Circuit. April 4, 1905.)

No. 1,431.

APPEAL—RECORD—DUTIES OF BRAKEMEN.

Where the record contains no evidence, it cannot on appeal, in an action for the ejection of an intruder from a freight train by a brakeman, be said that the brakeman was not acting within the scope of his employment; the duties of brakemen being fixed by the rules of the different companies, and varying accordingly.

In Error to the Circuit Court of the United States for the Northern District of Florida.

Geo. P. Raney, for plaintiff in error.

Wm. C. Hodges, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This is an action to recover damages caused by the violent and unlawful ejection of an intruder from a freight train of the Seaboard Air Line Railway. It was met by a demurrer, on the grounds that the declaration showed that the plaintiff was not a passenger on said train, but was a trespasser secretly stealing a ride without any knowledge or approval of anybody in authority. This de-

murrer was overruled; a general plea of not guilty was entered; the case was tried before the court and jury, resulting in a verdict for the plaintiff.

So far as the record shows, there was no objection to any rulings on the admission of evidence, or to any instructions to the jury. On this writ the first assignment is that the court erred in overruling the demurrer. The declaration appears to be sufficient, and the objections stated in demurrer are not well taken.

The second assignment is to the effect that the court erred in instructing the jury that if the brakeman on the train of the defendant caused the plaintiff to jump from the train, then it was responsible for the injury and damage resulting to him therefrom. There does not seem to have been any such charge made in the case.

The third and last assignment is that the court erred in overruling the motion for a new trial. This assignment is not well taken. The question argued by counsel on both sides in their briefs is whether a brakeman on a freight train of the Seaboard Air Line Railway, and an employé and servant of said corporation operating the said train, acted within the scope of his employment and agency in ejecting from the tender of said train and the said train the defendant in error, who, it is said, was stealing a ride. There is no evidence in the record to show what were the particular duties of the brakeman, employé, and servant in question, or the scope of his agency and authority in ejecting persons from the train. The matter is presented to us as though all the information necessary on the subject is within our judicial knowledge. In all the numerous cases cited on both sides in which the duties of brakemen in ejecting persons from railway trains are declared, we take it the rule announced in each case was based on the evidence in that case. The duties of railway brakemen are fixed by the rules of the different companies, and vary accordingly. There is a statute in the state of Florida—where this case originated—authorizing the servants of railway corporations, under certain circumstances to eject passengers (see chapter 2, § 2267, tit. 4, Rev. St. Fla. 1892), and this may have influenced the judge in his charge, and the jury in reaching a verdict. We assume that in the present case it was proved to the satisfaction of the trial court and jury that the brakeman in question was acting within the scope of his agency.

The judgment of the Circuit Court is affirmed.

WARNER BROS. CO. v. ROBERT N. BASSETT CO. et al.

(Circuit Court, D. Connecticut. March 24, 1905.)

No. 1,074.

PATENTS—VALIDITY AND INFRINGEMENT—CORSET STEEL TIPPING MACHINES.

The Seeley patents, Nos. 589,579 and 589,580, for tipping machines for fastening the tips on corset steels, in which the steel is passed through one machine which tips one end automatically, transferred to another, which as it passes back tips the other end, in view of the prior art, which contained single tipping machines, disclose patentable novelty only in the transferring mechanism, and they are void because such mechanism was not the invention of the patentee, but of another. **Also held not infringed if validity is conceded.**

In Equity. Suit for infringement of patents. On final hearing.
Seabury C. Mastick, for complainant.
John P. Bartlett, for defendants.

PLATT, District Judge. This is the usual action for injunction and accounting, based upon letters patent Nos. 589,579 and 589,580, both dated September 7, 1897. The earlier number was applied for on January 15, 1897, and the later on May 18, 1897.

In No. 589,579 the claims in issue are 1, 3, 11, and 12:

"(1) In a tipping-machine, the combination with means for feeding blades successively first in one direction and then in another, chutes or holders for tips arranged to feed the tips successively into position opposite the advancing ends of the blades, and means for compressing the tips upon opposite ends of the blades, substantially as described."

"(3) In a tipping-machine, the combination with chutes or holders for containing tips, means for feeding blades successively to present first one end and then the other of each blade to the tips in the holders and means for compressing the tips upon the ends of the blades, substantially as described."

"(11) The combination with the blade and tip-feeding devices, of compressor-wheels arranged beyond the tip-feeding devices to compress the tips upon the ends of the blades, substantially as described."

"(12) In a tipping-machine, the combination with means for feeding blades in one direction, of devices for applying and securing a tip to one end of the blades, means for feeding the blades in the opposite direction, mechanism for transferring the blades into position to be engaged by said means, and devices for applying and securing a tip to the untipped end of the blades, substantially as described."

In No. 589,580 the claim in issue is 2:

"(2) In a tipping-machine, the combination with means for feeding blades in one direction, of devices for applying and securing a tip to one end of each blade, means for feeding the blades in the opposite direction, and a traveling belt for transferring the blades into position to be engaged by said latter means, and devices for applying and securing tips to the untipped ends of the blades, substantially as described."

There are three defenses: (1) That Nilson was the inventor, not Seeley; (2) noninfringement; (3) that the claims, if broad enough to admit infringement, are invalid for want of patentable novelty.

It is convenient to discuss the question of infringement at the outset, because what is said will throw a light upon the bearing of the third defense thereon, and I shall then say a few words in re-

spect of the first defense. The patent of the earlier number, if not positively inoperative, does not appear to have been very satisfactory, and it comes dangerously near to being a paper patent. The other patent has been used by the complainant, a large corset manufacturer, in the construction of about four machines, made on the heels of the patent, in 1897 or 1898, and there its utility stops. In fact, the old foot-press single tipper is still in operation at the factory. The two patented constructions are quite alike, except in one respect, which will be explained in a moment. They are really made up of two automatic machines for tipping one end only of a corset steel (called "single tippers"), put side by side, oppositely placed, and connected by mechanism intended to automatically effect the transfer of the corset steel as it emerges from the first single tipper, across to the line of feed of the second single tipper. It is in this transfer mechanism that we find the distinguishing features of the two patents. Letters patent issued to Thomas B. De Forest as long ago as May 7, 1878 (No. 203,428), disclosed a continuously operating automatic double tipping corset steel machine, with hoppers, chutes, and compressing devices. The result aimed at was, therefore, old when Seeley entered the field, and it was for him to devise a new way of reaching that result. It is obvious that the above disclosure removes the greater part of the alleged novelty from the Seeley machines. The Hotchkiss patent, dated April 23, 1895, No. 537,891, shows how tips can be fed from a hopper and through a chute. The patent to Cook and Carter, dated February 18, 1896, No. 554,773, which shows upon its face that it was prepared by the same solicitors who appear in the Seeley patents, does not show, it is true, a corset steel tipping-machine, but it teaches us how to cover automatically similar steels or blades throughout their length. It shows how such strips can be fed into the bite of feed rollers, and so carried along into the cutting devices. The "feed wheels, 7 and 8," are in advance of "the presser wheels, 12 and 13," and these latter are of the same construction as the "compresser wheels" of the Seeley patents. Avoiding the wealth of illustration which the prior art affords, it is safe to assert of complainant's machines that the hoppers and chutes are old, that the feed rolls are old, that the compression rolls are old, and that a combination which feeds tips from a hopper through a chute to be engaged with an approaching article, which will thereafter reach a compressing device is old. In other words, the single tipper is old. The only novelty is that which appears in the way of combining two single tippers by a transfer mechanism. For that element in the combination it is fair to give the patentee the benefit of the mental conception which led to its production, but we cannot go further. The doctrine of equivalents should not be prostituted for the purpose of adding something to that conception.

Let us see what the patentee's notion was. In both constructions it is evident that the feed rolls which engage the corset blade after it has passed the compression device are essential to the transfer mechanism. In the earlier number the rolls seize the blade and compel its delivery into a peculiar chamber so arranged

that the blade is pushed laterally out of the line of feed and into the receiving chamber. A successive delivery of blades into this chamber causes the first blade to come nearer the line of return feed on the other side of the chamber, and when the chamber has filled that blade is started on its homeward journey. The second machine is simpler, but the primal inventive conception is about the same. The peculiar chamber, with its complicated lever attachments, is dispensed with, and the feed rolls deliver the blade upon a flat table and under an endless belt, which carries the blade across the table with a wiping motion, toward the line of return feed. The blade must, however, pass under the first pair of necessary feed rolls, so as to depress the return feed rolls on the other side, the lever, G, pendulum-like, alternately lifting and depressing the feed rolls as blades pass beneath them. It appears, therefore, that in both machines the transferring mechanism is dependent for its automatic double tipping action upon the co-operation and co-action of at least two single tipped blades. In the defendants' machines there is no vestige of this kind of transfer mechanism. After the blade first leaves the compression rolls, the momentum then received projects it into space, and it falls by gravity, directly upon the line of return feed. The atmosphere does the transferring. The necessity for the coaction of two single tipped blades does not exist, and in no sense do such blades coact or affect each other. It is a simple matter, indeed, to toss an untipped blade upon the return feed mechanism, and receive it single tipped at the point where the double tipping operation usually starts. The transferring mechanism must obviously be read into any claims from which it is absent, because to find any novelty its presence is a necessity. Manifestly there is no infringement.

I have said less in giving reasons for the "faith that is in me" in the above respect than I might have deemed wise if it were not also very clear to me that the first defense is sustained by the proofs. Let me state, as briefly as I can, why I am satisfied that Mr. Nilson, rather than Mr. Seeley, is the author of whatever may smack of novelty in the patents in suit. If Mr. Seeley had asked the Patent Office for a single tipper patent, his treatment there might have differed from that which actually took place, and we certainly should not be confronted with the present issues. To my mind, however, the evidence clearly establishes the proposition that Mr. Seeley never approached the conception of anything beyond that. After much experimenting and stress he evolved a single tipper construction shown in defendants' exhibit "Seeley Sketch of Single Tipper." This he turned over to Nilson along about September 9, 1896. The single tipper was completed in December, 1896. Late in October Nilson had prepared castings for a double tipper, and began to construct one, while work on the single tipper continued. This was his own notion, and for a time he and his assistant kept it covered whenever Seeley came in to look at the single tipper. The double tipper was delivered to Warner Bros. late in February, 1897. Nilson had November and December to give up to the double tipper construction before the single tipper

was delivered. During this time the construction undoubtedly came under Mr. Seeley's observation, and he may have made some idle remarks in the way of advice, but all through the work Nilson was the master mind, and was evolving in concrete form a nebulous notion which came to him by reason of his association with the single tipper. The patent attorneys spent two or three days at his factory making the sketches which they required for the patent application, which was filed on January 15th. This is the patent which shows the complicated system of springs in the transfer mechanism. Before the machine was delivered, late in February, the spring mechanism turned out to be inoperative. Nilson and Coulter, between them, thought out the belt transference plan, and Nilson used it. This worked very well, and it struck Seeley that it would be well to get as good a thing as that into the patent. So Coulter made an outline drawing, which is in evidence, about which Nilson suggested a couple of changes. The matter then went on to the attorneys at Washington and laid the foundation for the drawing and specification of 589,580, the changes suggested by Nilson appearing in Fig. 2 of the drawings. The rebuttal testimony does not help Mr. Seeley. Warner Bros. had a machine department and Mr. Seeley could have developed an idea right at home, but even his single tipper was too crude to be worked out there. He availed himself of Nilson's bright mechanical mind, and that mind went further, and evolved the double tipper. Seeley's crude single tipper idea is used with skill to bolster up an effort to show a disclosure of the double tipper mechanism. But the statements, the drawings, and the exhibits may all be traced back to the fundamental single tipper conception.

I am satisfied that, so far as anything appears which can be twisted into the appearance of a patentably novel conception, it most conclusively sprang from the brain of Nilson, helped, perhaps, by Mr. Coulter on the transfer belt, and that the concrete embodiment of those ideas is due entirely to the efforts of Mr. Nilson.

Let the bill be dismissed.

H. C. COOK CO. v. LITTLE RIVER MFG. CO.

(Circuit Court, D. Connecticut. March 31, 1905.)

No. 1,123.

PATENTS—INFRINGEMENT—NAIL CLIPPERS.

The Wenger patent, No. 569,903, for finger-nail clippers, construed, and held not infringed.

In Equity. Suit for infringement of patent. On final hearing.

George D. Seymour, for complainant.

A. M. Wooster, for defendant.

PLATT, District Judge. This is the usual action asking for an injunction and accounting based upon an alleged infringement of letters patent No. 569,903, dated October 20, 1896, issued to Julius

D. C. Wenger, for an improvement in finger-nail clippers, the title of said letters patent being in the complainant. The claims in issue are Nos. 1 and 2:

(1) The combination of the rigid member, the spring member connected therewith by one end, coacting cutters on the disconnected ends of said members, and the operating lever pivoted on the rigid member near the cutters and having a short end extended through a perforation in the spring member, substantially as described and for the purpose specified.

(2) The combination of the rigid member longitudinally slotted, the spring member connected therewith by one end, coacting cutters at the disconnected ends of said members, the operating lever pivoted to said rigid member, and means for confining the lever when turned down into the slot of the rigid member, substantially as described and for the purpose specified.

The defenses are (1) noninfringement; (2) that, if the patent in suit shall be construed broadly enough to discover infringement, it must be found invalid for want of invention.

Both parties have with painstaking care prepared and presented this cause. The court has examined the patent in suit and defendant's structure in the strong light cast upon them by the prior art. It is useless to enter upon an exhaustive discussion of the matter, and I may therefore hope to be excused if I shall confine my comments to the things which strike me as essential. When the patentee approached the art there was little left to be done. Heim and Matz recognized the narrowness of the field, and frankly said so. They obtained letters patent No. 244,891, dated July 26, 1881, for an application of the lever principle to such clippers, and truthfully point out in the specifications, lines 60-66, that it was old in the art to produce finger-nail trimmers "with two hinged jaws held normally gaping by a spring and having separately attached nipping edges," the jaws being compressed directly by the thumb and finger; and so, disclaiming broad invention, claimed as new "a pair of nail-clipping jaws, a, a', formed of a single integral piece of steel, A, which jaws are held normally gaping by their resilience, and are closed by a cam-headed lever, C, substantially as set forth." No. 244,891 was reissued November 1, 1881, as No. 9,921, and here a careful description shows how a cam lever can be pivoted upon a yoke fastened to one of the normally gaping spring jaws, so that it may press firmly together the jaws with their cutting edges. We have here, then, a full disclosure of the lever, with a cam action, bearing upon the outside of one of the members, and using the other member as the one to offer the resisting force, while the lever works upon its pivot, and how a single integral piece of steel can be bent upon itself in U shape, so that it will act as its own spring, or the jaws may be hinged together and kept apart by a spring; thus admitting the equivalency of the two methods of spring action. It is true that none of the nail clippers of the lever-pressure type offer a complete anticipation of the patent in suit. The La Casse patent, No. 523,708, July 31, 1894, in Fig. 9 shows a lever acting in slots with a cam-like action, which engages the member upon which one of the cutting edges is formed, pushing it forward to cut, and pulling it back after cutting. By using the slotted member and the perforated member the patentee obtains a peculiar kind

of inside connection for his lever, but it is of a peculiar kind, acting in a special way, and the inventive conception does not appear to have gone beyond the peculiar method of employing certain functions, which will be pointed out. Nor can I attach any importance to the alleged novelty and inventive thought in claiming as two elements of his invention a spring member and a rigid member. Heim and Matz had two members, and one of them was rigid enough for the purpose then sought. By slotting one member in the case of the patent in suit, it is somewhat weakened, it is true, but to turn the edges of the sheet steel, and thus add resisting capacity, was an understood thing in letters patent to Browne, No. 561,482, dated June 2, 1896, and what was done is, after all, as the Patent Office examiner suggested, "merely a verbal matter," which was, perhaps, a polite way of saying "merely a matter of words." Both members normally gape, by reason of the resiliency, caused by turning the strip of steel upon itself, and the rigidity given to one member by turning in the edges of the strip does not divest that member of its capacity for taking part in the springing operation. It is inconceivable that one member does all the springing, the other member none; and the patentee seems to concede this by saying "practically rigid" in his specifications. If it is more than a matter of words, then the combination of a rigid member with a spring member is shown in English patent to Gestetner, No. 8,638, July 1, 1886. It is wasteful to multiply citations on this as well as on many other points. I am in accord with the defendant's expert in his position that if the elements into which the claims are divided, as expressed by their terms, shall be held to include mechanical equivalents, it is easy to read them upon devices shown in the prior art; but, as I have said before, not in their entirety upon any one device. The situation demands, then, that if Wenger invented anything (and I think that he did), we must look for it around about his treatment of the lever action, and what he thought out is easily discovered. He claims an "operating lever * * * having a short end extended through a perforation in the spring member, substantially as described." He describes the short end of the lever as for a short distance, substantially parallel to the body of said lever, and extending "down through the perforation 7 of the spring member." The lever exerts its force by sliding with a cam action upon the back or outer face of the spring member, and is pivoted upon the rigid member. The cutting edges "shut squarely against each other as in cutting pliers," and this is necessary to the inventive thought, because the force of the lever weakens after the short end has moved a certain distance, and will not remain sufficiently powerful to injure the cutting edges when they come together.

Complainant's expert undertakes to juggle with the word "perforation," but he seems to admit that one cannot perforate without piercing through, or at least penetrating into the interior of, the substance operated upon. The hole or aperture becomes essential to the invention when we consider that it was necessary to employ the cam-like action of the lever end upon the outside surface of

the spring member and near its cutting end. In defendant's construction the short arm of the lever is in substantial alignment with the long end thereof, and is arranged to engage the horizontal portion of a staple which lies directly in front of, and has a path of movement extending from, a point slightly below the pivot pin to a point slightly above and close to said pin. Therefore the operating lever acts substantially as a straight lever, with the greatest possible power-multiplying effect, and with the least possible loss by friction. The engagement is with a yoke upon the spring member, which lies wholly between the members; and the closing action is effected by pull upon the yoke, instead of cam action upon the outer face of the member. It is evident that a result of this difference in construction is that in defendant's construction the leverage increases as the closing movement progresses, while in complainant's it decreases at the same stage of operation; and so in cutting heavy nails the patent in suit works with a decreasing, and the defendant's structure with an increasing leverage. So, also, this peculiarity enables the defendant to make use of the shearing motion, which compels the cutting edges to pass each other, whereas the patent in suit demands the square meeting of the cutting edges, as in the case of pliers. The record in the Patent Office and the prior art all demonstrates that Wenger adopted a number of old features and combined them in a way, which, after parleying with the Patent Office, he specifically claimed. Defendant likewise adopted many old features, and combined them in a different way, and asked for a patent upon his particular method, which was granted without contention, and carries with it such probative force as such grants usually enjoy. The patentee tells us that the main objects of his improvements are simplicity and economy in construction and general efficiency and convenience in use. It will be seen by an examination of finger-nail clipper or trimmer patents as far back as that of Edge, No. 183,256, October 17, 1876, that every patentee, whether he says so in plain terms or not, was hunting for convenience, simplicity, and economy in construction. Extreme cheapness and inefficiency are usually handmaidens, and it is feared that such may be the case in many of these patents, but that, of course, offers no reason why the man who has really invented anything in that line should not have the benefit of his conception. On the other hand, it offers no excuse for a demand reaching beyond the inventive thought. The conclusion is, that the patent, as it must be construed, is not infringed. The second defense need not be considered.

Let the bill be dismissed.

SELF-SEALING CAN CO. v. HOCKER.

(Circuit Court, E. D. Pennsylvania. March 30, 1905.)

No. 11.

1. PATENTS—INVENTION—COMBINATION OF OLD ELEMENTS.

Merely bringing together old devices in a combination in which each performs its old function, without producing any new result by reason of the combination, is not invention.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 27-29.]

2. SAME—CAN TOPS AND COVERS.

The Spencer patent, No. 412,134, for a can top and cover, is void for lack of invention, in view of the prior art.

In Equity. Suit for infringement of patent. On final hearing.

Charles C. Protherve, for complainant.

Charles A. Chase, for respondent.

HOLLAND, District Judge. The complainant, who is the assignee of a patent No. 412,134, issued to Richard McDonald Spencer on October 1, 1889, brings suit, alleging an infringement, and prays that an injunction shall issue, and that the defendant be required to account for profits and answer in damages which the complainant alleges it has sustained. The defense is: (1) That in view of the prior art the patent is void for want of patentable novelty; (2) noninfringement.

The object of the improvement was to construct can tops and can covers in such a manner that the can cover will safely retain its place in the can or can top, and also in such manner that the can cover may be conveniently and repeatedly removed, and the can opened, without injury to the can or to the can cover; and in order to accomplish this object Spencer constructed a can in which the upper head or plate of the can was soldered or fastened to the upper outer edge of the can or the can top. This part of the top of the can into which the can cover is to be inserted is a ring or flange extending downwardly from the outer upper edge of the can, to which it is fastened, and is curved or concaved, or it may be extended directly to the opening without a curvature. On the inner side there is a ring flange, which extends downward as near the plane of the upper outer side of the can as it can be made and yet retain its flexibility and lateral pressure, so that when the top is forced in it will be held there by this lateral pressure or adhesion. The can cover consists of a plate or bottom, with a ring flange, and beaded at the top. It is stamped out of a metal sheet in a single piece, and of uniform thickness throughout; but this is not essential. Its beaded top must be sufficiently strong to bear the pressure of a point of a lever, by which the cover is raised from the can by placing the point of the lever under the bead and using the upper outer angle of the can as a fulcrum. When this cover is made about the size of the opening in the top of the can, or slightly larger, and when crowded or forced into the opening, the outer surface of the ring flange of the can cover presses laterally against

the inner surface of the ring flange of the top of the can, and the latter is more or less expanded and enlarged, especially at its upper part, thus increasing the lateral adhesion, as well as the closeness of the fit, of the two parts. When the can cover is so crowded into its place, the inner part of the elastic material is deflected downward, and the tendency of the material to recoil upward and away from the body or bottom of the can, and to resume its former position, adds to the lateral pressure and adhesion in proportion to the force employed. In other words, the ring or flange in the can top extending downward is not strictly cylindrical, but tends slightly to a conical shape, and the ring or flange of the can top is of a similar shape, but slightly larger, and is forced down the same as a cork in a bottle.

There has been a great deal of evidence taken in this case for the purpose of showing a novel feature not heretofore discovered or used, and a long and elaborate argument has been submitted in support of the proposition that this invention differs in results from those heretofore used in the art. I fail to see anything new in this combination of old elements. The patentee admits in his disclaimer that prior to his invention cans had been so constructed that, when the can cover is fitted air-tight into the can's top, the cover will in most instances retain its place, and yet can be easily lifted or pried out, and that prior to his invention cans had been so constructed that the part of the can top between the upper outer edge of the can and the can cover extended downwardly to the lower part of a ring or rim into which the can cover was fitted air-tight. Following this disclaimer, the patentee makes four claims as follows:

"(1) A can top having the annular piece extending inward to the can cover receiving aperture, curved downward and then upward between its outer portion and inner edge, but having such edge lower than its outer portion, and a can cover fitting the cover receiving aperture and engaged by the inner edge of the can top, substantially as and for the purpose specified.

"(2) In combination with a can top having an annular piece extending inward and downward from the edge of the can to the cover receiving opening, so that its inner edge is below its outer portion and curved or concaved between such inner edge and the outer portion, the can cover having the upwardly extending flange or rim fitting the cover receiving opening, and held solely by the engagement of the can top with the flange and plate of the can cover, substantially as and for the purpose set forth.

"(3) In combination with a can top having an annular piece extending inward and downward from the edge of the can to the cover receiving opening, so that its inner edge is below its outer portion, and provided with a downwardly extending flange or rim at its inner edge, the can cover having the upwardly extending flange or rim fitting the cover receiving opening, and held solely by the engagement of the can top with the flange and plate of the cover.

"(4) In combination with a can top having an annular piece extending inward and downward from the edge of the can to the cover receiving aperture, and provided at its inner edge with a downwardly extending flange, and dish-shaped can cover held solely by the engagement of the can top with the flange and plate of the cover, consisting of a plate with an upwardly extending rim engaged by the inner edge of the annular piece and the downwardly extending flange thereon at a point above the body or plate part of the cover and having on its upper edge an outwardly extending bead or flange, substantially as and for the purpose specified."

An examination of the prior patents offered in evidence will show that there is nothing new in the Spencer patent.

The Gordon patent, issued March 16, 1869, shows a somewhat similar combination to that in these claims, as the diameter of the lower portion of the disc or can cover is made to correspond with that of the lower edge of the orifice or opening in the can. It may be a trifle larger than this opening, so that when it is forced down the opening will not only be closed air-tight, but there will be sufficient friction to hold the cover tight and in place. In this case, however, there is a covering or label placed over the top of the can to seal it.

The Norton can top, patented June 21, 1881, is similar in construction to that of the defendant. In this patent, however, a wooden top was used to effect the same object as is intended to be effected by the patent in suit, and this wooden top was held in place by the same forces utilized by Spencer in his patent; but it was found that the expansion of the wood was not uniform, and, therefore, the top was not reliable as a stopper or seal of the can.

The Bentley top, however, is the same kind of a mechanism as that of the plaintiff's can top, but the opening in the can is somewhat different. The flange, instead of extending downward, extends upward. If, however, the flange in the top of the Bentley can were turned down, instead of up, it would be the same as the can top and opening in the plaintiff's patent. So that we have in the Bentley can top and the Norton can opening the same combination found in the Spencer patent. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect, without the production of something novel, is not invention. *Hailes v. Van Wormer*, 87 U. S. 354, 22 L. Ed. 241.

The Clark patent, issued March 29, 1887, in England, was cited against this patent in the Patent Office, and letters were refused. Spencer, however, produced evidence to the effect that his patent was conceived before that date, but application was not made until the date of the issue of the patent to him above mentioned. Evidence was submitted by the plaintiff in this case on this point; but we need not consider it, because I am of the opinion that the Spencer patent does not involve any patentable novelty.

Let a decree be drawn dismissing the bill, with costs.

In re TROY & COHOES SHIRT CO.

(District Court, N. D. New York. April 12, 1905.)

No. 1,464.

1. BILLS AND NOTES—ACCOMMODATION INDORSEMENT—KNOWLEDGE.

The president and treasurer of a New York corporation drew certain notes payable to the corporation's order, which they then indorsed, first in the name of the corporation, then with the names of the president and treasurer individually. The notes were then delivered to the corporation's vice president, without consideration, for the benefit of a firm doing an independent business, of which all three were members. The vice president indorsed the notes individually, and then delivered them to the

president of the corporation, who indorsed them, without consideration, in the name of the firm. The firm having a deposit account with claimant in a distant city, an agent of the firm, who was not an indorser, presented the notes to claimant for discount, and on inquiry falsely represented to claimant that the notes had been executed, indorsed, and delivered on account of moneys advanced by the firm to the corporation, whereupon they were discounted on the faith of such representations. *Held*, that the form of the execution and indorsement of such notes was not such as to charge claimant with knowledge that the notes had been executed by the corporation for accommodation, and were therefore unenforceable against it.

2. SAME.

The party who discounted the notes knew the president and treasurer of the corporation who made the notes were also members of the firm for whose accommodation the notes were made. *Held*, this fact did not charge the party who discounted the notes with notice of their true character.

In Bankruptcy.

This is the review of an order made by Edwin A. King, as referee in bankruptcy, on the 7th day of January, 1905, disallowing the claim of International Trust Company against the estate of said bankrupt, Troy & Cohoes Shirt Company, for the sum of \$25,010.50, presented and proved February 26, 1904. The claim is upon five promissory notes of \$5,000 each, made by said Troy & Cohoes Shirt Company, payable to its own order, and indorsed by it and others, and finally discounted by the said International Trust Company. The defense of the trustee sustained by the referee was and is that the maker of the notes received no consideration therefor; that the notes bore upon their face notice that they were accommodation notes; that the making and indorsement was ultra vires; and that said International Trust Company, at the time it discounted the notes, was charged with full knowledge of the invalidity of the notes as against the bankrupt, Troy & Cohoes Shirt Company.

H. D. Bailey, for trustee.

Dillon & Hubbard, for claimant.

RAY, District Judge. To understand the case and the legal principles applicable, it is necessary to fully state the material facts.

(1) The maker of the notes in question, Troy & Cohoes Shirt Company, was, before its bankruptcy, a manufacturing corporation of the state of New York, with its principal place of business at Cohoes, N. Y., engaged in making and selling shirts, etc. Its officers were Frederick Beiermeister, Jr., president, Charles F. Beiermeister, vice president, and John M. Beiermeister, secretary and treasurer. These gentlemen were stockholders in, but not the only ones, and the only directors of the company. The affairs of the company were conducted by them as its board of directors, but no record was kept of their transactions. Section 10 of the general corporation law of the state of New York (Laws 1892, p. 1804, c. 687) provides as follows:

"No corporation shall possess or exercise any corporate powers not given by law or not necessary to the exercise of the powers so given."

The by-laws of the Troy & Cohoes Shirt Company provided as follows:

"No official or agent of this company shall have power to indorse in the name or in behalf of the company any note, bill of exchange, draft, check

or any written instrument for the payment of money, save only for the purpose of collection of said instrument, unless thereunto duly authorized by the vote of the directors of this company duly held at a regular or monthly meeting of the board of directors and entered on the minutes of said board."

"No officers or agents of the company shall singly or together, unless there-to specially authorized, contract or cause to be contracted, any debt or liability in the name or on behalf of the company beyond the ordinary legitimate business and current expenses thereof."

(2) Beiermeister Bros. & Co. was a firm and copartnership at Cohoes, N. Y., carrying on a distinct and separate business from that of the Troy & Cohoes Shirt Company. Such copartnership was composed of said Frederick Beiermeister, Jr., said John M. Beiermeister, and said Charles F. Beiermeister. It had no other member.

(3) Said International Trust Company was and is a corporation of the state of Massachusetts, duly authorized, etc., and was authorized to do and was doing a general banking business. John M. Graham was the president of said company, who did all the business for said company in connection with the discounting of the notes in question. He and said company knew that Frederick, Jr., and John Beiermeister were members of the firm of Beiermeister Bros. & Co. He and said company knew that said Frederick Beiermeister, Jr., was president, and that said John M. Beiermeister was secretary and treasurer, of said Troy & Cohoes Shirt Company. That fact appeared on the face and back of each of the notes in question. The negotiable instruments law of the state of Massachusetts, being chapter 73 of the Revised Laws of said state, contains the following provisions:

"Sec. 46. An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

"Sec. 69. A holder in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face. (2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored if such was the fact. (3) That he took it in good faith and for value. (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

"Sec. 73. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

"Sec. 74. A holder in due course holds the instrument free from any defect of title or prior parties, and free from defences available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

"Sec. 76. Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who was negotiated the instrument was defective the burden is on the holder to prove that he or some other person under whom he claims acquired the title as holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

(4) On the 10th day of March, 1903, the Troy & Cohoes Shirt Company at Cohoes, N. Y., without consideration, and not for any purpose connected with its own business, and, so far as appears, without any meeting of or action by its board of directors, authorizing such action, made its promissory note of which the following is a copy, viz.:

"\$5,000.00

March 10th, 1903.

"Six months after date, we promise to pay to the order of ourselves Five Thousand Dollars 00/100, payable at the International Trust Co., Boston, Mass., value received.

Troy & Cohoes Shirt Co.

"F. Beiermeister Jr. Prest.

"John M. Beiermeister Treas."

The name "Troy & Cohoes Shirt Co." and "F. Beiermeister Jr. Prest." were signed thereto by the president, and "John M. Beiermeister Treas." was signed thereto by such treasurer. Said note was thereupon and without consideration indorsed as follows: Said president of said company first wrote the name of said company on the back thereof, and his own name with the word "Prest." following, thereunder, and then said treasurer wrote his name under the name of the president, adding "Treas." Said F. Beiermeister, Jr., and said John M. Beiermeister then indorsed said note individually by writing their names in the order named thereunder. The said note, without consideration, was then delivered to said Charles F. Beiermeister, vice president of said shirt company, and also a member of the firm of Beiermeister Bros. & Co., who indorsed said note by writing his name thereon as follows: "C. F. Beiermeister," and said note was then delivered to said F. Beiermeister, Jr. (a member of said last-named company, the copartnership, and also president of said shirt company), who indorsed same, without consideration, by writing the name of such copartnership thereon as follows: "Beiermeister Bros. & Co." Such indorsements then read as follows and in the following order, viz.:

"Troy & Cohoes Shirt Co.

"F. Beiermeister Jr., Prest.

"John M. Beiermeister Treas.

"F. Beiermeister Jr.

"John M. Beiermeister.

"C. F. Beiermeister.

"Beiermeister Bros. & Co."

The note was not made or given for an advance or advances made, or any consideration whatever given or paid, by any one or more of such indorsers.

(5) The Troy & Cohoes Shirt Company was not indebted to said partnership, nor to said F. Beiermeister, Jr., but said partnership and said F. Beiermeister, Jr., each were indebted to Troy & Cohoes Shirt Company.

(6) Beiermeister Bros. & Co. had an account with said International Trust Company, from which it drew money on check from time to time.

(7) Henry Beiermeister was the agent of said firm Beiermeister Bros & Co.

(8) On the day of the date of the said note, March 10, 1903, said agent of said copartnership, known and representing himself to be such agent, presented the said note to said International Trust Company at its place of business in Boston, Mass., the place where payable, for discount, and he then and there stated and represented to the said International Trust Company, and directly to its said president, John M. Graham, who was doing the business for said trust company, that such note was made, executed, indorsed, and delivered on account of advances of money made by said Beiermeister Bros. & Co. to the said Troy & Cohoes Shirt Company. The said International Trust Company, so represented by its president in the transaction, believed such representations, and thereupon discounted such note for, and placed the proceeds thereof to the credit of, the firm of Beiermeister Bros. & Co. No part of such proceeds was paid to or for the benefit or use of the maker, Troy & Cohoes Shirt Company. It is not shown that the directors of said company, acting as a board, authorized the making, execution, indorsement, and delivery of said note.

(9) The other four notes, each for \$5,000, and reading the same, except as to date, were made, executed, indorsed, delivered, and discounted in precisely the same manner, by the same persons and companies, and under the same circumstances, and with the same representations, and the proceeds were placed to the credit of the same firm, as in the case of the note of March 10, 1903, the only difference being in the dates of the notes and of the transactions relating thereto, viz., one was dated and discounted April 3, 1903, two May 21, 1903, and the last May 29, 1903.

From these facts it appears that the International Trust Company knew, when it discounted these notes, that Troy & Cohoes Shirt Company, the maker, was a New York corporation; that Frederick Beiermeister, Jr., and John M. Beiermeister were the president and secretary and treasurer thereof, respectively; and that such named persons were members of the firm of Beiermeister Bros. & Co., a firm carrying on a separate and an independent business. From these facts the referee has found as a fact "that the notes in question bore upon their face and in their indorsement, when presented for discount by said firm of Beiermeister Bros. & Co. to the International Trust Company of Boston, notice that they were accommodation notes." Such referee has also found from the aforesaid facts "that said notes in question bore upon their face and in their indorsements, when presented for discount by Beiermeister Bros. & Co. to International Trust Company of Boston, notice that they were ultra vires and void as obligations of Troy & Cohoes Shirt Company." The referee also finds as a fact "that the claimant (International Trust Company) has failed to prove any loan of moneys to Troy & Cohoes Shirt Company, as alleged in its proof of claim." The proof of claim in due form, and properly verified, states that "the said Troy & Cohoes Shirt Company * * * was at and before the filing of the said petition, and still is, justly and truly indebted to said corporation (International Trust Company) in the sum of twenty-five thousand ten and ⁵⁰/₁₀₀ (25,010.50) dollars; that the

consideration of said debt is as follows: money loaned as per notes attached." The claim then says that no part of said note has been paid, no note received, and no judgment rendered, and that there are no set-offs or counterclaims, except \$534.72. The original notes, with certificates of protest attached, were annexed to the claim.

I do not see the pertinency or correctness of a finding "that the claimant has failed to prove any loan of moneys to Troy & Cohoes Shirt Company, as alleged in its proof of claim." The International Trust Company has neither stated nor suggested in its proof of claim that it did loan money to the Troy & Cohoes Shirt Company. It simply makes a claim upon the notes, with the statement that the consideration was money loaned as per notes attached, and as the last indorser upon each of said notes is Beiermeister Bros. & Co., the fair inference is that the money was loaned to this indorser, and not to the maker of the note.

The trustee insists that the making, execution, indorsement, and delivery of these notes were not the exercise of a power given by law, or, if given by law, such acts were not necessary to the exercise of the power given. The contention is that the Troy & Cohoes Shirt Company had power under the statute to give notes in the transaction of its business for money borrowed to use in its business, or in payment for property purchased, or for labor only, and that it had no power to make an accommodation note in this form, and indorse it in this form to a second party, and that the want of power to make this note appears upon the face thereof by reason of the fact that it is made by the maker payable to itself. It is also contended that under the by-laws quoted each note is void, for the reason that it does not affirmatively appear that the indorsement of such note by the president and treasurer was authorized by the vote of the directors at a regular or monthly meeting entered on the minutes of the board. It is further contended that each note is void because executed, indorsed, and delivered in violation of the by-law prohibiting the officers, unless specially authorized, from contracting any debt or liability in the name or on behalf of the company beyond the ordinary legitimate business and current expenses of the company. It is insisted that the International Trust Company of Boston was bound to know the powers of this company, the Troy & Cohoes Shirt Company. The trustee insists that each note showed to the International Trust Company upon its face that it was made and indorsed in the name of the company, by its officers, who were seeking to use such note for their own personal ends, and that the form of the note and of its indorsements were sufficient to put said trust company upon inquiry as to the power of the maker to utter such note, as to its consideration, and as to all other material facts. The trustee further claims that, as the International Trust Company was thus put upon inquiry, and failed to inquire further than it did, it stands charged with knowledge of all the material facts hereinbefore cited, and is as fully concluded and bound as though it had possessed actual knowledge when the paper was discounted.

The International Trust Company took these notes from the duly authorized agent of one of its customers, Beiermeister Bros. & Co. It would seem that it made inquiry, for it was informed that the note was made, indorsed, and delivered to the Beiermeister Bros. & Co. for advances made by that company to the maker of the note. It is not the case of a note made by a company payable to itself, and indorsed to an officer of the company, and by such officer discounted for his own benefit to the knowledge of the discounteer. Here, while the note is made payable to the order of the maker, and was then indorsed by the maker exactly as signed, and also by the president and secretary and treasurer of the maker individually, it also bore the indorsement of C. F. Beiermeister. There is no evidence that the International Trust Company knew C. F. Beiermeister held an official position in, or had anything to do with, the Troy & Cohoes Shirt Company. There is no evidence that the president of the Troy & Cohoes Shirt Company, or the treasurer thereof, made or used or indorsed the notes for their individual benefit. In fact, they did not. The notes were made and indorsed as they were for the benefit of Beiermeister Bros. & Co., a copartnership doing an independent business. It is probably true that, had either the president or secretary and treasurer taken these notes, indorsed as they were, to the International Trust Company for discount with the statement that he desired the money for his own purposes, or that he was procuring the discount for himself, and not for the maker, this would have been notice to the International Trust Company of the invalidity of the notes; but the notes were not presented for discount by any officer of the maker. On the other hand, each note was presented on the day of its date by an agent, not of Frederick Beiermeister, Jr., or of John M. Beiermeister, but of an independent company, doing an independent business, who sought to discount the note for the benefit of this independent company. The International Trust Company possibly had cause to suspect that the notes had been made and used for the benefit of either the president or secretary and treasurer, or both, inasmuch as such notes bore their individual indorsements, and hence it made inquiry, and was informed, in substance and effect, that the individual indorsements of Frederick, Jr., John M., and C. F. Beiermeister were accommodation indorsements, made to add their individual liability to the liability of the Troy & Cohoes Shirt Company, and that such notes were given for advances made by Beiermeister Bros. & Co. to the maker of the note.

In *Wilson v. the Metropolitan E. R. Co.*, 120 N. Y. 145, the court says at page 150, 24 N. E. at page 385 (17 Am. St. Rep. 625):

"Undoubtedly the general rule is that one who receives from an officer of a corporation the notes or securities of such corporation in payment of, or as security for, a personal debt of such officer, does so at his own peril. Prima facie, the act is unlawful, and, unless actually authorized, the purchaser will be deemed to have taken them with notice of the rights of the corporation. *Garrard v. P. & C. R. R. Co.*, 29 Pa. 154; *Pendleton v. Fay*, 2 Paige, 202; *Shaw v. Spencer*, 100 Mass. 388, 97 Am. Dec. 107, 1 Am. Rep. 115."

The cashier of a bank is not presumed to have power to bind it as an accommodation indorser on his individual note, and the payee cannot, unless he proves authority to make the indorsement, recover against the bank. *West St. Louis Bank v. Shawnee Bank*, 95 U. S. 557, 24 L. Ed. 490. It is conceded that such are the rules. But here, as already stated, the notes were not presented for discount by an officer of the Troy & Cohoes Shirt Company, or his agent, or for discount in payment of a debt of such an officer, or for the benefit of such an officer, but by the agent of an independent business company, which was carrying on a business independently of such shirt company. It was payable to the order of the maker, but this was not a suspicious circumstance.

In *Collins v. Gilbert*, 94 U. S. 753, 24 L. Ed. 170, the draft in question for \$8,000 was drawn by P. F. Collins & Co. on Thomas Collins to their own order, and by them indorsed in blank, and without consideration accepted by said Thomas Collins. Thomas Collins was not a member of the firm. P. F. Collins & Co., having possession of the accepted draft, delivered it to one Barnes, a contractor, with whom P. F. Collins & Co. were subcontractors. Barnes discounted the draft with Gilbert & Gay, the plaintiffs. It was held that this draft, although payable to the order of the drawer, carried no notice of any defect. The headnotes are:

"(1) A negotiable instrument, payable to bearer, or indorsed in blank, produced by a transferee suing to recover its contents, is, when received in evidence, clothed with the prima facie presumption that he became the holder of it for value at its date in the usual course of business, without notice of any thing to impeach his title.

"(2) The title of a bona fide holder for value of an accepted draft, indorsed in blank, is not affected by the fact that the party from whom he received it before its maturity had possession of it for certain purposes, and misappropriated it."

And in that case, at page 758 of 94 U. S. (24 L. Ed. 170) the court said:

"Where the supposed defect or infirmity in the title of the instrument appears on its face at the time of the transfer, the question whether the party who took it had notice or not is, in general, a question of construction, and must be determined by the court as matter of law. *Andrews v. Pond*, 13 Pet. 65 [10 L. Ed. 61]; *Fowler v. Brantly*, 14 Pet. 318 [10 L. Ed. 473]; *Brown v. Davis*, 3 T. R. 86."

In the *Chemical National Bank v. Colwell* (Sup.) 9 N. Y. Supp. 285, a note of the New York Lumber Company was drawn to its own order and indorsed exactly as signed. It was presented for discount by a director 20 days after made. The director who discounted the note in fact used the proceeds for his own benefit, but the bank did not know this fact. It was held that:

"The fact that Jones was a director of the company, and that the proceeds of the note were applied by him to his own use, does not show that the note was made for his accommodation, nor did the possession of the note by him naturally give rise to the question as to whether he was not confederating with the president of the company to make an improper use of the credit and the paper of the company. The note was signed: 'New York Lumber Company, Limited, D. C. Wheeler, Pres.,' and was drawn to the order of

'New York Lumber Co., Lim.,' and it was indorsed exactly as it was signed. Such a note, so indorsed, though presented for discount by a director of the company twenty days after it bore date, did not, upon its face, suggest that it was an accommodation note; nor did the possession of it by a director argue that it was used for a dishonest purpose. If, in point of fact, the proceeds of the note went into the company business; or if the note, after having been used in the business of the company, had found its way into the hands of a director (and the bank had nothing before it to show that either state of affairs was unlikely), what reason was there why it should not be discounted?"

The second headnote is as follows:

"A note of such company, drawn to its own order, and signed and indorsed by the president when presented for discount, although so presented by a director some time after its date, does not, on its face, suggest that it was an accommodation note, nor does the possession of it by the director tend to show that it was used for a dishonest purpose."

It is well settled that the fact that a note is presented for discount by the maker is notice to the institution making the discount that the indorsement thereon is an accommodation indorsement. *National Park Bank of New York v. Remsen* (C. C.) 43 Fed. 226; *The Bank of the Monongahela Valley v. Weston et al.*, 159 N. Y. 201, 54 N. E. 40, 45 L. R. A. 547; *Smith v. Weston et al.*, 159 N. Y. 194, 54 N. E. 38.

In *the Bank of the Monongahela Valley v. Weston et al.*, 159 N. Y. 201, 54 N. E. 40, 45 L. R. A. 547, it was held:

"When a promissory note was not received by the holder from any party prior in order of liability or possession to the indorser, it is not within the rule that when a note is presented by the maker the purchaser has, from that fact, notice that the indorsements were not made in the ordinary course of business."

In *Cheever v. The Pittsburg, Shenango & Lake Erie Railroad Company*, 150 N. Y. 59, 44 N. E. 701, 34 L. R. A. 69, 55 Am. St. Rep. 646, the first three headnotes are as follows:

"The rights of a holder of wrongfully diverted negotiable paper, acquired by him for value before due, cannot be defeated without proof of actual notice of the defect in title, or bad faith on his part, evidenced by circumstances."

"One who takes negotiable paper for value before due, without actual notice of any defect therein, has the right to assume that the relations to the paper of every party whose name appears on it are precisely what they appear to be."

"The principle that, where an officer or agent of a corporation makes a corporate obligation payable to himself, it bears upon its face sufficient notice of his incapacity to issue it, when he attempts to deal with it for his own benefit, does not apply where an officer or agent deals with a corporate note, executed by himself as such officer or agent, but originally payable to a third party, and which, so far as appears upon its face, has been regularly issued to the original payee, and by him transferred to a firm of which the officer is a member, and for which he acted in dealing with the note."

In that case the railroad company, by its president and secretary, made its note dated February 24, 1888, in the words and figures following, with the indorsements appearing thereon when same was discounted:

\$5,000.

Greenville, Pa., Feb'y., 24th, 1888.

"Four months after date the Pittsburg, Shenango and Lake Erie Railroad Company promises to pay to the order of John T. Bruen five thousand dollars, at the American Exchange National Bank, New York City.

"Value received.

"The Pittsburg, Shenango & Lake Erie Railroad Company.

"By M. S. Frost, President.

"Attest:

"E. S. Templeton, Secretary."

"Indorsed:

"Pay to the order of M. S. Frost & Son.

John T. Bruen,

"M. S. Frost & Son."

The note and name of the corporation signed thereto was in the handwriting of Templeton, the secretary. The president signed his own name. The indorsers signed their own names in the order appearing. Bruen was the private secretary of M. S. Frost, the president. M. S. Frost was a member of the firm of M. S. Frost & Son, the last indorser. There was no consideration for the making of the note, and Bruen, the payee, had no interest whatever in it. He indorsed it because requested to do so by Frost, the president. M. S. Frost & Son paid nothing for the note, and there was no consideration for the indorsement of that company. One Brooks, of Boston, had business with Frost, and in March, 1888, took the note of M. S. Frost & Son for \$30,000 as security for a loan of that amount. Frost gave Brooks, as collateral security for said \$30,000 note, certain certificates representing bonds, and also this note in question and another of the same character. Brooks held these notes as collateral merely until long after they were due, when he became the absolute owner through the foreclosure of his collateral. Thereafter Brooks transferred them to the plaintiff. It is perfectly plain that in this case Frost, the president of the company, fraudulently diverted the note of the corporation to his own use. Brooks knew that Frost was the president of the corporation, the maker of the note; and he also knew that Frost, the president of the corporation, was a member of the firm of M. S. Frost & Son. He therefore knew that M. S. Frost, who had made the note of the corporation as president, had probably passed it first to Bruen, and that then it had come to the firm or company of which said Frost was a member, M. S. Frost & Son. These facts appeared upon the note itself when Brooks took it. Brooks knew that the president of the company was using this note, thus indorsed, for the benefit of M. S. Frost & Son, and to an extent, therefore, for his own individual benefit. Brooks in fact had no actual knowledge of the facts surrounding the origin of the note, or of the diversion of it by the president. The court said as to the knowledge of Brooks:

"He knew nothing, so far as appears, outside of the paper itself, except the fact that the party presenting it was defendant's president, and that he was proposing to pledge the notes for his own debt, or rather for the debt of his firm, which, for all the purposes of the question, may be assumed to be the same thing. The question in the case is therefore reduced to a very narrow inquiry, and that is whether Brooks, standing in all other respects in the position and sustaining the character of a bona fide purchaser of negotiable paper, is deprived of that character and the benefits of that posi-

tion by reason of anything appearing upon the face of the notes themselves. The mind, at the threshold of the inquiry, encounters two principles that point in opposite directions and lead to different conclusions, as the one or the other is allowed to preponderate in the mental process of determining the legal rights of the parties. On the one hand is the principle which protects a bona fide holder of commercial paper from existing antecedent equities between the parties, and on the other the principle which protects a corporation from the unauthorized and fraudulent acts of its own officers. There is not much difficulty in stating the rule of law defining the duties and obligations of a party to whom negotiable paper is presented for discount or sale before due. He is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance. He does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The holder's rights cannot be defeated without proof of actual notice of the defect in title or bad faith on his part, evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted mala fide, his title, according to settled doctrine, will prevail. *Magée v. Badger*, 34 N. Y. 249, 90 Am. Dec. 691; *Am. Ex. Nat. Bank v. N. Y. Belting, etc., Co.*, 148 N. Y. 705, 43 N. E. 168; *Knox v. Eden Musee Am. Co.*, 148 N. Y. 454, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700; *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 202, 25 N. E. 402, 10 L. R. A. 676; *Vosburgh v. Diefendorf*, 119 N. Y. 357, 23 N. E. 801, 16 Am. St. Rep. 836; *Jarvis v. Manhattan Beach Co.*, 148 N. Y. 652, 43 N. E. 68, 31 L. R. A. 776, 51 Am. St. Rep. 727. Applying these rules to the conceded facts of the case, it seems to me to be impossible to impute bad faith to Brooks in the transaction. He advanced a large sum of money on the faith of the paper, without any actual knowledge that the relations of the party with whom he dealt to the paper were different from what they appeared to be on the face of it. The question now is, not what the facts were, but what they appeared to be, and what he had the right, from the notes themselves, to assume. He had the right to assume that the relations to the paper of every party whose name appeared on it were precisely what they appeared to be. *Hoge v. Lansing*, 35 N. Y. 136. He had the right to believe that the notes had been issued by the defendant to Bruen for value, in the regular course of business, and were by him transferred to Frost & Son in like manner. There was nothing to suggest to him that Frost was dealing with paper that belonged to the railroad for his own benefit. The appearances were that the defendant had put the notes in circulation by delivery to Bruen, and that they came to Frost's firm in the regular course of business, for value, and were then the property of the firm. It is quite true that all these appearances were deceptive, and that the actual facts were otherwise. But how was a banker or business man in Boston to know or suspect that Bruen was only the nominal payee and a mere instrument in the transaction to enable the president to divert the paper to his own use? The name of the party who presented it and had it in his possession appeared on the face of the paper to have signed it as president. The name of another officer of the corporation was upon it also, attesting its regularity, and everything was in his handwriting except the signature of the president and the indorsement of the payee. So far as Brooks was concerned, the paper showed that it had been issued to a stranger in the regular course of business, and, through his indorsement, had come to the hands of a mercantile firm of which the president of the corporation was a member. If this were the fact, there is no doubt as to his right to use it in the business of the firm. The holder of a note who has no actual knowledge or notice of a defect in the title, or other equities between the parties, when circumstances come to his knowledge sufficient to put him upon inquiry, is chargeable with knowledge of all the facts that such inquiry would have revealed. The difficulty in this case is to find the circumstance which can be said to be sufficient to put Brooks upon the inquiry. There was absolutely nothing on the face of the paper except the signature, as

president, of the party who was dealing with it; and that, we think, was not sufficient, in view of the fact that the appearances were that he was a purchaser from a third party. The principle that applies in a case where an officer of a corporation makes the corporate obligation payable to himself, and then attempts to deal with it for his own benefit, does not aid in solving the question in this case. When paper of that character is presented by the officer or agent of the corporation, it bears upon its face sufficient notice of the incapacity of the officer or agent to issue it. *Hanover Bank v. Am. Dock & T. Co.*, 148 N. Y. 612, 43 N. E. 72, 51 Am. St. Rep. 721; *Bank of N. Y., etc., v. Am. Dock & T. Co.*, 143 N. Y. 559, 38 N. E. 713; *Wilson v. M. E. R. Co.*, 120 N. Y. 145, 24 N. E. 384, 17 Am. St. Rep. 625; *Gerard v. McCormick*, 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234. There are numerous cases that belong to that class cited by the learned counsel for the defendant on his brief. There is a manifest distinction between them and the case at bar. Here the officer was not dealing with the corporate notes payable to himself, but with notes that had been regularly issued, so far as appeared from their face, to a stranger, and by him transferred to a firm of which the officer was a member, and for which he acted as agent in procuring the loan from Brooks and pledging them as security. The presence of Frost's name upon the paper as one of the agents who issued it was not naturally or reasonably calculated, under the circumstances, to arouse suspicion in the mind of Brooks, or to lead him to believe that the president was attempting to defraud the corporation in disposing of the notes. None of the cases cited by the learned counsel for the defendant sustain the proposition that such a circumstance is sufficient to put the purchaser of negotiable paper upon inquiry, or charge him with knowledge of the fact in case he fails to make it, and there are many cases that tend to support the contrary view. *Am. Ex. Nat. Bank v. N. Y. B. & P. Co.*, 148 N. Y. 698, 43 N. E. 168; *Miller v. Consolidation Bank*, 48 Pa. 514, 88 Am. Dec. 475; *Walker v. Kee*, 14 S. C. 142."

It would seem that in the case at bar the question is reduced to this: Was the fact that the notes in question were indorsed by the maker, Troy & Cohoes Shirt Company, by its president and treasurer and secretary, to such president, Frederick Beiermeister, Jr., individually, and by him to the secretary and treasurer, John M. Beiermeister, individually, and by him to C. F. Beiermeister, and by him to Beiermeister Bros. & Co., such notice of defect of title as to charge the International Trust Company with notice of the fact that this was an accommodation note, or with notice of the fact that Beiermeister Bros. & Co. had no title or right to have same discounted, notwithstanding the fact that the agent of Beiermeister Bros. & Co. stated to the trust company, when the discount was made, that the notes were given by the maker for advances? In other words, did the indorsements give notice to the trust company of the fact that in the hands of Beiermeister Bros. & Co. the notes were invalid and uncollectible? This would seem to depend upon two questions, viz.: Did the indorsement by the Troy & Cohoes Shirt Company to Frederick Beiermeister, Jr., individually, show or indicate that he had used or was using such notes or their proceeds for his own individual benefit, or did this indorsement to him and his indorsement to John M. Beiermeister show or indicate that they together had used the note or its proceeds for their individual benefit or purposes, and, if so, was the discount, International Trust Company, thus put upon inquiry, protected in accepting and relying upon the statement of the agent of Beiermeister Bros. & Co. that the notes were given for advances made by his firm to the maker?

Was there any presumption arising from the fact that the notes were indorsed by the maker, and then by its president and treasurer individually, that such officers, without full consideration to the maker, received and applied the notes or their proceeds to their individual use or purposes? If so, then the officers of a corporation who execute a corporate note for legitimate purposes cannot, for the benefit or security of a bank discounting such note, add their individual indorsements without thereby admitting that they are violating their duty as such officers and misappropriating or misapplying the note of the corporation or its proceeds. I am not aware of the existence of such a rule of law. The rule, as stated in *Wilson v. Metropolitan E. R. Co.*, 120 N. Y. 150, 24 N. E. 384, 17 Am. St. Rep. 625, and cases there cited, negatives this idea, for it is said:

"One who receives from an officer of a corporation the notes or securities of such corporation in payment of or as security for a personal debt of such officer does so at his own peril."

It seems to be the knowledge that the officer of the corporation is using the note for his own personal benefit that gives the notice, not the fact of the indorsement of the note or obligation by such officer. It would seem unreasonable to assume that the officer has diverted the note of the corporation to his own personal use because he indorses it. In *Garrard v. Pittsburgh & Connelsville Railroad Company*, 29 Pa. 159, the court said:

"But when he took it as collateral security for an individual debt of the president, he became a party to the misapplication and the breach of trust. * * * As a general rule, when the chief officer of a corporation is found in possession of its securities, his possession must be presumed to be the possession of the corporation."

In *Shaw v. Spencer et al.*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115, held:

"One holding stock as trustee has prima facie no right to pledge it to secure his own debt growing out of a transaction independent of the trust. If a certificate of stock expressed in the name of 'A. B., trustee,' is by him pledged to secure his own debt, the pledgee is by the terms of the certificate put on inquiry as to the character and limitations of the trust, and, if he accepts the pledge without inquiry, does so at his peril."

But here, even if such indorsements gave rise to suspicion, this was not enough to charge the International Trust Company with actual knowledge on the theory that upon inquiry it would have obtained knowledge of all the facts. Nor is the claimant here chargeable with bad faith. *Am. Ex. Nat. Bank v. N. Y. Belting, etc., Co.*, 148 N. Y. 698, 43 N. E. 168:

"Where it is sought to defeat the right of the holder of negotiable paper before maturity to recover against the maker, it is essential that actual notice be proved of the defect in title, or that circumstances be shown evidencing bad faith in the holder, and creating reasonable grounds for suspecting his conduct in the transaction. A bank has a right to assume, as to notes offered to it, whether for discount or as collateral security, by a customer who has an account with it, and who is in the habit of borrowing money from it, that the customer is acting in good faith, and within his lawful rights; and the fact that the customer is engaged in the business of note brokerage is not enough to deprive the bank of the right to indulge in such assumption."

In *Goetz v. Bank of Kansas City*, 119 U. S. 551, 7 Sup. Ct. 318, 30 L. Ed. 515, it was held:

"The bad faith in the taker of negotiable paper which will defeat a recovery by him must be something more than a failure to inquire into the consideration upon which it was made or accepted, because of rumors or general reputation as to the bad character of the maker or drawer."

In *Hart v. Potter*, 4 Duer, 458, it was held:

"When it appears that a promissory note, made for the accommodation of the payee, was obtained from the payee by fraud, the holder is bound to prove that it was transferred to him for value, and before its maturity. He is not, however, bound to prove, in addition, that he had no notice of the fraud when the note was transferred to him, but the burden of proving facts sufficient to charge him with notice rests upon the defendant."

In *Tod et al. v. Kentucky Union L. Co. et al.* (C. C.) 57 Fed., at page 52, the court said:

"When a corporation has power to issue bonds or execute promissory notes, it will be liable upon accommodation paper, though ultra vires, if such paper comes to the hands of a bona fide holder for value, without notice. Such a holder will be entitled to stand upon the presumption that the paper was executed for value, and for a lawful purpose. *Mor. Priv. Corp.* § 597; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322; *Mechanics' Banking Ass'n v. New York & S. White Lead Co.*, 35 N. Y. 505. The principle has been thus stated: 'Where a corporation has power, under any circumstances, to issue negotiable securities, the bona fide holder has a right to presume that they were issued under circumstances which give the requisite authority, and that they are no more liable to be impeached for any infirmity, in the hands of such a holder, than any other commercial paper.' *City of Lexington v. Butler*, 14 Wall. 296, 20 L. Ed. 809."

In 3 *Cook on Corporations* (5th Ed.) § 761, p. 1978, it is said:

"A bona fide purchaser of the corporate note is protected as he would be if the maker were an individual, excepting where he takes the note from an officer of the corporation in connection with the officer's personal business matters."

In 1 *Cook on Corporations* (5th Ed.) § 293, p. 640, it is said:

"It is well established that a person dealing with an officer of a corporation in a matter in which the officer is personally interested is not a bona fide holder of corporate securities received by him from the officer in that transaction. He is bound to inquire into the legality of any stock or corporate note which such officer issues or transfers to him in the officer's personal business, and is chargeable with notice of illegalities in the issue."

In *Nat. Park Bank of N. Y. v. The German American M. W. & S. Co.*, 116 N. Y. 281, 22 N. E. 567, 5 L. R. A. 673, it was held:

"Where the maker of a promissory note made payable to his order, and purporting to be indorsed by such a corporation, procures it to be discounted for his own benefit, if unexplained, this is notice to the discounter that the indorsement is not made in the usual course of business, but is for the accommodation of the maker."

In *Hotchkiss v. National Banks*, 21 Wall. 354, 22 L. Ed. 645, it was held:

"The title of a person who takes negotiable paper before due for a valuable consideration can only be defeated by showing bad faith in him, which implies guilty knowledge or willful ignorance of the facts impairing the title of the party from whom he received it; and the burden of proof lies on the assailant of the taker's title."

In *Richmond R. & E. Co. v. Dick et al.*, 52 Fed. 379, 3 C. C. A. 149, it was held:

"A manufacturing corporation received negotiable notes for property sold. The notes were discounted by a banking firm, in which the president of the corporation was a partner, but he had no actual knowledge as to the consideration for the notes, or of the transaction in which they were given. Held, that the mere fact of his connection with the two concerns was not sufficient to affect the banking firm with constructive notice of the consideration for the notes and of an alleged failure thereof."

In *Atlas Nat. Bank v. Holm et al.*, 71 Fed. 489, 19 C. C. A. 94, it was held:

"In order to deprive one of the character of a bona fide purchaser, it is not enough that he neglected to make the inquiry which a prudent man would or ought to have made, but he must have acted in bad faith. There is no presumption that a purchaser of a note was aware of existing defenses thereto."

There are many cases bearing on this question pro and con. After a careful examination of all the cases cited, and of many others, I have arrived at the conclusion that the facts appearing upon each note itself, including the indorsements, together with the knowledge possessed by the International Trust Company of Boston as to the interest of the president and treasurer of the maker of the note in the firm which presented such note for discount, were not sufficient to charge such trust company with knowledge of the facts as to the making of such note, the want of consideration, etc. While it appears that the trust company knew that Frederick, Jr., and John M. were members of the firm which presented the note for discount, it does not appear that it knew, or had reason to believe, that they were the only members of such firm, or the controlling members therein. As this firm was doing an independent business, the fact that the two Beiermeisters last mentioned were members not only of the corporation making the note but of the firm presenting such note for discount was not notice, nor a fact tending to give notice, that the corporate note was made and being used for the accommodation of the firm. *Cheever v. The Pittsburg, Shenango & Lake Erie R. Co.*, supra; *Richmond R. & E. Co. v. Dick et al.*, supra.

These notes were presented for discount by a customer of the trust company at its banking house in Boston, Mass. The agent of the company presenting the notes stated that they were made and delivered to his principal for advances made. There was nothing upon the notes or in the facts known to the trust company indicating that such was not the fact. If such notes were given by the corporation to the company for advances made, it was not suspicious, or a cause for further inquiry, that they bore the individual indorsements of the Beiermeisters. It well might be that such indorsements were made for the accommodation of the corporation. It is true that the notes were offered for discount at a long distance from Cohoes, N. Y. It was not stated that the advances for which the notes were given were made that day. The advances might have been made some days before the notes were

given. There was nothing improbable in this, in view of the fact that Frederick, Jr., and John M. Beiermeister were members both of the corporation and of the firm.

It is not suggested that the International Trust Company did not pay full value for these notes. The money was placed to the credit of the firm of Beiermeister Bros. & Co., and checked out by it in due course of business.

This court is of the opinion that it was error to reject the claim of the International Trust Company upon these notes. The order of the referee is reversed, with directions to allow the claim as presented.

HUGHES v. J. S. HOSKINS LUMBER CO.

(District Court, D. New Jersey. April 11, 1905.)

1. SHIPPING—CHARTER PARTIES—CONSTRUCTION—DEMURRAGE—LAY DAYS.

Where a charter party provided that after 1 idle day the charterer had 10 days to load, and that for every day's detention thereafter he should pay demurrage, he was entitled to 11 days to load, including Sundays, holidays, or stormy days.

[Ed. Note.—Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 637; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

2. SAME.

Where a charter party provided that the charterer, after 1 idle day should have 10 "working days" to load, before demurrage should be charged, he was entitled to 11 days, excluding Sundays and holidays, but not stormy days.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, §§ 568, 589, 590.]

3. SAME—DANGERS OF THE SEA.

Where a charter party provided that the dangers of the seas, etc., should be mutually excepted, but the evidence was insufficient to show that the charterer was necessarily prevented by storms from properly loading the barge, he was not entitled to a deduction of demurrage on that ground.

In Admiralty. Libel to recover for demurrage and freight.

James S. Macklin, for libelant.

Condict, Condict & Boardman and Walter Large, for respondent.

LANNING, District Judge. By the libel filed in this case the libelant seeks to recover certain sums alleged to be due for demurrage and freight under five separate charter parties, relating, respectively, to the five barges, Chesapeake, Dover, Etta Hughes, Hudson, and Falcon. The respondent embodied in its answer exceptions to certain specific allegations in the libel. When the parties first appeared before the commissioner for the examination of witnesses, the counsel for the respondent entered upon the record an objection to the taking of any testimony before the exceptions should be disposed of. They, however, cross-examined the libelant's witnesses, and examined witnesses on behalf of the respondent. Either party might have noticed the exceptions for hearing before any testimony was taken. 1 Am. & Eng. Ency. Pl. & Pr. 270. As the parties chose to proceed to take their proofs not-

withstanding the exceptions, the case should be considered upon its merits, and, if the proofs warrant the amendment of the libel in any respect in which it may be defective, an order to that effect may now be made.

In the charter party between the libelant, party of the first part, and the respondent, party of the second part, relating to the Chesapeake, and also in the one between the same parties relating to the Dover, and in the one between the same parties relating to the Etta Hughes, is this language:

"It is agreed that the lay days for loading and discharging shall be as follows: after one idle day, parties of the second part have ten days to load this barge, and that for each and every day's detention by default of said party of the second part, or agent, ten dollars per day shall be paid, day by day, by said party of the second part, or agent, to said party of the first part, or agent."

In the charter party between the same parties relating to the Hudson is this language:

"It is agreed that the lay days for loading and discharging shall be as follows: after one idle day, after barge is ready, parties of the second part have ten working days to load this barge, and that for each and every day's detention by default of said party of the second part, or agent, ten dollars per day shall be paid, day by day, by said party of the second part, or agent, to said party of the first part, or agent."

And in the charter party between the same parties relating to the Falcon is this language:

"It is agreed that the lay days for loading and discharging shall be as follows: after one idle day, parties of the second part have ten working days to load this barge, and that for each and every day's detention by default of said party of the second part, or agent, thirty dollars per day shall be paid, day by day, by said party of the second part, or agent, to said party of the first part, or agent."

The first question presented for consideration is as to the meaning of the word "days" and the words "working days" in these charter parties. Their meaning is important because of the relation they bear to the question of demurrage. In *Pedersen v. Eugster* (D. C.) 14 Fed. 422, Judge Billings, for the Eastern District of Louisiana, said:

"If the word 'days' alone is used with reference to lay days or days for loading a ship, all the running or successive days are counted. If the term 'working days' is used, all days are counted except Sundays and holidays. If the parties wish further to except days when the weather prevents work, they use the expression 'weather working days' or 'with customary dispatch,' or some other expression which clearly indicates the intention to recognize that days of inclemency from winds and storms are also excepted. Taking into consideration the cycle of years since this term 'working days' has received a commercial interpretation, as sanctioned by the judges, and the frequency and universality with which courts have adhered to that interpretation, for parties to use the expression 'working days' in a charter party is to express that, except Sundays and holidays, all days are to be counted, whatever be the state of the weather."

In *Sorensen v. Keyser*, 52 Fed. 163, 2 C. C. A. 650, Judge Pardee, in the Circuit Court of Appeals for the Fifth Circuit, held that "the term 'working days' means, in maritime affairs, running or calendar

days on which the law permits work to be done. It excludes Sundays and legal holidays, but not stormy days." In *Hagerman v. Norton*, 105 Fed. 996, 46 C. C. A. 1, he again said that "it is well settled that the term 'working days,' as ordinarily used in charter parties, excludes Sundays and holidays, but not rainy nor stormy days."

These authorities make it clear that the *Chesapeake*, the *Dover*, and the *Etta Hughes* were each required to be loaded within 10 days after 1 idle day (that is, within 11 days after being reported ready for cargo), not excluding Sundays or holidays or stormy days. The *Hudson* and the *Falcon* were each required to be loaded within 10 working days after 1 idle day (that is, within 11 days after being reported ready for cargo), excluding from the count, however, Sundays and holidays, but not stormy days.

But it is contended by the counsel of the respondent that the stormy days intervening before the expiration of the above-mentioned period of 11 days should not be counted as a part of that period, because of the provision in the charter parties that a penalty should be incurred only in case of "detention by default of said party of the second part, or agent." In my opinion, however, the failure to load any one of these barges within the specified time, notwithstanding stormy days intervened, in itself constituted a "default," within the meaning of the charter parties. Such was the construction of similar language in *The Oluf* (C. C.) 19 Fed. 459.

The counsel for the respondent also insists that the clause in the contracts, "the dangers of the seas, rivers and navigation always mutually excepted," entitles the respondent to a deduction of the days when work in loading the barges was suspended because of storm. But the evidence does not satisfy me that the storm referred to by the witnesses made it in any sense dangerous to engage in the work of loading the barges.

It becomes necessary, therefore, to determine the question as to the number of days, if any, for which the libellant is entitled to recover demurrage for each of the five barges. The three barges, the *Chesapeake*, the *Dover*, and the *Etta Hughes*, arrived at Piankitank river, Va., where they were to receive their cargoes, on Saturday, August 31, 1901. They were all taken to their loading place on Monday, September 2d, at about 4 o'clock in the afternoon, but were not placed in position for loading until September 3d. They were required to be loaded within 11 days; that is, by September 14th. The loading of the *Chesapeake* was completed on September 16th. Consequently there are two days' demurrage, or \$20, chargeable against the respondent in the case of the *Chesapeake*. The loading of the *Dover* was also completed on September 16th, and there is chargeable against the respondent in respect to that barge the same sum, \$20.

When the *Etta Hughes* arrived at the place for receiving her cargo, it was found that her stern porthole was too small for placing in her the lumber which she was to receive. There was considerable delay, first in enlarging the existing porthole, and then in making a second one. She was not completely loaded

until October 11th. I am satisfied that the change was not made in her portholes so as to allow of reasonably convenient loading before September 11th. From September 11th to October 11th is 30 days. From this there should be deducted the 10 days allowed for loading and the 1 idle day, leaving 19 days for demurrage, which, at \$10 per day, amounts to \$190.

The Hudson and Falcon arrived together at the place where they were to receive their cargoes on September 21st. By the libel it is charged that the loading of the Hudson was completed on October 3d. By this allegation it would appear that the Hudson was at the place where she received her cargo but 12 days. Two of these days were Sundays, and one was an idle day. The Sundays in this case should be deducted, because the charter party gave to the respondent 10 "working days" within which to load her. The result is that, according to the libel, no default on the part of the respondent has been shown. Nor is any shown by the evidence. While it is proven that her loading was completed on October 11th, and not on October 3d, as alleged in the libel, there is no proof that the delay was in any wise due to the neglect or default of the respondent. Consequently no demurrage can be charged for the Hudson.

The Falcon was ready to be loaded on September 23d, and the respondent finished loading her on October 18th. Twenty-five days were therefore consumed in loading her. The respondent was entitled to 10 working days and 1 idle day. There should be deducted from the 25 days the 10 working days and 1 idle day and 3 Sundays, or 14 days in all. This leaves 11 days for demurrage. The Falcon was a steam barge, and the demurrage in her case is fixed by her charter party at \$30 per day. Consequently the demurrage in this case is \$330.

A further claim is made in the cases of the Chesapeake, the Etta Hughes, and the Hudson for freight. The charter party for each of these vessels provided that the libelant should pay freight charges of \$900 for each vessel, and also 4 cents per lineal foot of lumber in excess of 20,000 lineal feet on each barge. There is no proper proof that any of these barges carried more than 20,000 feet. The only evidence offered on the subject was in the form of testimony from copies of letters and bills sent by the libelant to the respondent, and lead-pencil memoranda on the backs of the charter parties. There is no evidence that any one measured the number of feet of lumber carried by any one of these three barges. The evidence offered was objected to by the respondent. The objection must be sustained. It follows that nothing can be allowed for freight charges.

The result is that there should be a decree for the libelant for demurrage in the case of the Chesapeake for \$20, in the case of the Dover for \$20, in the case of the Etta Hughes for \$190, and in the case of the Falcon for \$330, making \$560 in all.

CELLA, ADLER & TILLES v. BROWN et al.

(Circuit Court, E. D. Missouri, E. D. March 1, 1905.)

1. FEDERAL COURTS—REMOVAL OF CAUSES—FILING PETITION—TIME—PRELIMINARY MOTIONS.

Where a petition for removal of a cause to the federal court is filed before the time fixed by the statute or the rules of court for the filing of an answer, petitioner's appearance and his hearing on a preliminary motion regarding an injunction did not constitute a waiver of his right to remove.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, §§ 10, 208.]

2. SAME—SEPARABLE CONTROVERSY—PARTIES.

The parties who are not indispensable to the determination of a suit in the federal court may be dismissed or disregarded if their presence would oust or interfere with the jurisdiction of the court.

3. SAME.

Where, in a suit to avoid a scheme and contract of B. & Co. to reorganize certain railroads, and to enforce specific performance of B. & Co.'s contract to convey to complainants their share of certain pledged securities of the railroad companies, there was no allegation that the railroads had done or threatened to do any act in violation of, or to prevent performance of, the contracts, and the only prayer affecting the railroads was for an injunction to forbid them doing any act or taking any steps interfering with plaintiff's rights, which prayer was unsupported by any averment of fact, the railroads were not indispensable parties.

4. SAME.

Complainants, who were citizens of Missouri, sued B. & Co., nonresidents, to avoid a railroad reorganization contract and for specific performance of a contract of B. & Co. to convey to complainants their share of certain pledged securities of the railroads, without complainants consenting to certain alleged invalid conditions. The bill also alleged that defendant bank, of the same citizenship as complainants, through which the transaction was to be carried out, made the required payment of complainants' share of the railroads' indebtedness on complainants' refusal to consent to the conditions, and claimed the right to receive complainants' share of the securities, and demanded, as against the bank, that it be required to deliver to complainants their share of such securities on payment of their share of the indebtedness. *Held* that the bank was not a necessary party to the determination of the controversies between complainants and B. & Co., and that they were therefore entitled to remove the cause to the federal court.

Henry W. Bond, for complainants.

George W. Easley and Boyle, Priest & Lehmann, for defendants.

SANBORN, Circuit Judge. On October 31, 1904, the complainants, who are citizens of Missouri, filed in the circuit court of the city of St. Louis a bill in equity against the defendants, James Brown and others, copartners as Brown Bros. & Co., and all citizens of the state of New York, and the National Bank of Commerce, the St. Louis Transit Company, and the United Railways Company, corporations of the state of Missouri. The summons required the defendants to appear and answer on the first Monday of December, 1904. On the 2d day of November, 1904, James Brown and the defendant corporations appeared and presented motions

relative to the issue of an injunction sought by the complainants. On November 17, 1904, the defendant James Brown filed a petition for the removal of this suit to the Circuit Court of the United States for the Eastern District of Missouri on the ground that it involved a separable controversy between the members of the firm of Brown Bros. & Co. and the complainants. A petition for removal which is filed before the time fixed by the statutes or rules of court for the interposition of the answer to the bill is in time; and the appearance of the petitioner, and his hearing upon preliminary motions regarding injunctions, attachments, and other provisional remedies, do not waive his right to removal. *Sidway v. Missouri Land & Live Stock Co.* (C. C.) 116 Fed. 381, 394, and cases there cited; *Garrard v. Silver Peak Mines* (C. C.) 76 Fed. 1.

The only question remaining is, was there a separable controversy which rendered the suit removable? So far as the facts set forth in the bill are material to this question, they are these: The complainants were the owners of 11,000 shares of the stock of the St. Louis Transit Company. The transit company was the owner of a large amount of stock and bonds, which were pledged to secure the payment of a debt of about \$7,000,000 which it owed. The transit company and the United Railways Company, through the votes and influence of Brown Bros. & Co., adopted a certain plan of reorganization. One of the terms of this plan was that each stockholder in the transit company should be permitted to contribute, in proportion to the amount of his stock, to the payment of this debt of \$7,000,000, and should receive such a portion of the pledged stocks and bonds of the transit company as the amount contributed should bear to the whole debt of \$7,000,000. Brown Bros. & Co. made a contract with the transit company and the railways company that they would carry into effect this plan, and thus vest in these various stockholders their respective shares of the pledged stock and bonds. The complainants' share of the \$7,000,000 required to pay the debt was \$446,160, and consequently their share of the pledged stocks and bonds was approximately one-sixteenth of the whole. Brown Bros. & Co. allotted to the complainants their proper share, and appointed the National Bank of Commerce their agent to receive the contributions of all the stockholders. They notified the complainants to pay to the Bank of Commerce 84 per cent. of their contribution, and the complainants tendered the payment of this amount to the bank. Before this tender was made, Brown Bros. & Co. had prepared a contract between themselves and the stockholders who should contribute to the payment of this debt, which provided that Brown Bros. & Co. should receive rights and advantages relative to the pledged securities to which they were not entitled under their contract with the railroad corporations, and that the contributors should deprive themselves of rights and privileges which lawfully belonged to them, and had instructed their agent, the bank, to accept no contribution until the contributor signed this contract. The bank accordingly presented the contract to the complainants, and demanded their signature, as a condition of its receipt of their con-

tribution. The complainants refused to sign. The bank refused to accept their contribution. The bank now makes claim that, after it refused the tender of the payment by the complainants, it paid the amount which had been allotted to them to pay, and that, unless the complainants will sign and become parties to the contract demanded by Brown Bros. & Co., the bank will claim for itself all the benefits of its payment. But the bank had no authority to act for the complainants in the matter, and could acquire, according to the averments of the bill, no rights to the securities belonging to the complainants by any such action. Brown Bros. & Co. threaten to allot the share of the complainants in the payment of the debt and in the pledged securities to some other person who will sign their contract. Brown Bros. & Co. induced the transit company, the United Railways Company, and their stockholders to adopt the scheme of reorganization by misrepresentation, deception, and fraud.

The bill prays that all proceedings in the attempted reorganization of the corporations be avoided for fraud, that Brown Bros. & Co. and the Bank of Commerce be required to deliver up to the complainants their share of the pledged securities upon their payment of their share of the debt, that Brown Bros. & Co. be enjoined from allotting their share to any other party, that the proposed contract which Brown Bros. & Co. presented for their signature be declared fraudulent and of no effect, and that the transit company and the United Railways Company be enjoined from interfering with the complainants' right to their share of the securities.

After the petition for removal had been filed, amendments were made to the bill. But the motion to remand is conditioned by the bill as it read at the time the petition was filed, and for this reason the amendments will be disregarded. The sufficiency of the statements of facts to constitute the causes of action pleaded in the bill is not open to consideration on a motion to remand, and nothing here said intimates any opinion upon that question.

The bill clearly sets forth two controversies or causes of action—one for the avoidance of the scheme and contract of the railroad companies and Brown Bros. & Co. to reorganize those corporations, and another to enforce the specific performance of the contract of Brown Bros. & Co. to convey to and vest in the complainants their share of the pledged securities of the transit company. There is no claim that the controversy and cause of action relative to the enforcement of the specific performance of the contract of Brown Bros. & Co. does not present a separable controversy and a distinct cause of action. The only question is whether it presents a controversy wholly between citizens of different states, which may be finally determined as between them.

All parties who are not indispensable to the determination of a suit in the federal court may be dismissed or disregarded if their presence would oust or interfere with the jurisdiction of that court. Hence, in the determination of questions involving the jurisdiction of the federal court, and the rights of petitioners to remove suits to that court, indispensable parties alone require consideration.

Geer v. Mathieson Alkali Works, 190 U. S. 428, 432, 23 Sup. Ct. 807, 47 L. Ed. 1122; *Bacon v. Rives*, 106 U. S. 99, 104, 1 Sup. Ct. 3, 27 L. Ed. 69; *Wormley v. Wormley*, 8 Wheat. 421, 451, 5 L. Ed. 651; *Wood v. Davis*, 18 How. 467, 475, 15 L. Ed. 460; *Sioux City Terminal R. & W. Co. v. Trust Co. of North America*, 82 Fed. 124, 126, 27 C. C. A. 73, 75. There is no allegation in the bill that the railroad corporations have done or threaten to do any act in violation of, or to prevent the performance of, the contract of Brown Bros. & Co.; and there is no prayer in the bill for any decree that they, or either of them, shall make any conveyance or take any step toward the execution of that agreement. There is a prayer for an injunction to forbid them from doing any act or taking any step to interfere with the rights of the complainants, but it stands without averment or recital of any fact to sustain it. The railroad corporations, therefore, are not made by the allegations of this bill indispensable parties to the controversy and cause of action for the enforcement of the contract of Brown Bros. & Co. Nor is any such claim seriously made by counsel for the complainants.

But counsel argues with great ability and force that the Bank of Commerce is an indispensable party to this cause of action, and in support of his contention he cites *Wilson v. Oswego Townshipp*, 151 U. S. 56, 14 Sup. Ct. 259, 38 L. Ed. 70; *Barth v. Coler*, 60 Fed. 466, 9 C. C. A. 81; *Powers v. Chesapeake & Ohio Ry. Co.*, 169 U. S. 92, 97, 18 Sup. Ct. 264, 42 L. Ed. 673; *Chesapeake & Ohio Ry. Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121; *Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528; and other cases. Before entering upon the discussion of the opinions in these cases, it is well to fix in mind the nature of the cause of action, and the statements of the bill concerning it. This cause, when reduced to its lowest terms, is for the specific performance of an agreement which Brown Bros. & Co. made with the two railroad corporations for the benefit of the complainants, to the effect that they should receive one-sixteenth of the pledged securities upon payment of one-sixteenth of the debt of \$7,000,000. The complainants aver that Brown Bros. & Co. refused to perform without just cause; that their excuse that the complainants will not sign the burdensome contract which they present is without merit; and they ask a decree that Brown Bros. & Co. shall convey and deliver to them their one-sixteenth of the pledged securities. The controversy between them is whether or not the complainants are legally entitled to this delivery and conveyance upon the payment of their share of the debt, without signing the contract demanded by Brown Bros. & Co. The determination of this controversy is conditioned entirely by the terms of the contract which Brown Bros. & Co. have made with the railroad companies. If by the terms of that contract the complainants are entitled to this share without signing the agreement requested, they are entitled to the relief which they seek by this cause of action. And if by the terms of that contract with the railroad companies they are not entitled to this conveyance, this cause of action fails. The National Bank of Commerce was not a party to this contract. It was but the agent of Brown Bros. & Co.

to do its bidding in the receipt of the contributions. After the controversy had arisen, and after the complainants had refused to sign the contract with Brown Bros. & Co., and the latter had refused to receive or permit the bank to receive their contribution, the bill alleges that the bank claimed that it paid the contribution allotted to the complainants, and that, unless they sign the agreement with Brown Bros. & Co., the bank will claim the benefit of this payment, but that it acquired no right to any share in the securities which belonged to the complainants by this action. How, then, was the bank an indispensable party to the determination of the question between the complainants and Brown Bros. & Co.—whether or not the latter's contract required Brown Bros. & Co. to convey and deliver the one-sixteenth of the pledged securities to the complainants upon the payment of their share of the debt without farther exactions?

In *Wilson v. Oswego Township*, 151 U. S. 56, 14 Sup. Ct. 259, 38 L. Ed. 70, bonds were deposited with the Union Savings Association, to be delivered upon the completion of a railroad. A controversy arose between claimants regarding their delivery. A suit was brought, to which the claimants and the association were parties. The court held that the association was an indispensable party to the suit, because it was the bailee or trustee in possession of the property. The decision has no relevancy to the issue in this suit, because the National Bank of Commerce has no possession or control of the pledged securities; and the only rational inference from the averments of the bill is that they are still in the possession and control of the creditors of the transit company to whom they were pledged, and who are not parties to this suit.

In *Barth v. Coler*, 60 Fed. 466, 9 C. C. A. 81, the allegations of the bill, which was exhibited by the owner of the equity of redemption in property which had been sold by the sheriff to set aside the conveyance he had made to the purchaser, were that the sheriff and purchaser had fraudulently conspired together to make the sale and to execute the deed. The rule is familiar and conceded that suits for joint trespass (*Little v. Giles*, 118 U. S. 596, 601, 7 Sup. Ct. 32, 30 L. Ed. 269), for joint negligence (*Chesapeake & Ohio Ry. Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121; *Powers v. Chesapeake & Ohio Ry. Co.*, 169 U. S. 92, 97, 18 Sup. Ct. 264, 42 L. Ed. 673), and for the breach of a joint contract (*Railroad Co. v. Ide*, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. Ed. 63) may not, by the denial of joint liability by the defendants, or by the presentation of separate defenses, be resolved into separable controversies, because, where the cause of action may be joint or several, the plaintiff may select and state in his pleadings the basis upon which he sues; and it is not competent for the defendants, by interposing separate defenses, to make a controversy several which the pleadings of the plaintiff show to be joint. But this rule is inapplicable to the case at bar, because the bill itself discloses the fact that the cause of action against Brown Bros. & Co. and the National Bank of Commerce is not joint. It is based upon the contract of Brown Bros. & Co., in which the Bank of Commerce never joined, and to

which it is not a party. Strike down the contract of Brown Bros. & Co., and there is no cause of action against them or the bank, because, in the absence of that contract, they would all be free to dispose of the pledged securities which they might purchase to such persons and on such terms as they might elect. The *sine qua non* of the cause of action is the contract, and, so far as Brown Bros. & Co. and the Bank of Commerce are concerned, that contract is the several contract of the former, and it is not the contract of the latter.

In *Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528, a suit in partition was commenced, and in the course of its progress a controversy arose between several of the parties to that suit over the title to an undivided share of the property which was the subject of the suit. The court properly held that inasmuch as the purpose of the suit was to administer the entire estate described in the bill, to determine the claims and rights of all the parties to it, and to distribute it to them in kind or in proceeds, in severalty, this controversy was a part of that indivisible suit, and could not be properly separated from it. But neither the suit at bar nor the cause of action under consideration seeks to administer the pledged securities and to distribute them to their rightful claimants, so that the decision in *Torrence v. Shedd* is not applicable here.

The act of Congress provides that a suit of the nature of that in hand may be removed to the federal court when there shall be a controversy in it which is wholly between citizens of different states, and which can be fully determined as between them. In *Barney v. Latham*, 103 U. S. 205, 214, 26 L. Ed. 514, the complainants exhibited a bill against certain individuals and a corporation. The charge of the bill was that the complainants were, in equity, the owners of $\frac{1}{37}$ of certain lands earned by the construction of a railroad; that the individuals had sold some of the lands, and received proceeds of such sale to the amount of \$129,500, $\frac{1}{37}$ of which belonged to the complainants; and that the individual defendants had caused the title to the remainder of the lands to be vested in the corporation. The Supreme Court held that the controversy between the complainants and the individual defendants, notwithstanding the fact that they were stockholders of the corporation, was separable from that between the complainants and the corporation, and said:

"With that controversy the land company, as a corporation, has no necessary connection. It can be fully determined as between the parties actually interested in it without the presence of that company as a party in the cause."

The cause of action against Brown Bros. & Co. to enforce their contract with the railroad corporations, and to compel them to convey and deliver to the complainants their one-sixteenth of the pledged securities, could have been maintained without the presence of the National Bank of Commerce. It was not a party to that contract. It had no possession or control of any of the pledged securities, and its presence in court was not necessary to a complete adjudication of the controversy which conditioned this cause

of action. Nor could the complainants, by naming it as a party in their bill, by asserting that it made a claim to have contributed to the payment of the debt of the transit company and to a share of the pledged securities, nor by a prayer for a conveyance and delivery by it of property over which it had no control, make it a party to the contract of Brown Bros. & Co., which conditioned the cause of action and the controversy between the complainants and the latter. Nor was the prayer for an injunction against the bank more material or effective because an injunction against Brown Bros. & Co. would necessarily have all the effect of an injunction against the bank, since the former controlled, and the latter had no possession or control of the property in controversy. The conclusion is that the controversy between the complainants and Brown Bros. & Co. over the question whether or not the contract of the former with the railroad corporations required them to convey and deliver to the latter approximately the one-sixteenth of the pledged securities of the transit company upon the payment of a corresponding share of the \$7,000,000, without exacting farther agreements or stipulations from them, was a controversy wholly between Brown Bros. & Co., citizens of New York, and the complainants, citizens of Missouri, which can be fully determined as between them; that the National Bank of Commerce has no part or lot in that controversy; and that it is not an indispensable party to the cause of action which it conditions. *Blake v. McKim*, 103 U. S. 336, 338, 26 L. Ed. 563; *Hyde v. Ruble*, 104 U. S. 407, 409, 26 L. Ed. 823; *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 432, 23 Sup. Ct. 807, 47 L. Ed. 1122; *Gudger v. Western N. C. R. Co.* (C. C.) 21 Fed. 81, 83; *Youtsey v. Hoffman* (C. C.) 108 Fed. 693, 698; *Lamm v. Parrot Silver & Copper Co.* (C. C.) 111 Fed. 241.

The motion to remand must be denied, and it is so ordered.

HAMILTON v. McCLAUGHRY, Warden.

(Circuit Court, D. Kansas, First Division. April 12, 1905.)

No. 8,284.

1. WAR—COURTS-MARTIAL—JUDGMENTS.

Courts-martial being courts of inferior and limited jurisdiction, it must be made to clearly and affirmatively appear, in order to give effect to their judgments, that the court was legally constituted, that it had jurisdiction of the person and offense charged, and that its judgment imposed was conformable to law.

[Ed. Notes.—For cases in point, see vol. 4, Cent. Dig. Courts-Martial, § 90.]

2. SAME—HABEAS CORPUS.

Where, on return to a writ of habeas corpus, the respondent alleged that he held the petitioner under a judgment of conviction by a military court-martial, the burden is on the respondent to show that the judgment was based on some provision of positive law.

3. SAME—ARTICLES OF WAR—CONSTRUCTION.

Whether a condition of war exists, within the fifty-eighth article of war, relating to the trial of certain offenses committed by soldiers, is

within the exclusive jurisdiction of the political department of the government.

[Ed. Notes.—For cases in point, see vol. 4, Cent. Dig. Courts-Martial, § 95; vol. 48, Cent. Dig. War, § 217.]

4. SAME—"BOXER UPRISING."

The "Boxer Uprising" in China, in June, 1900, during which the United States assembled an army of 15,000 men, over 5,000 of which were ordered to and did proceed to China to assist the forces of allied nations in quelling the uprising and to release the accredited representatives of the United States then imprisoned within the city of Pekin, during which the pay of the officers and men in the United States military service was increased to a war basis, constituted "a time of war," within the fifty-eighth article of war, providing for the trial of certain offenses committed by soldiers in time of war by military court-martial.

E. R. Adams, for petitioner.

John S. Dean and Wm. G. Doane, for respondent.

POLLOCK, District Judge. This is an application for writ of habeas corpus. The return of respondent admits the restraint charged in the petition and seeks to justify upon the following state of facts:

On the 23d day of December, 1900, petitioner was a private in Troop K, Sixth Cavalry Regiment, Army of the United States, stationed at Camp Reilly, Pekin, China, having been ordered there to assist the allied powers in the protection of the foreign legations, and the suppression of what is commonly known as the "Boxer Uprising" in China. At that time and place petitioner shot and killed one Corporal Charley Cooper, of petitioner's regiment, for which offense petitioner was on February 4, 1901, tried by a court-martial convened and sitting at Pekin, China. The trial resulted in a judgment of conviction. The record of the proceedings, trial, conviction, and sentence reads as follows:

"Headquarters China Relief Expedition,

"Pekin, China, February 4, 1901.

"General Orders No. 6.

"(1) Before a General Court-Martial which convened at Pekin, China, pursuant to paragraph 5, Special Orders No. 1, January 2d, from these headquarters, and of which Colonel Charles F. Robe, 9th Infantry, was president, and Captain Charles R. Noyes, Adjutant, 9th Infantry, was Judge Advocate, was arraigned and tried Private Fred Hamilton, Troop K, 6th Cavalry.

"Charge: 'Murder, in violation of the 58th article of war.'

"Specification: In that Private Fred Hamilton, Troop K, 6th Cavalry, U. S. Army, did willfully, feloniously, and with malice aforethought inflict a wound on Corporal Charley Cooper, Troop K, 6th Cavalry, deceased, by firing a ball cartridge from a Colt's revolver, calibre 38, at said Cooper. From the effect of said wound, the said Cooper died almost immediately, about 8:25 p. m. on the 23d day of December, 1900. This at Camp Reilly, Pekin, China, about 8:25 p. m. on the 23d day of December, 1900.

"Pleas.

"To which the accused submitted the following plea in bar of trial: 'Want of jurisdiction of the court.'

"The special plea in bar of trial was overruled by the court-martial. The accused then pleaded as follows: To the specification: 'Not guilty.' To the charge: 'Not guilty.'

"Findings.

"Of the specification: 'Guilty.' Of the charge: 'Guilty.'"

"Sentence.

"And the court doth therefore sentence him, Private Fred Hamilton, Troop K, 6th Cavalry, 'to be dishonorably discharged the service of the United States, forfeiting all pay and allowances due him, and to be confined at hard labor in such penitentiary as the reviewing authority may direct for the period of his natural life.'

"The proceedings, findings, and sentence is approved. The reviewing authority is of the opinion that the evidence presented shows that the accused, shortly before the commission of the crime, had been abused and maltreated by Corporal Cooper to a considerable degree, and therefore was laboring under some provocation. To this extent the severity of the crime is lessened, and because of it the reviewing authority is constrained to reduce that portion relating to confinement at hard labor to a period of twenty (20) years. As mitigated the sentence is confirmed and will be duly executed. The United States Penitentiary at Fort Leavenworth, Kansas, is designated as the place for the execution of so much of the sentence as relates to confinement at hard labor. The prisoner shall be sent to Alcatraz Island, California, at the first favorable opportunity, for transfer to the United States Penitentiary at Fort Leavenworth, Kansas.

"The General Court-Martial convened at Pekin, China, by paragraph 5, Special Orders No. 1, current series, from these Headquarters, is dissolved.

"By Command of Major General Chaffee:

"[Sgd.]

H. O. S. Heistand, Adjutant General.

"A true copy. R. B. Paddock, Captain 6th Cavalry.

"A true copy. R. W. McClaghry, Warden."

The fifty-eighth article of war, under which petitioner was tried and convicted, reads as follows:

"In time of war, insurrection or rebellion, larceny, robbery, * * * murder, * * * shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided for the like offense by the laws of the state, territory, or district in which such offense may have been committed."

It is the insistence of counsel for petitioner that at the time of the homicide there prevailed neither war, insurrection, nor rebellion, as required by the article of war above quoted to confer jurisdiction upon a general court-martial to try petitioner for the offense charged against him, and therefore the military court was without jurisdiction in the premises and its judgment void.

In approaching a consideration of this question, a few of the fundamental principles of law may be stated. It is the settled law that courts-martial are courts of inferior and limited jurisdiction. No presumptions in favor of their exercise of jurisdiction are indulged. To give effect to their judgments imposed, it must be made to clearly and affirmatively appear that the court was legally constituted, that it had jurisdiction of the person and offense charged, and that its judgment imposed is conformable to the law. *Dynes v. Hoover*, 20 How. 625, 15 L. Ed. 838; *Runkle v. U. S.*, 122 U. S. 543, 7 Sup. Ct. 1141, 30 L. Ed. 1167. The judgments of such courts may be called in question in a collateral proceeding. *Ex parte Watkins*, 3 Pet. 193, 7 L. Ed. 650; *Wise v. Withers*, 3 Cranch, 331, 2 L. Ed. 457. Again, so jealous are all English-speaking nations of the liberty of their subjects, where a respondent in

habeas corpus admits the restraint charged against him, he must justify by basing his right of restraint upon the exercise of some provision of positive law binding upon him, or the writ must issue and the person restrained have his liberty. It follows, therefore, notwithstanding the judgment of conviction by the military court set forth in the return of respondent and admitted by petitioner, if, as claimed by counsel for petitioner, the facts essential to a valid exercise of the military power conferred by the fifty-eighth article of war, to wit, the then existence of a state of war, insurrection, or rebellion in China, the place where the offense was committed and the trial had, is not shown, the writ must go and the petitioner be granted his liberty.

It is conceded in the briefs and argument of counsel for respondent that the terms "insurrection" and "rebellion," used in the article of war, mean insurrection or rebellion against this government, and not another; but it is contended that at the time of the homicide such a condition of war existed in China, in which condition of war this government, under the authority of the Department of War, was a participant, as to authorize the exercise of military power to punish one in the military service of the United States, then in that country, for the commission of the crimes enumerated in the fifty-eighth article of war, by a general court-martial. The question thus presented for determination is one of first instance and large importance.

As shown by the record, during the military occupation of China by the troops of this government, no less than 271 trials by general court-martial were had, which resulted in 244 convictions. Under the well-settled principles of law the offenders so tried were not amenable to the laws of the government of China, and the offenses by them committed, if any, whether by the laws of this country denominated as the crime of murder, robbery, larceny, or other felony, were not committed in violation of any law of China, because done by persons in the military service of this country while stationed in China. In *Coleman v. Tennessee*, 97 U. S. 509, 24 L. Ed. 1118, Mr. Justice Field, delivering the opinion of the court, said:

"It is well settled that a foreign army, permitted to march through a friendly country or to be stationed in it by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place. The sovereign is understood, said this court in the celebrated case of *The Exchange*, 7 Cranch, 139 [3 L. Ed. 287], to cede a portion of his territorial jurisdiction when he allows the troops of a foreign prince to pass through his dominions. In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require."

If an army marching through a friendly country would thus be exempt from its civil and criminal jurisdiction, a fortiori would an army invading an enemy's country be exempt. The fact that war is waged between two countries negatives the possibility of jurisdiction being exercised by the tribunals of the one country over persons engaged in the military service of the other for offenses committed while in such service. Aside from this want of jurisdiction, there would be something incongruous and absurd in permitting an officer or soldier of an invading army to be tried by his enemy, whose country he had invaded."

To like effect is the language employed by the same justice in rendering the opinion in *Dow v. Johnson*, 100 U. S. 158, 25 L. Ed. 632.

"As was observed in the recent case of *Coleman v. Tennessee*, it is well settled that a foreign army, permitted to march through a friendly country, or to be stationed in it by authority of its sovereign or government, is exempt from its civil and criminal jurisdiction. The law was so stated in the celebrated case of *The Exchange*, reported in 7 Cranch, 139 [3 L. Ed. 287]. Much more must this exemption prevail where a hostile army invades an enemy's country. * * * In both instances, from the very nature of war, the tribunals of the enemy must be without jurisdiction to sit in judgment upon the military conduct of the officers and soldiers of the invading army. It is difficult to reason upon a proposition so manifest. Its correctness is evident upon its bare announcement, and no additional force can be given to it by any amount of statement as to the proper conduct of war."

It therefore must follow, of necessity, if any punishment shall be meted out for the many crimes committed by persons in the military service of the United States during the occupation of China, such punishment must be imposed under the fifty-eighth article of war or the offender go unpunished; and this is true, whether the military occupation of China by the forces of this government was by or against the consent of the government of China. That is to say, if the homicide committed is an offense at all, it was an offense committed in violation of the military laws of this country, transplanted to China, under the authority of the military department of this government, for the government of our military forces while there engaged in operations against the "Boxer Uprising," and for the protection of the citizens and representatives of this government and their property.

Again, it is the well-settled law that the existence of a condition of war must be determined by the political department of the government; that the courts take judicial notice of such determination and are bound thereby. *U. S. v. 129 Packages*, Fed. Cas. No. 15,941; *Sutton v. Tiller*, 98 Am. Dec. 471.

Mr. Justice Grier, delivering the opinion in *Prize Cases*, 67 U. S. (2 Black) 666, 17 L. Ed. 459, says: "War has been well defined to be that state in which a nation prosecutes its right by force." In the present case, at no time was there any formal declaration of war by the political department of this government against either the government of China or the "Boxer" element of that government. A formal declaration of war, however, is unnecessary to constitute a condition of war. Adopting the definition of war above quoted with approval by the Supreme Court, the question here is whether this government was, at the time of the commission of the homicide

by petitioner, prosecuting its right in Chinese territory by force of arms. It has been well said the safety of the people is the supreme law of the land. The first duty of a state is the protection of the lives and property of its citizens, wherever lawfully situate, by peaceable means, if possible; if not, by force of arms. More especially must this protection be afforded the accredited representatives of this government in a foreign country.

These premises conceded, as I think they must be, it follows, of necessity, when the armed forces of this government, by authority of the Department of War, are commissioned to enforce the lawful demands of this government against a foreign country, or to protect the lives of citizens lawfully stationed in a foreign country, or the accredited representatives of this government in such foreign country, there must exist military jurisdiction and power to enforce such discipline among the troops as will command the respect of foreign nations, assure the safety of the nonoffending citizens of such foreign nation and their property, and protect the lives of the citizens of this country engaged in such military operations. With these fundamental principles of law and government as a basis for decision, what are the facts in the case, as gleaned from the evidence offered, and did there exist in China at the time the homicide in question was committed a state of war; that is to say, was this government there in China at the time prosecuting its right by force of arms?

The "Boxer" trouble arose in China in the month of June, 1900. It consisted of armed forces, dominated by the spirit of driving from that country or destroying all foreigners, including the accredited representatives of this and other nations, and the destruction of their property. It assumed such proportions that the Chinese government was either to weak to cope with it, or, as may be supposed, the governmental authorities of that nation, while protesting good faith, were in actual collusion with the "Boxer" element. The trouble spread until anarchy reigned and the lives and property of all foreigners within the territorial limits of that government, unless at protected ports, were threatened and liable to destruction. In this state of affairs, this government, acting in conjunction with other foreign nations, assembled an army of about 15,000 men, over 5,000 of which, under command of Gen. Chaffee, were ordered to and did proceed to China to assist the forces of other nations in quelling the uprising and to release foreign legations to that country, then imprisoned within the walls of Pekin, the capital city. Between the allied forces and about 30,000 armed Chinese there were fought many engagements, resulting in a considerable loss of life to the forces of this government. The capital city, Pekin, was besieged and captured, and the legations there confined released. Military zones were formed, and at the time of the homicide in question the legation from this government to China, and the legations of other foreign governments, were guarded and protected by the troops there assembled. Occupation of Chinese territory was held until that government gave assurance of both its ability and willingness to maintain order and protect

the lives and property of the citizens and legations of foreign countries, which occupation was continued until long after the commission of the homicide in question.

By act of Congress the pay of the officers and men in the military service of this country during the time they were occupied in China was increased to the amount paid in time of actual war, notwithstanding the fact that during all the time of the military occupation of China by this and other foreign nations the government of China maintained with this and the other foreign nations engaged in such occupation a footing of peace, and notwithstanding the further fact that at no time was there any declaration of war on the part of this government against the government of China. Yet I am constrained to hold that by reason of the occupation of Chinese territory by the large military force of this government, under authority of the Department of War, the many conflicts between the forces of this government and the armed Chinese troops, and the recognition of a condition of war by the Congress of the United States in making payment to the officers and men of this government there engaged on a war basis and all the other facts and circumstances in this case, at the time the homicide in question was committed there prevailed in China a condition of war, within the spirit and intent of the fifty-eighth article of war, for that this government was there asserting its right of protection over the citizens and accredited representatives of this government, and their property, by force of arms; that the essential and requisite jurisdictional facts authorizing a trial of petitioner by a general court-martial, under the provisions of the fifty-eighth article of war, did and must of necessity be held to have existed; and that the judgment of that court must be upheld and enforced, and the writ denied.

It is so ordered.

IN RE E. T. KENNEY CO.

(District Court, D. Indiana. April 13, 1905.)

No. 1,894.

1. BANKRUPTCY—COMBINATION OF CREDITORS—ASSIGNMENT OF CLAIMS—PROOF OF CLAIMS.

Where several creditors of certain insolvent corporations, before bankruptcy proceedings were instituted, assigned their claims for value to a committee—the intention being that the committee should purchase the property of the insolvents from the receivers and trustees, and sell or dispose of it again in the interest of the assigning creditors—the committee held such claims as trustee of an express trust, or under a power coupled with an interest, and was therefore only entitled to prove all of the claims against the estate of one of the corporations in bankruptcy as a single claim.

2. SAME—RIGHTS OF ASSIGNORS.

The beneficial interest of the assignors in the net proceeds of the claims so assigned after administering the trust by the committee was a mere equitable, unliquidated demand, prior to the settlement of the bankrupt's estate, and was therefore not provable in bankruptcy as provided

by Bankr. Act July 1, 1898, c. 541, § 63b, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447].

2. SAME—TRUSTS—ACTIONS—CESTUIS QUE TRUST—PARTIES.

Where a suit in the federal courts is brought to recover moneys for the benefit of a trust estate, the cestuis que trust are neither necessary nor proper parties.

4. SAME—ADEQUATE REMEDY AT LAW—STATE STATUTES.

Where creditors of a bankrupt before bankruptcy assigned their claims to a committee in trust to purchase the bankrupt's property and sell the same for the benefit of the assignors, the latter had an adequate remedy at law by proof of their claims in bankruptcy proceedings by the committee, and hence were not entitled to prove their equitable interest as claims against the bankrupt estate, notwithstanding the statutes of the state in which the proceedings were pending had abolished the distinction between legal and equitable proceedings, and had adopted a single form of action by the real party in interest.

5. SAME—TRUSTEE—SELECTION.

Where creditors of a bankrupt prior to the institution of bankruptcy proceedings assigned their claims to a committee in trust for the purpose of purchasing the bankrupt's assets from the trustee, and selling them for the benefit of such assignors, as distinguished from the bankrupt's general creditors, the committee was only entitled to a single vote in the selection of a trustee, and not to a vote for each of the claims so assigned.

In Bankruptcy.

Hempstead C. Shaw and Charles A. Dryer, for the Deposit Banking Co. of Delaware, Ohio.

John T. Dye, E. A. Foote, Kline, Tolles & Goff, and James W. Noel, for 118 creditors.

ANDERSON, District Judge. Previous to the filing of the petition in bankruptcy in this case, certain creditors of the Aultman Company and four other "allied" corporations, all of which were insolvent and in the hands of receivers or trustees of the state or federal courts, assigned and transferred, for a valid and sufficient consideration, their claims against these corporations, including all notes, bonds, and other evidences of indebtedness upon which the claims were founded, to E. G. Tillotson and others, of Cleveland, Ohio, who describe themselves as a committee. By the terms of this assignment, it became absolute and irrevocable within 10 days afterwards. The committee has all the rights and powers of ownership over these claims. It can sell or hypothecate them, or make any other disposition of them. It can prove them under receiverships or in bankruptcy, and is entitled to receive all dividends that may be declared upon them. It has all the right and title and interest of the individual creditors in these claims, and is the legal owner of them. On the other hand, the committee has undertaken to buy the property of these insolvent corporations from the receivers and trustees, and sell or dispose of it again in the interest of these particular creditors, as distinguished from the general creditors of insolvent or bankrupt estates, and finally to account for the net proceeds that are realized after a deduction of all costs and expenses, including a remuneration for the services of their attorneys and themselves. One hundred and eighteen of these creditors, who

owned and held claims against the bankrupt previous to the assignment and transfer of them to the committee, proved separate claims against the estate in bankruptcy at the first meeting of the creditors for the choice of a trustee, and claimed the right to cast 118 votes. The referee allowed them to prove separate claims, but held that, for reasons of public policy, they should not be allowed to cast more than 1 vote. Under this ruling of the referee, there was not a majority in number and value of the votes cast for any person or corporation as trustee, and the referee thereupon appointed as trustee the Indiana Trust Company, which had been acting as receiver of the E. T. Kenney Company, by appointment of the Marion superior court, for more than five months, and whose administration of its affairs is unobjectionable. Exceptions to the ruling of the referee were taken by the 118 creditors, and cross-exceptions to his allowance of any claim or vote of these 118 creditors, or any one of them, were also taken by the Deposit Banking Company of Delaware, Ohio, and the ruling of the referee is now before the court for review upon both exceptions and cross-exceptions.

This combination of creditors for the control of judicial proceedings in their own interest, as distinguished from the interest of the general creditors, for whose benefit the proceedings in bankruptcy are instituted, and out of whose money the costs and expenses of such proceedings, including the fees of Kline, Tolles & Goff, the solicitors for the petitioning creditors, who are also solicitors for the committee and the 118 creditors, are paid, is clearly against public policy, for the reasons assigned by the referee, and for other reasons which are equally obvious. One of these reasons is that it is a part of the undertaking and purpose of the committee to purchase in the interest of a portion of the creditors, as a single interest, from the trustee who represents all the creditors, the property of the bankrupt; and it is certainly undesirable that they should be permitted to select the trustee from whom such purchase is to be made. A single interest should vote as a single interest, and not otherwise. *In re Messengill* (D. C.) 7 Am. Bankr. Rep. 669, 113 Fed. 366; *In re Coburn* (D. C.) 11 Am. Bankr. Rep. 212, 126 Fed. 218; *Moulton v. Coburn* (C. C. A.) 12 Am. Bankr. Rep. 553, 131 Fed. 201; *Lowenstein et al. v. McShane Mfg. Co.* (D. C.) 12 Am. Bankr. Rep. 601, 130 Fed. 1007; *In re Frank*, Fed. Cas. No. 5,050.

The referee held, upon the evidence, that the various instruments and agreements conferred upon the committee powers coupled with an interest, and also that the members of the committee are trustees of an express trust, and that the legal title in all these claims is in them. If the powers of the committee were coupled with an interest or legal title in the claims, it is not "a substitute acting in the place and name of another, but is a principal acting in its own name," or the names of its members, and these claims should have been proved by them as a single claim, accordingly. *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589.

As trustee of an express or implied trust, the legal title is in them, and it must be conceded that the whole amount due the trust estate,

or themselves as trustees, might have been proved by them as a single claim. But it is contended that each of these 118 creditors has a beneficial interest in his original claim, which is a provable claim in bankruptcy. His beneficial interest is in the net proceeds of his original claim after the costs and expenses of administering the trust by the committee are paid, and not in the claim itself. It is therefore unliquidated, and could not become a provable claim in bankruptcy until after its liquidation according to the provisions of the bankrupt act, § 63b. (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]).

A court of bankruptcy has such jurisdiction "at law and in equity" as will enable it to exercise jurisdiction in the allowance or disallowance of claims. Section 2. But the distinction between law and equity is preserved in it, as in all other courts of the United States. "By the language of the Constitution, it is expressly declared (article 3, § 2, cl. 1) that the judicial power of the United States shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made under their authority. By the statute which organized the judiciary of the United States, it is provided that the Circuit Courts shall have jurisdiction of suits of a civil nature 'at common law or in equity.' Vide 1 Stat. 78, c. 20, § 11. In the interpretation of these clauses of the Constitution and the statute, the court has repeatedly ruled that by cases at common law are to be understood suits in which legal rights are to be ascertained and determined, in contradistinction to those where equitable rights alone are recognized, and equitable remedies are administered. Vide *Parsons v. Bedford*, 3 Pet. 447, 7 L. Ed. 732, and *Robinson v. Campbell*, 3 Wheat. 212, 4 L. Ed. 372. That by cases in equity are to be understood suits in which relief is sought according to the principles and practice of the equity jurisdiction, as established in English jurisprudence." *Irvine v. Marshall et al.*, 20 How. 558, 564, 15 L. Ed. 994.

The constitutional grant of judicial power to all courts of the United States, upon which the separation of law and equity is founded (article 3, § 2), and the legislative grant of jurisdiction to courts of bankruptcy (section 2, Bankr. Act), are in the same words. General order No. 37 in bankruptcy (89 Fed. xiv, 32 C. C. A. xxxvi) expressly provides:

"In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be."

Only such claims are provable in bankruptcy as are made provable by section 63, and it does not include equitable claims, unless they are included under the description of unliquidated claims, which are made provable only after they are liquidated. All other claims enumerated in section 63 are legal claims, and a statutory mode of proof is prescribed for them in section 57. The claim of the trustees is a legal claim, and within the terms of that section. A claim

must be legal or equitable, and it must be provable either upon the law side or the equity side of the court of bankruptcy, if provable at all. A cestui que trust has not any standing in a court of law. The right of action in a court of law is in the trustees only. Even in a court of equity, or on the equity side of a court of the United States, the trustee is always an indispensable party; and, where the suit is to recover moneys for the trust estate, the cestuis que trust are neither necessary nor proper parties, as was held by the Supreme Court of the United States in a case almost identical with the present one. *Carey v. Brown*, 92 U. S. 171, 23 L. Ed. 469. See, also, *Kerrison v. Stewart et al.*, 93 U. S. 155, 23 L. Ed. 843; *Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179; *Knapp v. Railroad*, 20 Wall. 117, 22 L. Ed. 328; *Thayer v. Life Ass'n*, 112 U. S. 717, 5 Sup. Ct. 355, 28 L. Ed. 864; *Dodge v. Tulleys*, 144 U. S. 451, 12 Sup. Ct. 728, 36 L. Ed. 501; *Shipp v. Williams*, 62 Fed. 4, 10 C. C. A. 247; *Shirk v. City of Lafayette (C. C.)* 52 Fed. 857; *Morris v. Lindauer*, 54 Fed. 23, 4 C. C. A. 162; *Gardner v. Brown*, 21 Wall. 36, 22 L. Ed. 527; *Smith v. Portland (C. C.)* 30 Fed. 737; *Hickox v. Elliott (C. C.)* 22 Fed. 13; *Cowen v. Adams*, 78 Fed. 544, 24 C. C. A. 198; *Story v. Livingston*, 13 Pet. 359, 10 L. Ed. 200; *Manson v. Duncanson*, 166 U. S. 543, 17 Sup. Ct. 647, 41 L. Ed. 1105; *Elwell v. Fosdick*, 134 U. S. 500, 10 Sup. Ct. 598, 33 L. Ed. 998; *McArthur v. Scott*, 113 U. S. 340, 5 Sup. Ct. 652, 28 L. Ed. 1015; *Beals v. Illinois, etc., R. Co.*, 133 U. S. 290, 10 Sup. Ct. 314, 33 L. Ed. 608; *Shaw v. Little Rock, etc., R. Co.*, 100 U. S. 605, 25 L. Ed. 757; *Corcoran v. Ches. & Ohio Canal Co.*, 94 U. S. 741, 24 L. Ed. 190.

If any cestui que trust in the present case were permitted to prove a claim on the equity side of the court in bankruptcy, it should be a single claim on behalf of himself and all other cestuis que trust for the whole amount due the trust estate, and not for his individual interest therein.

But it is very earnestly contended that the statutes of Indiana, which have abolished the distinction between legal and equitable proceedings, and adopted a single form of action by the real party in interest, in which legal and equitable proceedings are blended, apply to the courts of the United States, under the provisions of section 914, Rev. St. [U. S. Comp. St. 1901, p. 684], concerning suits at law, etc., and make these 118 claims provable in bankruptcy. None of these 118 creditors has proved or sought to prove a claim for his beneficial interest. Each of them has proved the whole amount of his original claim, which was assigned and transferred by him to the committee previous to the bankruptcy proceedings, and is now seeking to recover the whole amount of dividends upon it which legally belong to the committee. But even if they had proved or sought to prove their equitable interest, it is well settled by the decisions of this court, the Circuit Court of Appeals, and the Supreme Court of the United States that a state legislature cannot give a court of the United States jurisdiction upon its law side over a suit founded upon an equitable title or interest, and it cannot authorize the institution of a suit in any court of the United

States upon an equitable title or interest where there is a plain, adequate, and complete remedy at law, as there is in the present case by the members of the committee as trustees. *Fenn v. Holme*, 21 How. 481, 16 L. Ed. 198; *Lindsay v. Bank*, 156 U. S. 485, 15 Sup. Ct. 472, 39 L. Ed. 505; *Jewett Car Co. v. Const. Co. (C. C.)* 107 Fed. 622; *Jewell Filtration Co. v. Sullivan (C. C.)* 111 Fed. 179; *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059; *Jones v. Fidelity Co. (C. C.)* 123 Fed. 506; *McManus v. Chollar*, 128 Fed. 902, 63 C. C. A. 454; *Mining Co. v. Strickley*, 116 Fed. 854, 54 C. C. A. 186; *Schoolfield v. Rhodes*, 82 Fed. 153, 27 C. C. A. 95; *Davis v. Davis*, 72 Fed. 81, 18 C. C. A. 438.

A "creditor," within the meaning of the bankrupt act, § 1 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419]), is one who "owns" a claim, and the owner of a beneficial interest in a claim does not own the claim itself.

The choice of a trustee by the creditors is, under the provisions of general orders of the Supreme Court No. 13 (18 Sup. Ct. vi), subject to the approval of the referee or the judge, and a trustee chosen by the creditors is removable by the judge.

The exceptions of the 118 creditors, and each of them, to the ruling of the referee, are overruled, and the cross-exceptions of the Deposit Banking Company of Delaware, Ohio, to the ruling of the referee, are sustained, and the appointment of a trustee by him is approved.

UNIVERSAL TALKING MACH. CO. v. KEEN et al.

(Circuit Court, E. D. Pennsylvania. March 24, 1905.)

No. 32.

CONTEMPT OF COURT—VIOLATION OF INJUNCTION—EVIDENCE CONSIDERED.

Evidence considered, and *held* to establish a contempt of court by defendants by selling and offering for sale large numbers of talking machine records, which they had on hand at the time of the granting and service of a preliminary injunction restraining such sale, and in violation of such injunction.

In Equity. Rule on defendants to show cause why they should not be adjudged in contempt.

Horace Petit, for complainants.

A. B. Stoughton, for defendants.

ARCHBALD, District Judge.* At the time the present suit was brought the defendants admittedly had on hand about 15,000 talking machine discs or records, impressed with the complainants' trade-mark "Zon-o-phone," which they were offering for sale at about one-half the price sought to be maintained for them by the complainants. The right to sell was attempted to be justified by a purchase from H. A. Caesar & Co. of New York, who had obtained them in turn from the

* Specially assigned.

Auburn Button Works, by whom they had been manufactured for the complainants. It was shown, however, that the Auburn Button Works had not lived up to their contract, and that the records were put upon the market by Caesar & Co., as their agents, without the sanction of the complainants and in disregard of their rights. Under the circumstances a preliminary injunction was awarded, which went out and was served December 23, 1903. It is contended by the complainants that this injunction has been violated, and the present proceedings have been taken in consequence to punish the defendants for the contempt. Whether the injunction was rightly issued or not, the defendants were bound to respect it, and the only question is whether they have, which depends upon the showing which has been made.

It appears by the affidavit of Edward W. Vaill, Jr., a member of the bar of this court, that on February 13, 1904, he visited the defendants' store at No. 156 North Eighth street, Philadelphia, and purchased from the party in charge a talking machine disc or record, which is produced and put in evidence, and upon which as it originally stood was marked in plain sight on its face, in impressed letters, the words: "Zon-o-phone Record, National Gram-o-phone Corp. All rights reserved"—from which, however, as it was when purchased, the syllable "Zon" had been scratched out. According to Mr. Vaill there were a large number of other similar records in the same condition lying on a table in the store, exposed for sale, and also a large number, having simply the words: "Zon-o-phone Record. All rights reserved"—with the name of the tune or selection, both in white lettering without erasure, on the shelves, in uncovered boxes at the side of the store, and in the window, in full view and within easy reach, apparently arranged for sale. The same day he visited the store at No. 251 North Ninth street, which was leased to Benjamin Futernik, one of the defendants, and purchased a "Zon-o-phone" record like the one last described, from among a number which were displayed in the window and in the rear of the store, where a talking machine business was carried on.

The defendants in their answer to the rule to show cause deny that they have sold or permitted to be sold any records "in infringement of the alleged rights of the complainants," and further specifically aver that they have refused to sell the records which they had at the time the injunction was served upon them, although they have been frequently solicited to do so, and that they still remain undisposed of, and have simply been removed from the center table to one side of the store and piled on the floor, where they remain covered over with paper. They further explain that it is part of their business to exchange records, a thousand of which pass through their hands in this way in a week, those which are so received being placed on a table in the center of the store for exchange or sale; that while they have taken every precaution not to accept any "Zon-o-phone" records on exchange—all of them being first tried in a talking machine—if those which were presented for exchange did not happen to announce the word "Zon-o-phone," upon being so tried, as all "Zon-o-phone" records are supposed to do, they might be accepted through inadvertence; and that, if records of this kind were purchased at the Eighth street store by representatives

of the complainants as alleged, they must have been sold from the exchange table, after being taken in, in the way described, in the exact condition in which they now are. Nor are records so exchanged and sold, as they maintain, an infringement of the complainants' rights.

As to the store on Ninth street, they deny that they control, operate, or have anything to do with it, in proof of which it is testified by Benjamin Futernik, one of the defendants, who leased the store from W. H. Heiss, the owner, in May, 1903, that while he and David Keen, another of the defendants, carried on business there prior to October 11, 1903, a fire occurred on that day, after which he sublet the front part of the store to his father for a cigar business, and the back part to one Benjamin Switky, who carried on a talking machine business there. Leases to this effect are produced, signed by the parties named, bearing date, the one October 15, 1903, for seven months, and the other November 15 for six months, which would carry them to May 15, when the lease to Benjamin Futernik expired. Benjamin Switky also makes affidavit that he leased the back part of the premises in this way, and that he conducted a business there, entirely independent of the defendants. W. H. Heiss, the owner of the building, also swears, qualifying an affidavit which he had previously given to the complainants, that while, for a week or two after the fire in October, he saw Futernik and Keen about the store, he has not seen the latter there since, and the former only occasionally, with his hat and coat on, and not selling goods.

Whatever conclusion might be reached, from the evidence so referred to, with regard to the alleged purchase of "Zon-o-phone" records at the Eighth street store, standing by itself, there would seem to be too much doubt as to the connection of the defendants with the talking machine business carried on at the store on Ninth street to charge them with what happened there, although there is one circumstance, to which I shall allude later on, which might still have the effect of doing so. But since the hearing further evidence has been produced by the complainants, which puts quite another light upon the matter. In an affidavit by Meyer Futernik, the brother of Benjamin Futernik, one of the defendants, made May 21, he states that he is in partnership with his father, Loeb Futernik, in the talking machine and retail tobacco business, at 251 North Ninth street, the store already referred to; that up to March 28, 1904, his father simply conducted a tobacco business there, in the front part of the store, beginning in November previous, during which period, as he says, he was in attendance there, assisting his father two or three hours every day, and was thus familiar with what was going on; that up to the time when his father took over the talking machine business, on March 28, the business was owned and controlled by the defendants, and that after the preliminary injunction was served upon them they moved a large number of "Zon-o-phone" records from the Eighth street store to the store on Ninth street, where they exposed them for sale, additional records of the same kind being brought from the

one place to the other, from time to time, down to the date last mentioned, when they moved all the stock of this character back to the Eighth street store. During this time also, he says, a case of these records was shipped from the Ninth street store to New York City to be sold.

Corroborative of this, Loeb Futernik, the father, in an affidavit made a few days later, testifies that for a year previous to March 28, 1904, when he himself took up the talking machine business at 251 North Ninth street, the defendants owned and controlled the business there; that while in the tobacco business at the same place he frequently assisted them in waiting on customers and selling "Zon-o-phone" records, after Christmas, 1903, and up to March following, the money from the sales so made being taken once or twice a week to the Eighth street store by defendants' representatives; that on January 2, 1904, early in the morning, 12 cases of "Zon-o-phone" records, about 3,000 in all, were brought to the Ninth street store in a wagon, in charge of Jacob Keen, a brother of the two defendants of that name, the wagon being at the store when the affiant got there, and the door being opened by him and the records taken in and exposed for sale, such sales being continued from that time up to the time the defendants moved out for good; that the same day Benjamin Switky was sent there by the defendants for the first time, to take direction of the talking machine business, of which he continued in charge for about three weeks on a salary, after which he went to New York to open a talking machine establishment, and another representative of the defendants was put in his place, a case of the "Zon-o-phone" records being shipped by the defendants to New York, through Switky, early in February, to be sold there; that at sundry times after January 2 parties called and made purchases of "Zon-o-phone" records, and said they had been sent there for that purpose from the Eighth street store. It is explained with regard to the so-called lease from Benjamin Futernik to the father, Loeb Futernik, the affiant, and to Benjamin Switky, that while these are dated October 15, 1903, they were both executed on or about February 18 (which was just as the hearing in the contempt proceedings was coming on), and dated back, Switky having had nothing to do with the store prior to January 2. The affiant took the business, as he says, because the defendants complained that it did not pay, but after it had been arranged that he should do so, a day or two prior to March 28, David Keen objected to his starting in until April 15, up to which time, as he claimed, the defendants had paid the rent, and the place and the business belonged to them. He offered, however, to let them have it sooner if the month's rent which had been advanced was refunded to them, and, this having been agreed to, affiant and his son took possession.

The defendants meet the affidavit of Meyer Futernik with a counter one by David Keen, alleging its entire falsity, in which Morris Keen and Benjamin Futernik, the other defendants, join. They make no response, however, to that of Loeb Futernik, just referred to, which is of a later date, other than as it is contradicted by the

one they had already made. In this they deny that they owned the talking machines and records at the Ninth street store, or that they moved out from there on March 28, as charged, and they reiterate that their connection with the store ceased about the middle of November, when, as they had before stated, Benjamin Futernik sublet to Switky to go into the talking machine business on his own account. It is further averred, but only on information and belief, that during the time Meyer Futernik swears he was in attendance at the Ninth street store he was employed in a tailoring shop, working eight hours a day, and only visited the place occasionally to see his father. This statement runs counter, however, to that of W. H. Heiss, the owner of the building, whose credibility is substantiated by his having been sworn for both sides, who says that a considerable portion of the time after the lease to Benjamin Futernik was made the father and brother of the latter were employed there in connection with the sale of cigars and talking machines, and that at the time of making the affidavit in February they were still so employed, the brother principally attending to the talking machine business, assisted occasionally by the father. John B. Everett also swears to having been in the store several times, shortly before February 19, when his affidavit was taken, and that the business in the rear, consisting of talking machines and records—the latter of which were largely “Zon-o-phone” records—was in charge of the father and brother, who acted as salesmen.

Going back to the Keen affidavit, it is there denied that a large quantity of “Zon-o-phone” records were moved from the Eighth to the Ninth street store after the preliminary injunction, and it is explained that it was Columbian and Victor records that were sold and delivered to Switky from the one place to be sold at the other. It is also denied that a case of records was shipped to New York, and the adverse testimony of the two Futerniks, father and son, is sought to be discredited by the suggestion that on May 15 the defendants started up another store for conducting the talking machine business, at 230 North Ninth street, a few doors distant from the other place, and that when Meyer Futernik heard of this he declared that it would injure his trade, and threatened to make a false (sic) affidavit that the defendants had violated the injunction.

The additional evidence which is brought forward by the complainants in the Futernik affidavits is important, and it cures any weakness which existed in the case without it. Nor is it to be overcome by the insinuation that the Futerniks, father and son, are seeking to injure the defendants because of interference with their trade. There undoubtedly is difficulty between these parties, intimately related by blood and marriage though they are, by reason of the rival stores on Ninth street; but it is more likely to have brought out the truth than to have perverted it. The story that is told clears up and fits in too well with the other facts, which we have, to be rejected. And it is here that the circumstance, to which allusion was made above, comes in. It is clear that all the “Zon-o-phone” records in evidence which were obtained from the

Eighth street store, where the defendants were admittedly in business, as well as those from the Ninth street store, where they try to show that they were not, were part of the lot which were manufactured for the complainants by the Auburn Button Works; these records, according to Mr. Crandall, being the only ones on which the title of the tune or selection is impressed in white letters, by which fact they are at once distinguished and identified. When, therefore, we consider that 90 cases of these, containing some 15,000 records, were purchased by the defendants from Caesar & Co., while it is not impossible that others from the same source might have got into the hands of parties in Philadelphia and so have turned up at the Ninth street store, it is a significant circumstance, taking into account the intimate relations of the defendants with that place, even on their own showing, that records, of which they possessed so large a quantity, should be found there in such abundance exposed for sale. Even without the testimony of the Futerniks as to how they got there, an adverse inference would be justified from this situation, unexplained; and it requires but little in the face of it to persuade of the entire truth of what they say when they swear that these records were brought in quantity from the one store to the other, and were disposed of by representatives of the defendants there.

Nor am I by any means convinced that sales at the Eighth street store stopped upon the granting of the injunction, or were made from records which had been taken in by inadvertence in exchange. There is too much to the contrary to accept that idea. The mutilation on the face of the records, by which the word "Zon-o-phone" is attempted to be obscured, could not deceive or escape the notice of any one, and particularly of those who were so familiar with the business as the defendants' clerks. What purpose any one should have to serve by scratching these records in this way, except, like the defendants, they were prohibited from dealing in them, it is difficult to see. And the fact that in the face of it the defendants were content to deal in them, and now put forward the lame explanation which they do, to try and escape the effect, only serves the more to fasten upon them the charge of having made deliberate and evasive sales. Satisfied, as I am, that the defendants are responsible for what was done at both stores, and that, at both, sales of the complainants' records were made with their knowledge and connivance, after the injunction and in violation of it, I am compelled to hold that there has been a contempt of the order of the court, and that it should be punished by a substantial fine.

Let a decree be drawn adjudging the defendants in contempt, and imposing a fine of \$300, with costs.

WELLS v. CLARK.

(Circuit Court, D. Montana. March 20, 1905.)

No. 259.

1. JURISDICTION OF FEDERAL COURTS—MANNER OF MAKING SERVICE—CONFORMITY STATUTE.

Rev. St. § 914 [U. S. Comp. St. 1901, p. 684], requiring conformity to the state practice, applies only to matters of practice and procedure, and does not appertain to jurisdiction, or the mode of obtaining jurisdiction of the person in actions brought in the federal courts.

[Ed. Note.—Federal courts following state practice in service of process, see notes to *O'Connell v. Reed*, 51 C. C. A. 599; *Nederland Life Ins. Co. v. Hall*, 27 C. C. A. 393.]

2. REMOVAL OF CAUSES—ESTOPPEL TO DENY JURISDICTION OF FEDERAL COURT —ATTACHMENT SUIT.

Where an action by attachment against a nonresident pending in a state court having jurisdiction, in which property has been attached, and the plaintiff is proceeding in conformity to the state statute to obtain service, is removed by the defendant to the federal court on the ground of diversity of citizenship, such removal confers upon the federal court jurisdiction of the defendant's person, and that court may proceed to render a personal judgment against him, to be satisfied from the proceeds of the attached property. The removal statute cannot be so construed as to permit a defendant to oust the rightful jurisdiction of a state court by a removal, and then obtain a dismissal of the action in the federal court for want of jurisdiction.

On Motion to Quash Service of Summons.

McConnell & McConnell, for plaintiff.

W. M. Bickford and Geo. F. Shelton, for defendant.

HUNT, District Judge. Plaintiff commenced this action in the district court of the state of Montana in and for the county of Lewis and Clarke to recover judgment against the defendant for the sum of \$2,500 and interest and attorney's fees alleged to be due upon a promissory note made by the defendant on December 28, 1903, wherein he promised to pay to the Union Bank & Trust Company \$2,500, with interest at the rate of 6 per cent. per annum from date until paid. It is alleged that the Union Bank & Trust Company on September 19, 1904, indorsed, assigned, and delivered the promissory note sued upon to the plaintiff herein. Summons in due form was issued out of the district court aforesaid. An affidavit for attachment, duly made under the laws of the state of Montana, was filed on September 20th, together with the necessary undertaking, and writ of attachment issued to the sheriff of Silver Bow county, Mont. On September 23d the sheriff of Silver Bow county made his return to the writ, certifying that by virtue thereof, on September 22, 1904, he attached the interests of the defendant, C. W. Clark, in and to certain real estate in Silver Bow county, standing on the records in the name of Katherine Q. R. Clark. On October 18, 1904, the defendant, C. W. Clark, appearing specially for the purpose of the motion and no other, and waiving no right to object to the jurisdiction of the district court over his person or property, filed a petition in the said district court for the removal of the suit to the United States Circuit Court. The ground of this motion

was based upon the fact that C. W. Clark was at the time of the commencement of this suit and at the time of motion a citizen of the state of California, residing in said state, and that the plaintiff therein was a citizen of the state of Montana. Defendant furnished the necessary bond on removal, and upon October 18th the district court of the state ordered that the cause be removed for trial to the Circuit Court of the United States for the District of Montana. After the transcript on removal had been filed and entered in this court, on November 3, 1904, N. W. McConnell, Esq., counsel for the plaintiff, filed an affidavit setting forth the institution of the action in the district court of the First Judicial District of the state, and the issuance of summons, the nature of the action, together with a statement that defendant resides out of the state of Montana, and cannot, after due diligence, be found therein. In support of affiant's statements he alleged in his affidavit that George F. Shelton, Esq., attorney for defendant, had filed a petition, appearing specially for that purpose, for the purpose of removing the cause from the said district court to the United States Circuit Court; and in said petition it was alleged that defendant was a resident of the state of California. The affidavit further stated that personal service of the summons issued could not be had on the defendant, and prayed for an order that service of the summons in the case might be made by publication thereof. The clerk of the court thereafter made an order reciting that, it satisfactorily appearing by the affidavit of N. W. McConnell, Esq., that the defendant had departed from and resides out of the state of Montana, and that a good cause of action exists in favor of plaintiff and against defendant, and it further appearing that summons had been duly issued out of the state district court, and that personal service could not be made upon the defendant for reasons stated, and that service of summons could be made upon defendant by publication at least once a week for four successive weeks, and it appearing that the residence of the defendant was known to be at the city of San Mateo, Cal., therefore a copy of the summons and complaint should be deposited in the United States post office at Helena, Mont., directed to the said defendant at his place of residence. On December 6th thereafter the defendant filed a motion to quash service of summons, the motion being in the following language:

"Now comes the above-named defendant, and appearing specially for the purpose of this motion, and for no other purpose, and not in any way acceding or consenting to the jurisdiction of the court, except so far as may be necessary for the purposes of this motion, and moves the court to quash the pretended service of summons in this cause upon the grounds and for the reasons following, to wit: (1) That the said summons has never at all or in any manner been served upon the defendant herein personally in the state and district of Montana, nor has the defendant ever at any time waived service of summons, or voluntarily entered his appearance in this cause. (2) That the publication of service herein, wherein and whereby the said summons has been published in a newspaper, does not give the court any jurisdiction over the said defendant, nor is such service by publication permissible or in accordance with the rules of procedure in the United States court, nor is the same sanctioned or authorized by any law of the United States, and the said pretended service of summons by publication is wholly and absolutely void under the laws of the United States."

The records show that pursuant to the order of the clerk publication of summons was made for four successive weeks, as required by the laws of the state, and that a personal service of a copy of the summons and complaint was made upon defendant at San Mateo, Cal., on December 29, 1904, by the United States marshal in and for the Northern District of California, wherein the defendant resides. Sections 637, 638, Code Civ. Proc. Mont.

Section 914 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 684] applies only to matters of practice and procedure, and does not appertain to jurisdiction, or the mode or manner of obtaining jurisdiction of the person in the courts of the United States in actions brought in the federal courts. *Harland v. United Lines Tel. Co.* (C. C.) 40 Fed. 308, 6 L. R. A. 252. The right to attach is conferred by section 915 of the Revised Statutes, which provides that:

"In common law causes in the Circuit and District Courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such Circuit or District Courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process: provided, that similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other remedy."

Under the acts of Congress of March 3, 1875, c. 137, 18 Stat. 470, and August 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], amending the act of March 3, 1875, the jurisdiction of the Circuit and District Courts was more closely defined by the following language of section 1:

"And no civil suit shall be brought before either of said courts against any person by original process or proceeding in any other district than that where in he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

The limitations in the statute just quoted restrict its operation to civil suits brought before either Circuit or District Courts against any person "by original process or proceeding." It was held in *Perkins v. Hendryx et al.* (C. C. 1889) 40 Fed. 657, that a federal court does not acquire jurisdiction of a suit removed from a state court by virtue of an attachment made in a state court, where there was no personal service of process on defendant, a resident of another state; and, furthermore, that a defendant does not, by appearing in the state court for the purpose of removing the case to the federal court, thereby waive any irregularity as to service of process. The doctrine of that case finds general approval in *Black's Dillon on the Removal of Causes*, § 203. But in *Crocker Nat. Bank v. Pagenstecher et al.* (C. C. 1890) 44 Fed. 705, the court distinguished the cases cited in the opinion of Judge Colt in *Perkins v. Hendryx et al.*, supra, by drawing attention to the fact that they were all cases in which the action was originally brought in the Circuit Court, and were not cases removed to the Circuit Court. In *Richmond v. Brookings* (C. C. 1891) 48 Fed. 241, the case of *Perkins v. Hendryx* was again disapproved of. In *Purdy v. Wallace Muller Co., Limited* (C. C.) 81 Fed. 513, an action was begun in the state court

against a nonresident defendant by process of foreign attachment, without personal service or voluntary submission on the part of the defendant to the jurisdiction of the court. Judge Brown, of the United States District Court of Massachusetts, held that custody of a res being recognized by the federal courts as a ground of jurisdiction, as well as personal service of process, a suit begun in a state court by attachment of property, and removed into a federal court, will not be there dismissed for want of jurisdiction because there has been no personal service. The case of *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517, is distinguished as one not having involved the consideration of the exception pointed out in the case of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, and *St. Clair v. Cox*, 106 U. S. 353, 1 Sup. Ct. 354, 27 L. Ed. 222, to the general rule regarding personal service or voluntary submission. "It is obviously not the purpose of the removal statute," says Judge Brown, "to destroy a valid jurisdiction of the state court. Nor is it the purpose to secure to a defendant the right to litigate in the district of his own domicile, since the removal must be to the United States court for the district wherein the suit was begun." *Tallman v. Baltimore & O. R. Co.* (C. C.) 45 Fed. 156. In *Cowley v. Northern Pacific Railroad Co.*, 159 U. S. 583, 16 Sup. Ct. 131, 40 L. Ed. 263, the principle which controls was clearly stated:

"The case having been removed to the federal court upon the defendant's petition, it does not lie in its mouth to claim that the court has no jurisdiction of the case, unless the court from which it was removed had no jurisdiction."

The jurisdiction which the state court acquired by attachment created jurisdiction in the federal court when the action was removed, for the reason that by virtue of the attachment in the state court the property attached was brought into the custody of the federal court.

Has the defendant had notice, or, if not, how, and what, notice shall be given to him, so that the federal court may now proceed to render judgment and subject the property attached to the payment of the debt sued upon? The right of removal and the removal are based upon the fact of diverse citizenship. The one court lost and the other acquired jurisdiction on this account. Here defendant has voluntarily interrupted service of summons in the state courts by exercising his right to remove the case to this court. Having based his petition upon the fact that he is a citizen of California, and having given the necessary bond, it ought to follow that, although he appeared in the state court solely to remove the case, and would limit his appearance in this court to an attempt to have the action dismissed from it, yet, by his voluntary act in preventing the full notice contemplated by the state law, by removing the case, relying upon such diverse citizenship, he has given this court jurisdiction of his person, and authorized judgment which will not only subject his property to the payment of the debt involved, but in personam. The satisfaction of any judgment rendered in the federal court against the defendant must be limited to the proceeds realized from the sale of the property attached, but the judgment is in form against the person. I believe the correct rule to be that jurisdiction to remove carries with it jurisdiction to proceed, and that, where the action was properly instituted in the state court, and attach-

ment was had, and where petitioner relies solely upon a diversity of citizenship for removal, any construction which would allow a suit to be removed merely for the purpose of dismissing it would not be sound. *U. S. v. Ottman*, 1 Hughes, 313, Fed. Cas. No. 15,977; 11 Meyer's Fed. Dec. §§ 1638-1643; *Sayles v. Northwestern Ins. Co.*, 21 Fed. Cas. 608; *Tootle v. Coleman*, 107 Fed. 44, 46 C. C. A. 132, 57 L. R. A. 120; *Elliott v. Shuler* (C. C.) 50 Fed. 454.

In the argument of the learned counsel for the plaintiff, while he expressed confidence in the position that by removing the case the jurisdiction of this court attached to the person as well as to the property of the defendant, he also suggested that constructive service, as provided by the laws of the state, was authorized in the federal courts under section 914; and that service of summons by publication and by serving a copy of the complaint and the summons upon the defendant had been made in case it might be decided that these steps were necessary. But as I believe that the acts of the defendant have given jurisdiction of his person and authorize judgment against him to the extent indicated, the additional steps had by publication of summons and the service of a copy thereof and of the complaint, though pursued by plaintiff, were not essential.

The motion to quash is overruled.

**FIRST NAT. BANK OF WILKES BARRE et al. v. WYOMING VALLEY
ICE CO.**

(District Court, M. D. Pennsylvania. March 17, 1905.)

No. 558.

1. BANKRUPTCY—TRADING CORPORATIONS—ICE COMPANY.

A corporation chartered for the purpose of carrying on a wholesale and retail ice business, and which in fact sold not only ice of its own harvesting, but also large quantities which it purchased from third parties, is engaged chiefly in trading and mercantile pursuits, within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], and may be adjudged an involuntary bankrupt.

2. SAME—CORPORATIONS—VALIDITY OF BONDS.

The failure of a Pennsylvania corporation to pay the tax due the state on an increased issue of stock, which had been duly reported to the state authorities as required by law, was an irregularity of which advantage could only be taken by the state, which waived its right by subsequently accepting the tax, and the delay in making the payment did not affect the validity of the stock, or of bonds based thereon, which could only be issued under the state law to the amount of half the capital stock, so as to exclude such bonds from consideration in determining the question of the corporation's insolvency in bankruptcy proceedings against it.

3. SAME—INSOLVENCY.

The liability of stockholders of a corporation for stock claimed to have been issued without payment, which claim is disputed, cannot be taken into account as an asset in determining the question of the corporation's solvency in bankruptcy proceedings against it.

4. SAME—GOOD FAITH OF PROCEEDINGS.

Where a corporation is insolvent, and has been forced by reason of its insolvency to commit acts of bankruptcy in failing to vacate executions levied on its property, the fact that directors and stockholders, who are

also creditors, join with other creditors in a petition to have it adjudged a bankrupt in order to secure an equitable distribution of its assets is not an evidence of bad faith or collusion which will avail the execution creditors to defeat the adjudication.

In Bankruptcy. On involuntary petition.

W. S. McLean, for petitioners.

George R. Bedford and W. H. Hines, for contesting creditors.

ARCHBALD, District Judge. These are involuntary proceedings brought against the Wyoming Valley Ice Company, a corporation organized under the laws of Pennsylvania, and having its principal place of business at Wilkes Barre, in this district. No defense is made by the company; but certain execution creditors, who had levied upon and were about to sell its personal property at the hands of the sheriff, which brought about its bankruptcy, appear and contest the validity of the proceedings upon several grounds. In view of the preference secured by virtue of their executions, it is a question whether they are entitled to do this without a surrender. *Collier on Bankruptcy* (5th Ed.) 229. *Contra, In re Moench* (D. C.) 10 Am. Bankr. R. 590, 123 Fed. 977. But, passing that by, let us consider the objections that are made.

1. It is charged in the petition, in order to bring the case within the law, that the respondent company is engaged exclusively in trading and mercantile pursuits. Issue is taken as to this in the answer, and the question is whether it is sustained by the proofs. A "trader" is defined as one who is engaged in trade or commerce (28 Am. & Eng. *Encycl. Law* [2d Ed.] 438); or, more strictly speaking, one who buys and sells goods or merchandise for gain. *Collier on Bankruptcy* (5th Ed.) 63; *Brandenburg* (3d Ed.) § 115; *Loveland* (2d Ed.) 148. A corporation principally engaged in trading, according to the latter view, would therefore be one which bought to sell, and not simply one which sold that which it has produced, supplied, or made. *In re New York Water Co.* (C. C.) 98 Fed. 711. Having regard to the general purpose of the bankruptcy act [U. S. Comp. St. 1901, p. 3423], a narrow construction is not to be maintained; but, without attempting anything closely accurate, it is sufficient to say that a corporation is within its provisions where it is engaged in a commercial pursuit or business which, if carried on by an individual, would constitute him a "trader" or "dealer," in the ordinary acceptance of that term. *In re Tontine Surety Co.* (D. C.) 116 Fed. 401.

In the present instance the respondent company was incorporated by a special act of the Pennsylvania Legislature for the purpose of carrying on a wholesale and retail ice business, as its name implies. Act April 15, 1869 (P. L. 1870, p. 1415). It was given the right to take ice from the Susquehanna, Lackawanna, or Lehigh rivers, or any other creek or stream, in the then county of Luzerne, in order to supply its icehouses for the accommodation of the public; and by the extension to it of the privileges possessed by the Cold Spring Ice & Coal Company of Philadelphia, incorporated by Act March 30, 1864 (P. L. 114), it had the further general right of purchasing, conveying, or holding such real and personal estate as might be required for carrying on its

business. Conceding that this of necessity gave it authority to buy and sell or deal in ice, it is contended that the proofs do not show that this was done, but only that it sold to customers the ice which it harvested itself from various fields. This brings it, as it is said, within the Case of New York Water Co. (C. C.) 98 Fed. 711, where it was held that the character of a corporation is to be determined by the business which it actually does, and not simply by that which it is empowered to do. But, without committing myself to the doctrine of that case, it is sufficient to observe that a mistake is made as to the extent to which the evidence goes here. Not only is it established that the company was carrying on the ice business, selling or dealing in ice of its own gathering, whatever the effect of that might be, but it is expressly shown that a material part of that which it disposed of to customers in this way was obtained from third parties, none other in fact than the Bear Creek Ice Company, one of the contesting creditors, and the Pocono Ice Company, with each of whom agreements were proved for the purchase of certain annual minimum quantities, out of which the financial embarrassment of the company largely grows. Whatever view be taken of it, therefore, the law is thus fulfilled. The ice company is a trading corporation in every sense of the word, buying and selling for expected gain, and the objection falls.

2. It is said, however, that, rightly considered, the company is not insolvent. For these two positions are taken: First, that the bonds of the company, which constitute by far the greater part of its indebtedness, and without which it would be undoubtedly solvent, are invalid; and, second, that among the assets of the company the liability of stockholders is to be included to whom stock was given as a bonus upon the purchase of bonds. The following is a comparative statement of liabilities and assets at the time the proceedings were instituted, as given by the president:

Liabilities.

First mortgage bonds.....	\$ 90,000
Int. thereon for two years at 6%.....	10,800
Floating indebtedness (about).....	3,000
Debts due to petitioning creditors.....	24,000
Judgments of petitioning creditors (say).....	7,000

\$134,800

Assets.

Property at corner of Delaware and Jackson streets, Wilkes Barre, one and one-half acres held in fee, improved with icehouses, stables, sheds, offices, etc.....	\$ 70,000
Leasehold on west side of Market St. bridge, Dorranceton, improved with two icehouses, small office building, and barn; no value except for old lumber, railroad terminal there having been abandoned	600
Contracts for two lots in Hanover township, with two icehouses, offices, and barn.....	6,000
Horses, wagons, ice on hand, and personal property generally, outside of book accounts, sold by receiver, and realized.....	4,250
Collectible accounts (about).....	900
Money in bank.....	330

\$ 82,080

Taking these figures—and we have none others—the liabilities exceed the assets over \$50,000. But this depends, of course, on the validity of the bonds, which, with the accrued interest, amount to over \$100,000; and their invalidity is asserted on the ground that the company was prohibited, both by its charter and by the general law of the state, from borrowing money upon mortgage to an amount exceeding one-half its capital stock, which at the time, as it is claimed, was but \$25,000. Act April 15, 1869, § 2 (P. L. 1870, p. 1415); Act May 21, 1889, § 1 (P. L. 257). But see Act Feb. 9, 1901, § 1 (P. L. 3); *Commonwealth v. Buffalo & Susquehanna R. R.*, 25 Pa. Co. Ct. R. 274. The fact is not ignored that before the bonds in question were issued, on March 16, 1901, steps were taken to increase the capital stock from this, its original amount, to \$225,000, of which due return was made to the secretary of the commonwealth, as required by law. Act April 18, 1874, § 7 (P. L. 62); Act Feb. 9, 1901, § 3 (P. L. 5). But the point is made that the tax or bonus due the state upon the increase was not paid at the time as provided by the statute, nor, indeed, till after the proceedings in bankruptcy were instituted, and that the increase, therefore, was illegal. If there was any delinquency of this kind, however, it had no such effect as is claimed for it, going neither to the validity of the increase nor to the bonds which are based upon it. At the most, it was an irregularity, of which the state authorities alone could take advantage (*Columbia National Bank's Appeal*, 16 Wkly. Notes Cas. 357; *Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818), and they have condoned it by accepting the payment which was recently made.

Neither is anything to be made out, on the other side of the account, of what is claimed to be due from the holders of bonus stock. It is no doubt true that the parties who accepted this stock were well aware of its origin, having assisted as directors in issuing it to Mr. Young, in consideration of the contracts and options which he turned over to the company. But even though this be the case, and although it should be determined in the end that they are severally liable, to the extent of their holdings, as for stock which remains unpaid, the liability amounts to nothing as an asset to be reckoned with at this time. If ever secured, it will only be at the end of a lawsuit, all the parties expressly declaring that they should contest their liability, and no possible value can therefore be ascribed to it here.

3. Finally, the good faith of the proceeding is assailed—a friendly affair, as it is said, in which the directors and stockholders are petitioners, for the purpose of accomplishing indirectly what the company as a corporation could not do for itself, in order to shake off the claims of the contesting creditors. In this connection it is pointed out that Mr. Weigand, the treasurer, admitted having stated that the main reason was to get rid of the Albert Lewis contract, and that Mr. Conyngham, another director, testified that bankruptcy was discussed as the only alternative left, after negotiations with Mr. Lewis for a settlement had failed. The appearance of the First National Bank as a petitioner is explained by the suggestion that Mr. McLean, the president, is also counsel for the ice company, and took action without consulting with the other officers, and without the bank having any interest to sub-

serve, it being abundantly secured on the notes of the ice company which it holds.

But self-interest and bad faith are not to be confounded, and the one is all that we have here. Bankruptcy was a lawful expedient to be resorted to, to secure an equal division of the property, so that the execution creditors who are contesting the proceedings should not get it all. An act of bankruptcy was undoubtedly committed by the failure of the company to vacate the executions on which the property was advertised, and that the company was insolvent has been found. The situation, therefore, was one of the contestants' own making, and not manufactured by the petitioners by virtue of their position, and, existing independently of them, there was nothing in law or morals which prevented them from taking advantage of it, for their own protection, any more than any one else. Having carried the company along as they had, by advancing money and lending their credit, they were not obliged to sit by and do nothing, simply because of their official relation to it. Nor is it admitted that bankruptcy was resorted to to get rid of the claims of the contesting creditors, but only that no other alternative was open to them, the contesting creditors pressing for a settlement by judgment and execution, and all other means of relief having failed. And even if evidence of a sinister purpose in this direction was stronger than it is, without proof of collusion among all the petitioners, it would only affect those directly implicated, and but two of them have been named. Neither is the position of the bank open to question. The steps taken by Mr. McLean in its behalf are not to be impugned because there was no formal consultation with his associates. Where expedition is required, this often is not possible. The president of a corporation is its executive head, and his action is to be accepted in the first instance by virtue of his general authority to represent the company, subject to revision by the directors, if they are so moved; and as there has been no repudiation in the present instance of what was done by Mr. McLean, it therefore stands.

The petition is sustained, and an adjudication is directed to be entered in conformity therewith.

THE WYANDOTTE.

(District Court, E. D. Virginia. March 11, 1905.)

1. ADMIRALTY—ADVANCES TO MASTER—DRAFTS—SET-OFF.

Where a charter party provided that the charterers' agents in foreign ports should be employed as brokers to attend to the ship's business, and such brokers procured libelants to purchase a draft drawn by the master to pay necessary and usual charges in the port where the ship received her cargo, which the master was bound to pay and did pay from the proceeds of the draft, the owners were not entitled to offset against the same, in the hands of the holder in good faith, claims against the charterers or their agents, either for dead freight or demurrage.

2. SAME—FREIGHT—POSSESSION BY MASTER—KNOWLEDGE OF LIBELANT.

Where the purchaser of a draft drawn by the master of a vessel in a foreign port for advances to pay proper charges had no knowledge that at the time the draft was drawn the master was in possession of drafts

for freight, which he could have used to pay such charges, but which he in fact forwarded to the owners, and which they received, the fact that the charter party provided that the captain's ordinary disbursements at the port of loading should be advanced, payable from freight only, and that his disbursements might have been so paid, was no defense to the draft.

In Admiralty. Libel to recover advances made to ship's master in foreign port.

This libel was filed on the 10th of June, 1902, to recover the amount of a draft issued by the Wyandotte's master at the port of New Orleans on the 15th of November, 1901, for the ship's necessary disbursements at said port. The ship is owned by the British Maritime Trust, the claimant thereof; and by their representative at New York, on the 24th of September, 1901, was chartered to one W. W. Wilson, as agent for an undisclosed principal, under which she was to proceed to Port Eads for a cargo of wheat or maize; and, upon arriving at said port, to be loaded at Galveston or New Orleans, as directed by the charterers. The steamer at once proceeded to Port Eads, reaching there on the 10th day of October, 1902, and immediately by telegram advised the charterer of her arrival, and that she was awaiting orders. No orders were given until the 9th day of November, 1902, when the ship was ordered to New Orleans, to which port she at once proceeded, and reported to Baccich & Clement, the charterer's agents, to whom she was consigned. The loading was concluded on the 15th of November, and she on that day sailed from New Orleans to the port of Hull, England, where the cargo was discharged. Respondent insists that the lay days expired on the 10th day of November, 1902, and that demurrage was due from that day to and including the 16th of November, as well as for time for detention in unloading from December 14th to December 23d, both inclusive; also that there was a shortage of cargo of 162 tons, for which she was entitled to recover; and that on those two accounts there was due to them a sum in excess of the amount sued for. The charter party provided that the steamer should be consigned to the charterer's agents at the ports of loading and discharge, and should employ their broker to attend to the ship's business; that the cash for the captain's ordinary disbursements at the port of loading were to be advanced, if required, the steamer paying 2½ per cent. commissions and cost of insurance thereon; the amount advanced to be covered by the captain's draft, payable three days after the ship's arrival at the port of discharge, out of the freight on which the draft formed a lien. Prior to the captain's departure from New Orleans a statement was made and duly signed by him of the ship's disbursements, amounting to \$1,614.52, for which he drew a draft on November 15th, payable to his own order five days after the arrival of the ship at the port of Hull, England, or wherever else the said voyage might terminate, unless the freight was collected sooner; the said draft reciting, among other things, that the same was for value received, and "for necessary disbursements owed by my vessel at this port, for the payment of which I hereby pledge my vessel and her freight; and I hereby assign to the legal holder of this obligation all my lien and claim against freight, vessel and owners, with power to take in my name all steps necessary to enforce the same; and my consignees at the port of discharge are hereby instructed to pay this obligation, and deduct the amount thereof from the freight due said vessel. In case of nonpayment, the holder shall also be entitled to the benefit of all liens in law, equity, or admiralty which the master or owners of the vessel may be entitled to against any part of the cargo or its owners for freight, compress, or other charges on the cargo paid by the vessel or master at the port of loading. This claim to have priority of payment over all others that may be presented against said freight and vessel. My vessel is now lying at the port of New Orleans, loaded with a cargo of grain, and ready to sail for Hull, England." This draft was regularly discounted by the libelants' agents at New Orleans for Baccich & Clement, the agents for the charterers, and for the ship at said port, and the proceeds arising therefrom duly applied to the payment of the ship's bills as certified to by the master. Prior to sailing, the charterers accounted with the ship's master for the difference of freight due by them, amounting to

\$1,235, for which two drafts were given to the ship's master, and duly forwarded by him to the owners of the ship. The defense interposed by the claimant is that certain items included in the draft, amounting to \$702.70, were not claims of a maritime character, and the libel as to them could not be maintained; that under the terms of the charter party the ship's master was limited to drawing upon the freight money, as distinguished from the ship itself; that the claimant should have the right to offset against the draft sued on for any loss sustained either by reason of shortage in the cargo, or demurrage; and that the damages in that respect more than covered the amount sued for.

Hughes & Little, for libelants.

Convers & Kirlin and Whitehurst & Hughes, for respondent.

WADDILL, District Judge (after stating facts as above). However important the questions discussed in this case may be from an academic or theoretical standpoint, so far as this particular case is concerned, there can be but little difficulty in reaching a just conclusion, and one which under the law the parties should be subjected to. The libelants are purchasers for value of the draft in question, drawn by the ship's master, and from the proceeds of which the ship's charges were paid—charges certified to by the master as necessary disbursements for the ship, and which the evidence shows were the customary charges in the port of New Orleans, and confessedly expenditures the master had the right to make out of any funds in his hands belonging to the ship; and while it may be true, technically, that the draft in question is not negotiable because of the uncertainty in the time and place of its payment, it was of a quasi negotiable character (*The Serapis* [D. C.] 37 Fed. 436; *Moore v. Robilant* [C. C.] 42 Fed. 162, 165), discounted as other negotiable paper, and in the hands of an innocent holder, whose rights should be respected and protected, unless there is some controlling consideration to the contrary. The right to offset as against this claim rights or causes of action that the ship may have against the charterers or their agents, either for dead freight or demurrage, is so manifestly untenable and unreasonable under the facts of this case as not to be entitled to serious consideration. The draft drawn by the master on which the libelants advanced the money sued for was negotiated at the special instance and request of the ship's master by Baccich & Clement, the ship's agents, they, as to that transaction, being the joint representatives of the shipowner and the charterers, the charter party having prescribed that the charterers' agents should be employed as brokers to attend to the ship's business, and in what they did in this respect they acted not as the representative of the charterers, but the ship, and negotiated the loan to the libelants to raise the money to extinguish the ship's necessary charges at that port.

It would seem that ordinarily, at least, the ship's master would have the right to do what was done in this case. He was in a foreign port; and, while it is true his vessel was under charter, great delay had been encountered, and he had finally secured a cargo, or such a cargo as he could secure for his voyage, and it was necessary for him to go on. He was without money. The ship's owners

were in a foreign country, but with local representatives, who were also without means; and through the ship's representatives, at the master's instance, on the faith and credit of the ship, effected an arrangement to raise money to pay the ship's disbursements, and thereby enabled her to proceed on her voyage. Without this the ship and cargo would have been held indefinitely, to the serious loss of both properties. The principles of maritime law applicable to this case are too well settled to need special elaboration at this late day. The *Grapeshot*, 9 Wall. 129, 19 L. Ed. 651, will be found to be a specially interesting and instructive case, and in which Mr. Chief Justice Chase (pages 135, 136, 9 Wall., 19 L. Ed. 651) discussed the character and extent of the lien, and the circumstances under which the same would properly attach against the ship; and also the character of a bottomry bond and obligations more particularly like the one in this case, executed under circumstances and the terms of which were more or less different from the ordinary bottomry bond, but which would be recognized and enforced as such bonds. And in *The Lulu*, 10 Wall. 192, 19 L. Ed. 906, Mr. Justice Clifford, speaking for the Supreme Court (page 197, 10 Wall., 19 L. Ed. 906) said of the lien:

"Where it appears that the repairs and supplies were necessary to enable the vessel to proceed on her voyage, and that they were made and furnished in good faith, the presumption is that the vessel, as well as the master and owners, is responsible to those who made the repairs and furnished the supplies, unless it appears that the master had funds on hand, or at his command, which he ought to have applied to the accomplishment of those objects, and that they knew that such was the fact, or that such facts and circumstances were known to them as were sufficient to put them upon inquiry, and to show that, if they had used due diligence in that behalf, they might have ascertained that the master, under the rules of the maritime law, had no authority to contract for the repairs and supplies on the credit of the vessel."

The Aurora, 1 Wheat. 102, 4 L. Ed. 45; *The General Smith*, 4 Wheat. 443, 4 L. Ed. 609; *The Patapsco*, 13 Wall. 329, 20 L. Ed. 696; *The J. E. Rumble*, 148 U. S. 1, 9, 11, 12, 13 Sup. Ct. 498, 37 L. Ed. 345; *Moore v. Robilant* (C. C.) 42 Fed. 162.

In this case the action was that of the agent of the owner, and entered into in good faith, when there was, in the opinion of the court, sufficient necessity for so doing; and the same should be held and treated as valid, whether considered a bottomry bond or not. The supplies were secured, and the draft issued pledging the ship as well as the freight money due, under such circumstances of exigency as would have caused a prudent owner, if present, to have ordered the supplies, and made provision for their payment on the faith of the ship; and a presumption arises as well that the necessity did exist as that the credit was given upon the faith of the ship. *The Alexander*, W. Robinson, 362; *The Medora*, 1 Sprague, 139, Fed. Cas. No. 9,391; *The Grapeshot*, 9 Wall. 141, 19 L. Ed. 651, *The Lulu*, 10 Wall. 192, 201, 203, 19 L. Ed. 906.

The respondents' contention is, however, that these conditions did not exist, because they say that the master had possession of freight money belonging to the owners, sufficient in amount to cover his obligations. If this be true, there is no pretense that the libelants had any knowledge of the fact, or that they were placed in such a

position as to afford them knowledge or opportunity of knowledge of the fact; and knowledge that Baccich & Clement, the ship's agents, may have had in this respect, if any, cannot be imputed to them. But it will be seen at a glance that the defense made is purely technical in character; for while it is true that the ship's master did have, after the adjustment of the difference of freight, drafts for the amount of the same, it does not follow that he necessarily had the money when this obligation was assumed, and when it was necessary for him to proceed on his voyage, or that he in fact had more than the draft in the owner's favor, and which it appeared he duly forwarded to them; and, if he did actually have the money, or a draft payable to his own order, the respondents should not be heard to interpose the technical defense they seek to make to defeat the right of the libelants to recover, when the freight money it is claimed the master had, and with which he could have paid his expenses, had been paid to and received by them. With the money in hand, to allow them to retain the same, and defeat libelants of their right of recovery, though their money has been properly expended and used to pay the very bills that the freight money would have been applied to, would be outrageously unjust and technical in the extreme. The ship owners having received the freight money that confessedly could have been applied to the disbursements made in their behalf, they should be estopped from making such technical defense to the payment of libelants' debt. Had the libelants not paid or furnished the money with which to pay the bills, the respondents would have been short just that sum in their freight money; and they should not, as against a person innocently furnishing the money to their own representative, and in their behalf, and after the same has been used on their account, be allowed to introduce as a defense a claim that they may happen to have against some third party, however fair and just as against such parties the claim may be. Manifestly, they have no such claim against their own representatives in this transaction, Messrs. Baccich & Clement, and their master, and it was only with them that the libelants acted in advancing the money on the master's draft sued for.

In the view taken by the court, the consideration of the question of which and which not of the particular items charged in the captain's draft are for disbursements of a maritime character need not be determined, since there is no doubt of the fact that out of the freight money paid to the captain, and by him transmitted to the owners, he could have paid the same that were paid out of the funds arising from the draft in question, and the owners should not be heard to defeat the recovery on that account. It will be borne in mind that in this case there is no suggestion of fraud, wrongdoing, or improper conduct on the part of this ship's master or their representatives. What they did was in good faith, with the bona fide purpose and in the interest of the ship. Not an expenditure was made that did not receive the sanction of the ship's master, and which he could not have paid from any money of the ship coming into his hands; and to defeat a recovery either because some of the items paid may not have been of a maritime character, or that the master

may have been limited by the terms of the charter in drawing his draft on the freight money, would be to defeat the recovery of a confessedly just claim in the hands of innocent holders upon the veriest technicality.

It follows from what has been said that a decree may be entered in behalf of the libelants for the amount sued for, with interest from the time the same was paid.

In re CLIFFORD.

(District Court, N. D. Iowa, Cedar Rapids Division. February 11, 1905.)

1. **BANKRUPTCY—PREFERENCE—MORTGAGE FOR PRESENT CONSIDERATION.**

Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445] as amended, providing that a person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, made a transfer of any of his property, or if within such time transfer has been recorded, where the effect of the transfer would be to enable a creditor to obtain a greater percentage of his debt than other creditors of the same class, prohibits the giving of a preference to existing creditors only; section 67d (30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]) covering a transfer for a present consideration.

2. **SAME—RECORDING.**

Bankr. Act July 1, 1898, c. 541, § 67d, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449] providing that liens given or accepted in good faith, and not in contemplation of, or in fraud of, the act, and for a present consideration, which have been recorded according to law, shall not be affected by the act, is satisfied as to recording if the instruments be recorded before commencement of the bankruptcy proceedings.

3. **SAME—INSOLVENCY—INTENT TO PREFER—CAUSE TO BELIEVE.**

In the absence of proof or findings of insolvency of bankrupt when he gave a mortgage, or when it was recorded, or of the mortgagee having reasonable cause to believe that a preference was intended, which facts are by Bankr. Act July 1, 1898, c. 541, §§ 60a, 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], made conditions of a transfer being a voidable preference, the mortgage cannot be held to be a preference.

In Bankruptcy. On petition of the trustee and certain creditors for review of the order of the referee allowing the claim of Euclid Sanders as a preferred claim to the amount of \$395.

From the certificate of the referee it appears that on January 25, 1904, the bankrupt purchased of Sanders 24 head of cattle at the agreed price of \$395, and at the same time, and as a part of the same transaction, he made to Sanders a chattel mortgage upon such cattle to secure the payment of such purchase price and a prior debt of \$126.15 that the bankrupt was then owing to Sanders; the mortgage being for the sum of \$521.15. The mortgage was not filed for record until May 11, 1904, which was within the four months next preceding the filing of the petition upon which Clifford was adjudged bankrupt, which petition was filed more than four months after the date of the mortgage. Sanders made proof of his debt and mortgage, and claimed priority for the entire amount thereof upon the cattle which had passed to the custody of the trustee in bankruptcy. The trustee and two creditors filed objections to allowing Sanders priority as to any part of his claim. The referee allowed him priority as to the claim for the purchase price of the cattle, viz., \$395, but denied it as to the balance of the claim; and the trustee and objecting creditors petition for review of such order.

Baker & Ball, for petitioners.
Dutcher & Davis, for Sanders.

REED, District Judge. The petitioners contend that by the mortgage a preference was given by the bankrupt to Sanders for the purchase price of the cattle, as well as for the antecedent debt, and that, inasmuch as the mortgage was not recorded until within the four months next preceding the filing of the petition in bankruptcy, the lien thereof dates from the time of the filing of the mortgage, under section 60a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), and not from the date of the mortgage. Whether or not the mortgage, as to the \$126.15, dates only from the time of filing the same, as against the petitioners, need not be determined, for the referee held in favor of them as to this part of the debt, and Sanders does not ask for a review of such order. Section 60a of the bankruptcy act, as amended, is as follows:

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, * * * made a transfer of any of his property, and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

The purpose of this section is to prohibit the giving of a preference by a bankrupt to existing creditors, and it does not apply to transactions whereby the bankrupt receives a present consideration for the transfer. Such a transaction is covered by section 67d (30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]) of the act, which is as follows:

"Liens given or accepted in good faith, and not in contemplation of, or in fraud upon, this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary to impart notice, shall not be affected by this act."

The two sections must be considered together, section 60a relating to the payment or securing of a prior indebtedness, and section 67d to liens given for a present consideration; and, if the latter are recorded at the time of the commencement of the bankruptcy proceedings, they are not affected thereby.

In *Bernhisel v. Firman*, 89 U. S. (22 Wall.) 170, 22 L. Ed. 766, it is said:

"In order to bring the security for a debt within this provision of the bankruptcy law, it is necessary that all the prescribed conditions should concur. If either element of the combination be wanting, there is no infringement of the law. Among them—and the cardinal one—is that the security should be given by the bankrupt within the time specified, with the view of giving a preference to a creditor or person having a claim against him. * * * It is as much the purpose of the law to sustain all valid claims arising beyond the time specified as to strike down the frauds within that time which it denounces."

As to the \$395, it is clear that the mortgage securing this did not create a preference at the time it was given, for that was a part of a transaction whereby the bankrupt then became the owner of the cattle, and for such part of the mortgage the bankrupt then received a present consideration, and his estate was not diminished nor the rights of any of his then existing creditors impaired in the least by the transaction.

In order that there may be a preference under section 60a of the bankruptcy act, there must be an existing creditor to whom a preference can then be given. Thus, in *Tiffany v. Boatman's Institution*, 18 Wall. 375, 21 L. Ed. 868, it is said:

"The preference at which this law is directed can only arise in case of an antecedent debt. To secure such a debt would be a fraud on the act, as it would work an unequal distribution of the bankrupt's property, and therefore the debtor and creditor are alike prohibited from giving or receiving any security whatever for a debt already incurred if the creditor had good reason to believe the debtor to be insolvent. But the giving securities when the debt is created is not within the law, and, if the transaction be free from fraud in fact, the party who loans the money can retain them until the debt is paid."

It does not appear that the mortgage in question was withheld from record by agreement between Sanders and the bankrupt, or that any fraud was intended by so withholding it, or that any debt was incurred by the bankrupt after the date of the mortgage and before it was filed for record. As to the \$395, the mortgage was therefore a lien given by the bankrupt for a present consideration in good faith advanced by the mortgagee at its date, within the meaning of section 67d, and was not a preference to a prior creditor under section 60a of the act; and, having been recorded before the commencement of the bankruptcy proceedings, is not affected by them.

Again, the certificate of the referee is silent as to whether or not Clifford was insolvent either at the date of the mortgage or at the time it was filed for record. To constitute a preference, the mortgagor must have been insolvent. Section 60a, Bankr. Act. And to be invalid as against the trustee the person receiving the mortgage or to be benefited thereby must have had reasonable cause to believe that a preference was intended. Section 60b. In the absence of all proof, and of any finding of the referee as to the insolvency of the mortgagor, or that the mortgagee had reasonable cause to believe that a preference was intended, it could not, in any event, be held that this mortgage, having been duly recorded, so far as it secures the purchase price of the cattle, is in violation of any of the provisions of the bankruptcy law.

The order of the referee is approved.

G. & C. MERRIAM CO. v. STRAUS et al.

(Circuit Court, S. D. New York. December 9, 1904.)

1. UNFAIR COMPETITION—INJUNCTION—PLEA.

The plea to a bill for injunction presenting a case of unfair competition in trade, arising from the manner in which defendants have used the word "Webster's" to lead the public to believe their dictionaries are those manufactured by complainants, is insufficient, it not denying explicitly the averments that the term when used on such dictionaries had acquired a meaning in the trade and with the public as signifying editions which were the product of complainants, and that defendants have used the word without any qualifying descriptive matter tending to show that their dictionaries are not the product of complainants; as, if such averments are true, the word has acquired a secondary meaning, and complainants are entitled to protection against the misleading use of it,

though any publishers, by reason of the expiration of the copyright on the literary product, are at liberty to use the word in a manner which distinguishes their dictionaries from those of complainants.

[Ed. Note.—Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

2. SAME—COPYING CHARACTERISTICS.

The principles which interdict unfair competition in trade will protect a publisher who has imparted to his books peculiar characteristics, which enable the public to distinguish them from books published by others and containing the same literary matter, against the copying of the characteristics, though the copyright on the literary matter has expired.

3. SAME—PLEAS—SUBSTITUTE FOR ANSWER.

A plea to a bill for unfair competition which amounts substantially to a denial, with an allegation of evidential facts to disprove the charges of the bill, is improper, an answer being sufficient.

E. E. Wise and Mr. Banning, for the plea.
Hale & Judson, opposed.

WALLACE, Circuit Judge. The elaborate briefs which have been filed upon the argument of the plea invite discussion of many questions which are not involved in deciding whether the plea which has been set down for argument is good upon its face. The facts set forth in the bill present a case of unfair competition in trade by the defendants, arising from the manner in which they have used the word "Webster's," to lead the public to believe that their dictionaries are the dictionaries which are produced and manufactured by the complainants. The plea is a purely negative plea, except that it sets forth facts which show that the word as applied to dictionaries which reproduce the definitions of which Noah Webster was the author was publici juris, as a generic descriptive term for such dictionaries, at the time of its alleged wrongful use by them. The plea does not deny explicitly the averments of the bill which assert that the term when used on such dictionaries had acquired a meaning in the trade and with the public as signifying editions which were the product of the complainants, and assert that the defendants have used the word without any qualifying descriptive matter tending to show that their dictionaries are not the product of the complainants. If these averments are true, the word had acquired a secondary meaning, and the complainants are entitled to protection against the misleading use of it, notwithstanding the defendants are at liberty to use it in a manner which distinguishes their dictionaries from those of the complainants. Because the denials in the plea do not fully meet the averments in the bill of evidential facts which should be either traversed or admitted, the objections to the plea are well taken.

The exhibits annexed to the bill suggest grave doubt whether the books sold by the defendants, notwithstanding the use of the word "Webster's" thereon, are not sufficiently distinguished from those published by the complainants to repel the charge of unfair competition; but any present discussion of the merits would be out of place. It is proper, however, to say that the bill is in part an attempt to protect the literary property in the dictionaries which became publici juris upon the expiration of the copyrights. This attempt must prove futile.

But there may be a commercial property in books as well as a literary property, and when a publisher has imparted to his books peculiar characteristics which enable the public to distinguish them from other books embodying the same literary property, and to recognize them as his particular product, there is no reason why the principles which interdict unfair competition in trade should not afford him protection against the copying of the characteristics by rivals. So far as the bill proceeds upon this theory it presents a meritorious case.

The defense sought to be interposed by the plea could as well have been presented by an answer. If it is true that the word had become a generic descriptive term for dictionaries such as the defendants have sold and threaten to sell, and that the defendants have made no misleading use of it, the case made by the bill is fully met, and the defendants by their answer can narrow the controversy to these issues. It is doubtful whether such a defense is the proper subject of a plea. The new facts which it brings forward are merely evidential facts which go to disprove the charges in the bill of the unfair use of the word by the defendants. It is not the province of a plea to interpose defenses which can be raised by denying some of the statements of the bill without bringing forward any new fact which creates a bar to the suit or to that part of the bill to which the plea is addressed. Thus, in a suit brought to restrain infringement of a patent, the defense of noninfringement is not properly interposed by a plea, and should be presented by an answer. *Sharp v. Reissner* (C. C.) 9 Fed. 445; *Korn v. Wiebusch* (C. C.) 33 Fed. 50; *Union Switch & Signal Co. v. Philadelphia & R. R. Co.* (C. C.) 69 Fed. 833. The defense set up in the present plea amounts substantially to a denial that the complainants have any exclusive right to the use of the word, or that the defendants have used it unfairly. In other words, it amounts to a denial of infringement of the rights of the complainants.

The plea is overruled, and the defendants are directed to answer.

THE THREE BROTHERS.

THE STAMFORD.

(District Court, S. D. New York. March 18, 1905.)

COLLISION—TUGS MEETING—IMPROPER MANEUVER FOR PASSING.

A tug passing up about the center of East river in the evening *held* on conflicting evidence solely in fault for a collision with a meeting tug on the ground that she attempted to cross the bows of the other tug and pass starboard to starboard, contrary to the proper signal given by the descending tug, and when the situation was such as to render a port to port passing the proper maneuver.

In Admiralty. Cross-suits for collision.

James J. Macklin, for the Stamford.

Alexander & Ash, for the Three Brothers.

ADAMS, District Judge. The first of the above entitled actions was brought by William E. Barber, the managing owner of the steamtug *Stamford*, to recover from the steamtug *Three Brothers*, the damages

caused to his tug by a collision in the East River, abreast of Newtown Creek, on the 6th day of December, 1902. The second action was brought by John D. Dailey, the owner of the Three Brothers, to recover the damages he suffered in the collision.

The Stamford was proceeding down the river on a trip from Whitestone and alleges that she observed the red light of the Three Brothers on her own port bow and sounded a signal of one whistle to which the Three Brothers replied with a signal of two whistles and the latter swung to port, whereupon the Stamford blew a second signal of one whistle, which was followed by alarm whistles and the stopping of the Stamford but the Three Brothers came on and struck the former about amidships on the port side.

The Three Brothers was bound up the river, destined for 130th Street, Harlem, and alleges that she was navigated in the middle of the stream; that when abreast of 20th Street she slowed down to permit a steamer bound up stream to pass ahead and then proceeded on her voyage; that shortly thereafter, a green light, which was being set, suddenly loomed up a little off the starboard bow of the Three Brothers, which immediately blew a signal of two whistles and starboarded; that she received a reply of one whistle and the red light of the Stamford came into view; that the Three Brothers immediately blew an alarm signal and stopped and reversed her engines but the Stamford ran into her carrying away her stem and doing other damage.

The collision happened in about the center of the river opposite Newtown Creek by the stem of the Three Brothers striking the port side of the Stamford. The tide was ebb.

The testimony, as well as the pleadings, is in direct conflict, and apparently there is no way of reconciling the accounts of the collision and one side or the other must be adopted.

The account given by the Stamford seems to be the more credible. The Three Brothers insisted that the lights of the Stamford were being put up at the time of, or just before, the collision but it satisfactorily appears that they were duly set when the tug was near Whitestone and were brightly burning thereafter and continued to do so up and subsequent to the collision. It appears that the Stamford was bound down the river, and the Three Brothers up the river. The latter was nearer the Long Island shore than the Stamford and the vessels would naturally show each other their red lights. Such being the situation, it was proper that they should exchange a signal of one whistle and pass port to port. The Stamford gave the correct signal and endeavored to conform thereto, until it was observed by her that the Three Brothers was endeavoring to cross her bow from port to starboard, giving a signal of two blasts to indicate her intention in such respect. The latter says that at first she was heading up the river but towards the Long Island shore. Under these circumstances she could not have been showing the Stamford her green light, as she urges, but must have been showing her red. This accords with the Stamford's contention and is inconsistent with the Three Brothers'.

The only thing that tends to implicate the Stamford in the matter is her admission that the bearing of the vessels to each other continued about the same, indicating that instead of passing some distance apart,

as they should, they were drawing together with danger of collision. This rendered it necessary for the Stamford to take some precautionary measures but about the time it would have become actually incumbent upon her to do so, it appeared to her that the Three Brothers was trying to cross her bow and she then stopped and backed. Her navigation can not be said to be free from criticism but I do not find that she was guilty of any fault which contributed to the collision, which can be fully accounted for by the Three Brothers' improper attempt to cross the Stamford's bow in order to pass on the starboard side.

Decree for the libellant Barber, with an order of reference. The libel of Dailey is dismissed.

DENNIS v. HOME INS. CO.

(District Court, S. D. New York. March 8, 1905.)

MARINE INSURANCE—EQUIPMENT OF YACHT—BOATS "OF AND IN" VESSEL.

A marine policy insured "in port and at sea, * * * at all times, in all places and on all occasions, * * * upon the hull, spars, sails, materials fittings, boats (including launches, steam or otherwise, if any), furniture, provisions, stores, * * * boilers, etc., of and in the schooner yacht Rosemary," against all manner of marine perils, and the furniture and boats against fire when laid up on shore. *Held*, that a naptha launch, part of the equipment of the yacht, carried on davits when she was under way, and used as a means of communication with the shore when in port, while being so used in the usual way between the yacht and shore was "of and in" the yacht, and covered by the policy.

In Admiralty. Action on marine insurance policy.

Wing, Putnam & Burlingham, for libellant.

James J. Macklin, for respondent.

ADAMS, District Judge. This action was brought by John B. Dennis, the owner of the schooner yacht Rosemary, to recover from the Home Insurance Company the loss suffered by the sinking of a naptha launch, on the 6th of August, 1902. The yacht at the time was insured under a policy of insurance covering a period of a year from the 21st day of September, 1901, which, among other things, provided as follows:

"As employment may offer, in port and at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places and on all occasions, services and trades whatsoever and wheresoever, under steam or sail, upon the hull, spars, sails, materials, fittings, boats (including launches, steam or otherwise, if any), furniture, provisions, stores (electric light installation and plant, if any), machinery, boilers, etc., of and in the Schooner Yacht Rosemary."

* * * * *

"Touching the adventure and perils which we, the said assurers, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints, and Detainments of all Kings, Princes and People, of what nation, condition or quality soever, Barratry of the Master and Mariners, and all other perils, losses and misfortunes that

have and shall come to the hurt, detriment or damage of the said yacht, etc., or any part thereof."

* * * * *

"It is understood and agreed that should any part of the furniture, tackle, boats or other property of this yacht be separated and laid up on shore during the period of this policy, then this policy shall cover the same against the risk of fire only to an amount not exceeding its proportion of \$1500.00 which amount ceases to attach on board yacht at such times."

A part of the equipment of the yacht was a naptha launch, which was ordinarily carried on davits when the yacht was under way, but used in ports as a means of communication with the shore. She was being so used on the 6th of August, 1902, between the yacht and club station on Shelter Island. During a trip at night, the launch collided with an unlighted boat boom belonging to another yacht, with the result that the stack of the launch was torn loose and the naptha on board ran out of its reservoir into the bottom of the launch and caught fire. The launch was practically destroyed thereby and it is sought to recover from the respondent its proportion of the loss.

The defence is, that the loss occurred not while the launch was "of and in" the yacht but when it was off the yacht, separate and apart therefrom, and navigating under its own power and engaged in its particular business and by reason thereof was not covered by the policy at the time of the loss.

The decision turns upon the construction to be given to the policy, especially in connection with the use of the words "of and in." The insurance is expressly intended to cover the yacht, "(including launches, steam or otherwise, if any)" * * * "in all perils, losses and misfortunes that have and shall come to the hurt, detriment and damage of the said yacht, etc., or any part thereof."

It is well settled that a "ship's launch is comprised in the rigging and apparel of the ship, because it is absolutely necessary for the navigation. The same is the case with the smaller boats"—Emerigon on Insurances, 1850, Boston Ed. 144—and it would seem singular if the launch of a yacht taking guests ashore was not intended to be covered. Of course, if a ship's boat were used in a way not connected with the business of the ship, it is evident that a policy, without some special provision, would not be regarded as covering the boat, but where it is engaged in performing the proper business of the vessel, to which it belongs, it would be straining the construction of a policy to hold it was not then a part of the vessel and covered by such insurance as this contract provided for. The principle is that "every underwriter is presumed to be acquainted with the practice of the trade he insures; and it must be supposed to be the intention of the contract to conform the indemnity to the known practice." *Parsons v. Mass. F. & M. Ins. Co.*, 6 Mass. 197, 203, 4 Am. Dec. 115. This was a case of a loss of part of a cargo in boats on a trading voyage. While taking some of the cargo ashore it was lost. The court said (page 208 of 6 Mass. [4 Am. Dec. 115]):

"For although, in the commencement of the voyage, the insurance did not attach upon the goods, while in the act of transportation in boats to the brig, nor until they were on board, and this from the terms of the policy, yet during the voyage, the goods were as much protected by the policy in the boats

while they were employed as auxiliary to the legitimate purposes of the voyage, as they were on board the ship. For all the purposes of the voyage, boats so employed are very reasonably considered as part of the ship."

There can be no doubt for the purposes of insurance, that the boats are generally considered a part of the ship, although an insurer would not be liable if he proved that the boat was improperly used or carried. *Hall v. Ocean Ins. Co.*, 38 Mass. 472, 481, 482.

There is no proof in this case that the boat was improperly used. On the contrary, it appears that she was engaged when the accident happened in the regular business of the vessel. It seems to be clear in the absence of proof to the contrary that the launch was intended to be covered by the policy when being used in the ordinary manner. Unless the express terms of the policy decisively repel the customary inference, the insured is entitled to recover in a case where the loss of a boat occurs during such use. *Arnould on Marine Insurance*, §§ 57, 58, 221.

This policy bears every evidence of an intent of the parties to cover all risks to which the yacht or its appurtenances might be subjected, even to the extent of insuring boats and fittings when separated from the yacht and laid up on shore. It is not conceivable that the parties designed to omit covering the boats, while being used for an every day purpose when the vessel was in commission and in port.

Decree for the libellant.

HOY et al. v. ALTOONA MIDWAY OIL CO. et al.

(Circuit Court, D. Delaware. March 17, 1905.)

No. 255.

PRELIMINARY INJUNCTION—WHEN GRANTED.

On an application for a preliminary injunction where the bill sought the recovery of shares of stock alleged to have been obtained by the defendants from the complainants through fraud and duress, the case admittedly being within the jurisdiction of the court and wholly turning upon disputed questions of fact, and the only evidence adduced aside from the bill and answers consisting of exhibits, wholly inconclusive in themselves, and affidavits disclosing irreconcilable conflict on vital points, *held*, that, under the circumstances, and without any expression of opinion on the merits, a preliminary injunction should be awarded to preserve the property in litigation until the case could be disposed of on final hearing.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 86-90, 305-309.]

(Syllabus by the Court.)

In Equity.

Herbert H. Ward and David T. Marvel, for complainants.

Harry Emmons, for defendants.

BRADFORD, District Judge. This is an application for a preliminary injunction in a suit brought by Harvey K. Hoy and Franklin P. Hoy against the Altoona Midway Oil Company, Richard W. A. Jameson and Charles A. Barlow. The complainants seek to recover from Jameson 55,000 and from Barlow 30,000 shares of the

capital stock of the oil company of the par value of \$1 each, which the complainants claim to be their property and allege were obtained by Jameson and Barlow through fraud and duress. The bill, among other things, prays in substance that Jameson and Barlow be declared to hold the disputed shares of stock as the property and for the benefit of the complainants, and be decreed to assign and transfer the same to them together with the proper certificate or certificates therefor, and also that, until the further order of the court, Jameson and Barlow be restrained from voting such shares of stock or otherwise performing any act of ownership with respect thereto, and the oil company be restrained from transferring such shares of stock or allowing them to be transferred upon its books, and from receiving, counting or considering any votes cast by virtue of the holding upon its books of such shares of stock or any of them in the names of Jameson and Barlow, or in the name or names of any other person or persons; and also that a preliminary injunction issue restraining the defendants in like manner. It is admitted that this court has jurisdiction of the controversy and, further, that the case wholly turns upon questions of fact; the principles of law and equity applicable to it being indisputable. In *Harriman v. Northern Securities Co.* (C. C.) 132 Fed. 464, I had occasion to consider the circumstances usually determinative of the propriety of granting or withholding preliminary injunctions. It was there said:

"The granting or refusal of a preliminary injunction, whether mandatory or preventive, calls for the exercise of a sound judicial discretion in view of all the circumstances of the particular case. Regard should be had to the nature of the controversy, the object for which the injunction is sought, and the comparative hardship or convenience to the respective parties involved in the awarding or denial of the injunction. The legitimate object of a preliminary injunction, preventive in its nature, is the preservation of the property or rights in controversy until the decision of the case on a full and final hearing upon the merits, or the dismissal of the bill for want of jurisdiction or other sufficient cause. The injunction is merely provisional. It does not, in a legal sense, finally conclude the rights of parties, whatever may be its practical operation under exceptional circumstances. In a doubtful case, where the granting of the injunction would, on the assumption that the defendant ultimately will prevail, cause greater detriment to him than would, on the contrary assumption, be suffered by the complainant, through its refusal, the injunction usually should be denied. But where, in a doubtful case, the denial of the injunction would, on the assumption that the complainant ultimately will prevail, result in greater detriment to him than would, on the contrary assumption, be sustained by the defendant through its allowance, the injunction usually should be granted. The balance of convenience or hardship ordinarily is a factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction. Such doubt may relate either to the facts or to the law of the case, or to both. It may equally attach to, or widely vary in degree as between, the showing of the complainant and that of the defendant, without necessarily being determinative of the propriety of allowing or denying the injunction. Where, for instance, the effect of the injunction would be disastrous to an established and legitimate business through its destruction or interruption in whole or in part, strong and convincing proof of right on the part of the complainant and of the urgency of his case is necessary to justify an exercise of the injunctive power. Where, however, the sole object for which an injunction is sought, is the preservation of a fund in controversy, or the maintenance of the status quo, until the question of right between the parties can be decided on final hearing, the injunction properly may be al-

lowed, although there may be serious doubt of the ultimate success of the complainant. Its allowance in the latter case is a provisional measure, of suspensive effect and in aid of such relief, if any, as may finally be decreed to the complainant."

The foregoing views are supported by abundant authority. *Russell v. Farley*, 105 U. S. 433, 438, 26 L. Ed. 1060; *City of Newton v. Levis*, 79 Fed. 715, 25 C. C. A. 161; *Glascott v. Lang*, 3 Myl. & C. 451, 455; *Hadden v. Dooley*, 74 Fed. 429, 431, 20 C. C. A. 494; *Great Western R. Co. v. Birmingham, etc.*, R. Co., 2 Phil. Ch. 597; *Shrewsbury & Chester R. Co. v. Shrewsbury R. Co.*, 1 Sim. N. S. *410, *426, *427, *432; *Denver & R. G. R. Co. v. United States*, 124 Fed. 156, 59 C. C. A. 579; *Allison v. Corson*, 88 Fed. 581, 32 C. C. A. 12; *Buskirk v. King*, 72 Fed. 22, 18 C. C. A. 418; *Sanitary Reduction Works v. California Reduction Co. (C. C.)* 94 Fed. 693; *Southern Pac. Co. v. Earl*, 82 Fed. 690, 27 C. C. A. 185; *New Memphis Gas & Light Co. v. Memphis (C. C.)* 72 Fed. 952; *Indianapolis Gas Co. v. Indianapolis (C. C.)* 82 Fed. 245; *Georgia v. Brailsford*, 2 Dall. 402, 1 L. Ed. 433. The application of these principles to the case before the court clearly requires the awarding of a preliminary injunction. The case is not ripe for a final decision. Aside from the bill and answers the only evidence before the court consists of certain exhibits and ex parte affidavits. The exhibits are wholly inconclusive, and there is an irreconcilable conflict in the affidavits on vital points. Further, the affidavits in a number of instances are so drawn as to preclude the possibility of ascertaining from their face what allegations of fact proceed from personal knowledge and what from hearsay or mere surmise. Possibly the evidence, such as it is, preponderates on the side of the complainants. The case, however, on the present showing is doubtful, and that doubt can be resolved only after a thorough, orderly and rigid investigation of the facts, so conducted as to allow the application of the usual and most satisfactory test of truth, namely, the examination, cross-examination and re-examination of witnesses. To pass upon the merits now would be both premature and improper. It would be in large measure to substitute mere conjecture for duly established facts as the basis for a judicial determination. The "balance of convenience or hardship" here operates in favor of the complainants. It does not appear that the granting of the preliminary injunction would be detrimental to the interests of the oil company. It might prove injurious to Jameson and Barlow through the suspension, until the case shall be finally decided, of any and all acts of ownership on their part with respect to the shares of stock in controversy, and, possibly, of their receipt of dividends thereon. But this court has power to require as a condition precedent to the issuing of the injunction a bond from the complainants in such amount and with such surety as fully to indemnify the defendants, should they ultimately prevail, against any loss or damage resulting to them from their temporary restraint. On the other hand, the denial of a preliminary injunction might result in rendering fruitless, so far as this suit is concerned, any final decree for the complainants, through the alienation by the defendants pendente lite of the shares of stock

now held by them, and in forcing the complainants to resort to a multiplicity of suits against those to whom such shares should be transferred. Such a result would be calculated to hinder and embarrass, if not to defeat, the complainants, in their effort to recover the shares, through the creation of new equities on the part of those purchasing such stock directly or indirectly, from the defendants in good faith and for full consideration. Under these circumstances it is the duty of the court, without expressing at this stage an opinion on the merits, to preserve the property in litigation until the case can be disposed of on final hearing. An interlocutory decree for a preliminary injunction may be prepared and submitted.

THE JOHN FLEMING. THE JULIA A. TRUBEE. THE SCOW E 25.

(District Court, S. D. New York. March 16, 1905.)

1. COLLISION—TUG WITH LONG TOW AND SCHOONER—FAILURE OF TUG TO KEEP OUT OF THE WAY.

A tug returning from the dumping grounds with two scows in tow on a line, the whole 1,400 feet in length, held solely in fault for a collision in New York Bay between the rear scow and a schooner beating her way in, for failure to exercise the care required, because of the length of the tow, to keep out of the schooner's way; the schooner having properly held her course until danger of collision became imminent.

2. SALVAGE—RESCUE OF SCOW ADRIFT AFTER COLLISION.

A salvage award of \$450 made to a tug for rescuing and taking to a place of safety a scow worth \$4,500, which had gone adrift and filled after a collision in New York Bay, including the value of a hawser destroyed by the tug in the service.

[Ed. Note.—Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.]

In Admiralty. Cross-suits for collision and suit for salvage.

Wing, Putnam & Burlingham, for Charles G. Sanford and others, and for Timmins and others.

Albert A. Wray, for Brown & Fleming Contracting Company and scow E 25.

ADAMS, District Judge. The first of the above entitled actions was brought by Charles G. Sanford, et al., owners of the schooner Julia A. Trubee, to recover the damages caused to the schooner by a collision which occurred between scow E 25, in tow on a hawser of the tug John Fleming, on the 3rd day of April, 1904, in New York Bay, above the Narrows, about 9 o'clock P. M. The second action was brought against the schooner to recover the damages caused to the scow and the salvage imposed upon her by the collision, and the third action was brought by the owners of the tug Mutual to recover the said salvage.

It appears that the schooner was bound from Jacksonville, Florida, to New York, with a cargo of lumber, including a deck load. The Fleming and tow were returning to New York after dumping the loads of the scows. The first scow was on a hawser of about 120 fathoms and the other followed, on a hawser of about 60 fathoms. The

whole tow, including the vessels, was in the neighborhood of 1400 feet in length. The tow was going faster than the schooner, which was beating up the bay, with a north north-west wind. The tide was flood. The place of collision was about the middle of the channel.

After the vessels came in view of each other, the schooner tacked across the course of the tow towards Staten Island and then back towards Long Island. On tacking for Staten Island again, the tow was somewhat in the schooner's way and she pinched up in the wind to let the tow pass ahead of her. Finding that she was getting close to the tow she attempted to go about again and while engaged in the manœuvre, the last scow was brought into collision with her port stern, doing considerable damage to the schooner and parting the hawser between the scows. The schooner anchored, and the scow being adrift for some time, without the knowledge of the Fleming, was picked up by the tug Mutual.

There can be little doubt as to the tug's responsibility for the effects of the collision. She was bound to keep herself and tow away from the schooner and it was the latter's duty to keep her course until it was obvious that a collision could not be averted by the tow. As the vessels were approaching each other, the tug changed her course slightly to port, which brought the last scow somewhat to the Long Island side of the other vessels in the tow, and before the schooner gathered full way on the last tack, the collision took place. Tugs with these long tows are required to exercise the utmost care in their management, which the evidence shows was not manifested in this case. The Fleming is therefore responsible to the libellants Sanford, et al., for their damages.

The action of Timmins, et al., against the scow E 25, was to recover salvage on the latter. It appears that the Mutual picked up the scow about 10 o'clock P. M. and towed her to a place of safety in Erie Basin, where she was made fast shortly after midnight. When found, about 10 feet of her were under water at one end, and during the trip to Erie Basin, she became completely submerged and helpless, although still capable of being towed. Her value when rescued was about \$4500. The tug sacrificed a hawser worth about \$100 in the service. This amount the libellants are entitled to recover, in addition to a reasonable award for the salvage services, which, in view of some danger to the scow in her helpless condition, I think may be justly fixed at \$350.

Decree for the libellants Sanford, et al., with an order of reference. Decree for the libellants Timmins, et al., for \$450. The libel of the Contracting Company against the schooner will be dismissed.

GEORGE FROST CO. et al. v. KORA CO. et al.

(Circuit Court, S. D. New York. December 21, 1904.)

1. INFRINGEMENT OF PATENT—USE OF ARTICLE BY PURCHASER.

It is not an infringement of a patent for clasps for one, purchasing in open market clasps sold without restriction as to use, to detach them from a cord to which they were attached, and attach them to supporters, to manufacture which both parties were licensed.

2. SAME—AFFIRMATIVE RELIEF TO DEFENDANT.

Defendant in an infringement suit cannot have affirmative relief therein for unfair competition, a separate and distinct cause of action.

3. UNFAIR COMPETITION—INJUNCTION.

The writing of a single letter by one manufacturer to a customer of another manufacturer, stating that the latter manufacturer is infringing a patent, and that any one purchasing from him would be held as an infringer, is not sufficient proof of unfair competition to warrant a preliminary injunction.

[Ed. Note.—Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper*, 30 C. C. A. 376.]

In Equity. Motion by complainants for a preliminary injunction. Motion by defendant the Kora Company for an injunction restraining complainants from interfering with its customers. Motion by defendants for a commission to take the testimony of witnesses in England.

W. K. Richardson, for complainants.

Harold Binney, for defendants.

COXE, Circuit Judge. The clasps used by the defendants were made by the complainant company under the Gorton patent and were purchased by defendants in the open market, there being no reservation respecting their use for other purposes and on other garments and supporters than those made by the complainant company. What the defendants do is to detach the clasps from the complainants' supporters and attach them to supporters made by defendants, both parties being licensed under the Young patent for hose supporters.

This action by defendants may, perhaps, constitute unfair competition in trade, but it certainly is not an infringement of complainants' patent. The sale of the patented article by the owners of the patent without condition or notice of restriction of use carries with it dominion over the article so sold. The fact that it is attached by the patentee to a cord or webbing does not make the cord or webbing a part of the patented structure so far as to preclude a purchaser from using it in another combination if he sees fit to do so. *Morgan En. Co. v. Albany Paper Co.*, 152 U. S. 425, 432, 14 Sup. Ct. 627, 38 L. Ed. 500; *Mitchell v. Hawley*, 16 Wall. 544, 21 L. Ed. 322; *Holiday v. Mattheson* (C. C.) 24 Fed. 185; *Walker on Patents*, § 301.

Regarding the quia timet branch of the controversy the allegations that the defendants intend to manufacture the Gorton device is contradicted by a flat denial on the part of the officers of the defendant companies. There seems to be nothing in the papers to show that anything has been done by the defendants to carry the threat, if one was made, into execution. Upon the argument the intention to do so was disclaimed and it is most unlikely, after what there took place, that any attempt at manufacturing will be made in the future. If, however, it should appear hereafter that the defendants have done any act in furtherance of the alleged threat, this motion may be renewed.

But little need be said regarding the defendants' motion for an injunction. The complainants wrote to one of defendants' customers, a merchant of New York City, stating in substance that the defendants were infringing the Gorton patent and that any one purchasing clasps

from them would be held as an infringer. Thereupon the defendants without commencing a new action, proceeded to procure a temporary restraining order, in the first infringement suit against the Kora Company, and now move that the complainants be enjoined from sending other letters of this character to the trade. There are two very cogent reasons why this motion cannot prevail, first, the defendant in an infringement suit cannot convert the action into one for affirmative relief upon an entirely separate and distinct cause of action, and, second, even if the proper action were commenced, the proof of unfair competition is wholly inadequate to warrant granting the relief asked for.

I have been referred to no case, and know of none, where a single letter of this kind has been held sufficient to warrant the issuing of a preliminary injunction.

The motion for a commission to take the testimony of witnesses in England is granted. Both the other motions are denied and the temporary restraining order obtained by the defendants is vacated.

McKINNON v. WATERBURY et al.

(Circuit Court, D. Montana. March 13, 1905.)

No. 246.

MORTGAGES—SUIT TO FORECLOSE—DEFENSE OF ILLEGALITY.

The fact that a lender of money caused the note and mortgage taken therefor to be made payable to an alien, for the purpose of escaping local taxation thereon, does not render the contract itself invalid, and cannot be set up as a defense to a suit to foreclose the mortgage.

In Equity. Suit to foreclose mortgage. On exceptions to answer.

Forbis & Evans and W. H. Trippett, for plaintiff.

W. B. Rodgers, H. W. Rodgers, and J. W. James, for defendants.

HUNT, District Judge. This is an action by Rebecca McKinnon, a resident and citizen of Canada, against Edna R. Waterbury, John W. James, and H. W. Rodgers, residents and citizens of the state of Montana. The bill is brought to foreclose a mortgage executed on March 23, 1900, by Edna R. Waterbury, conditioned for the payment of the sum of \$5,500 and interest, according to a certain promissory note, to secure which the mortgage was executed. Complainant alleges that the interest on the note has been paid by the defendant up to December 23, 1903, but that no part of the principal has been paid, and that the defendant is in default. The prayer is that a receiver be appointed to collect the rents and profits, and that the mortgage be foreclosed, and that the usual decree for sale be made, and that the interests of the defendants James and Rogers, if any they have, be declared subsequent to the plaintiff's mortgage. The defendant Edna R. Waterbury, for answer, admits signing the note described in the complaint, but denies that there was any consideration therefor passing from the said defendant to the said complainant; and she avers that the real party in interest, and the person to whom the note was in fact made, executed, and delivered,

and who is now the owner of the same, is one A. C. McKinnon, who was at the time of the execution of the note, and still is, a resident of the state of Montana. Defendant admits that she signed the mortgage described in the complaint, but denies the delivery of the said mortgage to the complainant, and avers that it was without consideration from complainant to defendant, and that the real party in interest, and the person to whom the said mortgage was in fact made and delivered, was the said A. C. McKinnon. She admits the payment of interest to December 23, 1903, but denies that the principal remains due and unpaid to the complainant; denies that the complainant is now or was the rightful owner and holder of the promissory note or mortgage. She admits that she has not kept the property insured as provided by the terms of the mortgage, but denies that complainant was obliged to pay any sums out as insurance. She denies that the property is insufficient to discharge the indebtedness sued for, or that a receiver is necessary. For a further defense, she sets forth that the defendant at the time of the execution of the mortgage was, and now is, a resident of Canada; that the owner thereof, A. C. McKinnon, was at the time of the execution of the mortgage and note, and was for a long time thereafter, and up to May, 1903, a resident of the state of Montana. She alleges that the consideration of the said pretended note and mortgage—the principal sum—was the money and personal property of said A. C. McKinnon, and was loaned to defendant upon his own account, and that the complainant never had any interest therein, or in the note and mortgage delivered to the said A. C. McKinnon, and that McKinnon was acting in his own behalf, and not as complainant's agent, and that the loan was made for his own benefit. She alleges that the said A. C. McKinnon directed the said note and mortgage to be executed in the name of the said Rebecca McKinnon, a nonresident of the state of Montana, for the purpose of defrauding the revenues of the county of Deer Lodge and of the state of Montana, and, being so executed to the said Rebecca McKinnon, the said A. C. McKinnon has from the day of its execution avoided the payment of all taxes to the county of Deer Lodge and to the state of Montana upon said note and mortgage. She alleges that the name of the complainant, Rebecca McKinnon, was used in said note and mortgage solely for the purpose of enabling the said A. C. McKinnon so to defraud the revenues and escape taxation upon the note and mortgage, and that there has been no assessment upon the note and mortgage up to 1903. Defendant prays that the note and mortgage be declared null and void. The complainant excepts to those parts of Edna Waterbury's answer which plead that the complainant is not the real owner of the note and mortgage, and that the mortgage was without consideration, and to the affirmative defense set up by the defendant, as impertinent and scandalous.

In my judgment, the doctrine of public policy cannot be invoked by the defendant to discharge her from the payment of her debt, which is justly due. She has received the full consideration of a contract which in itself did not require the doing of anything wrong, and which was not forbidden by the laws of the state. We must not confuse the contract itself with a collateral or incidental purpose of the mortgagee, which, though wrong, yet should not be a bar to the enforcement of the

agreement of the parties. Although the contract itself may have enabled the plaintiff to escape payment of taxes, still the intention of the complainant formed no part of the consideration, and the law will not refuse enforcement. I cannot agree with the argument that it becomes impossible to separate the taint surrounding the contract from the contract itself; nor do I believe that it follows that the court, in enforcing the contract, affirms an illegal stipulation thereof. The fallacy of this reasoning lies in regarding the purpose of the mortgagee to evade taxation as an element of the contract. In *Hanauer v. Doane*, 79 U. S. 342, 20 L. Ed. 439, after laying down the principle that a contract tainted with the vice of giving aid and support to a rebellion against the United States could receive no sanction or countenance from the courts, Justice Bradley uses this language:

"Where to draw the precise line between the cases is which the vendor's knowledge of the purchaser's intent to make an unlawful use of the goods will vitiate the contract, and those in which it will not, may be difficult. Perhaps it cannot be done by exact definition. The whole doctrine of avoiding contracts for illegality and immorality is founded on public policy. It is certainly contrary to public policy to give the aid of the courts to a vendor who knew that his goods were purchased, or to a lender who knew that his money was borrowed, for the purpose of being employed in the commission of a criminal act, injurious to society or to any of its members."

A mortgagee who knows that his money is borrowed for the purpose of being employed in the commission of a criminal act cannot appeal to the courts to enforce the contract, upon the ground of public policy. But the principle, as stated, contemplates that the loan be made for the purpose of employment in the commission of a wrong. If, for example, the borrower in this case secured the loan to enable her to start a gambling house, and the lender knew of it, the contract would not be enforced; the ground in such a case being that the lender, having knowledge of the illegal end in view, will be deemed to have aided the illegal object at the time he made the contract. But that is not this case, for here there was no purpose to use the money for an unlawful purpose or for an illegal end. The owner of the note may be dealt with for having failed to pay taxes due to the state, but the mortgage debt is a valid one between the parties, and may be enforced. *Hanover Nat. Bank v. First Nat. Bank*, 109 Fed. 421, 48 C. C. A. 482; *Crowns v. Forest Land Co. (Wis.)* 74 N. W. 546; *Nichols v. Weed Sewing Machine Co.*, 27 Hun, 200; *Jones on Mortgages*, § 619; *Callicott v. Allen (Ind. App.)* 67 N. E. 196.

The exceptions to the answer of the defendant are sustained.

UNITED STATES v. MORFEW.

(District Court, E. D. Arkansas, W. D. April 11, 1905.)

INTOXICATING LIQUORS—WRONGFUL SALE—INTERNAL REVENUE TAX.

Rev. St. § 3244 [U. S. Comp. St. 1901, p. 2096], defines a retail liquor dealer as any person who sells distilled spirits or wines in less quantities than five gallons at the same time, and section 3248 [page 2107] defines distilled spirits as that substance known as "ethyl alcohol," etc., commonly produced by fermentation of grain, starch, molasses, or sugar,

including all dilutions and mixtures thereof. *Held*, that where a druggist, without paying the internal revenue tax imposed on retail liquor dealers, sold a medicinal preparation which was 88 per cent. proof spirits, more than sufficient to preserve the medicinal properties of any herbs, roots, or drugs contained therein, he was a retail liquor dealer within such sections.

W. G. Whipple, for the United States.

TRIEBER, District Judge (charging jury). The defendant is indicted for having engaged in the business of a retail liquor dealer without having paid the special tax required by law, in violation of section 3242, Rev. St. [U. S. Comp. St. 1901, p. 2094]. The facts are practically undisputed. From the evidence it appears that the defendant is the owner of a drug store at Stuttgart, Ark., a place where, under the laws of the state of Arkansas, no liquors are permitted to be sold; that he has been selling a preparation put up in bottles, called "Duffy's Malt Whiskey," the bottles having labels to that effect, and also labels claiming that it is a medicinal preparation. It was sold to all who desired to purchase it, but no one was permitted to drink it on the premises, the defendant selling it in good faith as a medicinal preparation, like other patent medicines. It is admitted that he paid no special tax as required by the laws of the United States of retail liquor dealers. Section 3244 of the Revised Statutes [U. S. Comp. St. 1901, p. 2096] defines a retail liquor dealer to be:

"Every person who sells, or offers for sale, foreign or domestic distilled spirits or wines in less quantities than five gallons at the same time shall be regarded as a retail dealer in liquors."

Section 3248, Rev. St. [U. S. Comp. St. 1901, p. 2107], defines distilled spirits as follows:

"Distilled spirits, spirits, alcohol, and alcoholic spirits, within the true intent and meaning of this act is that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by fermentation of grain, starch, molasses or sugar, including all dilutions and mixtures of this substance."

It has been testified to by the expert who was put on the stand by the government, and who analyzed a bottle of this whisky, that it is 88 per cent. proof spirits; that it is made from grain which had first been malted and fermented, and is of the substance known as ethyl alcohol; that it is not made of malt, nor is there any malt used in the preparation of it except for the purpose of giving it a malt flavor; that some caramel is used for the purpose of coloring it and giving it the appearance of aged whisky; that there are some few drugs in it, but in such small quantities that the analysis failed to show them; that the quantity of whisky used is largely in excess of what would be necessary either to extract or to preserve the medicinal properties of any herbs, roots, or drugs, 40 to 50 per cent. proof spirits being sufficient for those purposes in any case. The fact that there are labels on the bottles, or that it is called a medicine or medicinal preparation, does not make it so. A great many people regard all whiskies as possessing medicinal virtues, and no doubt there are some diseases which, by a prompt use of whisky—I mean plain whisky—may be, if not cured,

at least temporarily relieved; but that fact alone does not authorize dealers, whether druggists or others, to sell them without paying the special tax required by law. A manufacturer of medicinal articles putting up preparations containing supposed curative elements of medicinal substances, supposed or claimed to possess the virtue of curing or relieving disorders of the human body, may use in the preparation thereof such a per cent. or quantity of alcohol or distilled spirits as he, in his honest judgment, thinks necessary to extract the virtues of the ingredients used and to hold the same in solution, and the merchant or druggist selling such articles in good faith as a medicinal preparation is not guilty of the offense charged in this indictment. But if, as a matter of fact, such preparation contains a large percentage of alcohol or spirits—as much as 50 per cent., or, as the evidence in this case shows, 88 per cent. of proof spirits—the fact that there are other ingredients in it which possess curative powers does not authorize the sale of such articles without the payment of the special tax. The laws against such sales are not to be evaded by mere names which may be added or used to designate a certain preparation composed in the essential parts of distilled spirits. The law does not tolerate subterfuges, and merely disguising whisky or distilled spirits by aromatic or other drugs, or putting some herbs or roots in them to serve as a substitute for whisky, is not to be tolerated. If the principal ingredient is whisky, it is immaterial whether it is called a patent or proprietary medicine, or by any other name. In this case, if you find that this “Duffy’s Malt Whiskey” is principally whisky, diluted with water so as to reduce it below the 100 proof, but is over 50 per cent. proof, or, as the evidence in this case tends to show, 88 per cent. proof, then the fact that there are some drugs in it, or that it is called a medicine, does not relieve a dealer from the payment of the special tax, and, as the defendant admits the sale of this whisky, if you find that it is principally whisky your verdict should be “Guilty.” But if, on the other hand, you believe from the evidence in this case that it is a medicinal preparation, and that the whisky used in it is no more than is necessary for the purpose of extracting the virtues of the drugs used and preserving them, then your verdict should be “Not guilty.” This being a criminal case, it is incumbent upon the government to satisfy you of all the material allegations in the indictment beyond a reasonable doubt. If there is any doubt in your mind arising from the evidence as to the defendant’s guilt, then your verdict should be “Not guilty,” but if you have no such doubt then your verdict should be “Guilty.”

The jury, after an absence of five minutes, returned a verdict of “Guilty.”

SAUNDERS v. ADAMS EXPRESS CO.

(Circuit Court, D. New Jersey. April 11, 1905.)

1. FEDERAL COURTS—REMOVAL OF CAUSES—JOINT-STOCK ASSOCIATIONS—CITIZENSHIP.

A joint-stock company, though a legal entity, and suable in the name of its president under state laws, is not a corporation, and cannot be deemed to have citizenship for the purpose of removing actions against it to the federal courts.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, §§ 64-67½, 173.

Diverse citizenship as a ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullaghan, 27 C. C. A. 298.]

2. SAME—STATE COURTS—JURISDICTION.

Where, prior to the filing of a petition for removal of a cause against a joint-stock express company, the state court had acquired full jurisdiction over defendant's person by the service of process on two of defendant's agents, as authorized by New Jersey Practice Act 1903 (P. L. 1903, p. 545) § 40, defendant's nonresident president, on entering an appearance, was not entitled to have the suit removed to the federal court.

On Motion to Remand.

Preston Stevenson, for the motion.

Conover English and Robert H. McCarter, opposed.

LANNING, District Judge. The defendant, the Adams Express Company, is a joint-stock association organized under the laws of the state of New York. Section 1919 of the New York Code of Civil Procedure provides in reference to such an association that:

"An action or special proceeding may be maintained by the president or treasurer of an unincorporated association, consisting of seven or more persons, to recover any property or upon any cause of action for or upon which all the associates may maintain such an action or special proceeding by reason of their interest or ownership therein, either jointly or in common. * * * An action or special proceeding may be maintained against the president or treasurer of such an association to recover any property or upon any cause of action," etc.

This action was commenced in the Supreme Court of the state of New Jersey under the authority of section 40 of the New Jersey practice act of 1903 (P. L. 1903, p. 545), which is as follows:

"Any unincorporated organization consisting of seven or more persons and having a recognized name, may be sued by such name in any action affecting the common property, rights and liabilities of such organization; all process, pleadings and other papers in such action may be served on the president or any other officer for the time being or the agent or manager or person in charge of the business of such organization; such action shall have the same force and effect as regards the common property, rights and liabilities of such organization as if it were prosecuted against all the members thereof; and such action shall not abate by reason of the death, resignation, removal or legal incapacity of any officer of such organization or by reason of any change in the membership thereof."

Appearance for the defendant was entered in the Supreme Court as follows:

"The appearance of the defendant in the above-entitled cause is hereby entered this 9th day of March, 1905, by and in the name of Levi C. Weir, a

citizen of the state of New York, the president of, and one of the members and partners in, the said the Adams Express Company."

In the petition to the Supreme Court for the removal of the cause to this court, the petitioner, Levi C. Weir, declared:

"That he is the president of, and one of the members and partners in, the Adams Express Company, an unincorporated organization or joint-stock association organized under the laws of the state of New York, and that as such he has entered his appearance as and for the defendant in the above-entitled suit, which is now pending in the said Supreme Court of the state of New Jersey. * * * That the controversy of said suit is between citizens of different states, and that your petitioner [that is, Levi C. Weir], the defendant herein, was at the time of the commencement of the said suit, and still is, a resident of and citizen of the state of Ohio, and a nonresident of the state of New Jersey, and that the said plaintiff, Bertram H. Saunders, at the time of the commencement of the said suit was, and still is, a resident of, and citizen of, the state of New Jersey."

The plaintiff moves to remand the case to the state court, and bases that motion on the theory that this court is without jurisdiction of the case.

I think the motion to remand must prevail. In *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800, it was held that an allegation that a joint-stock company is a citizen of the state under whose laws it is organized cannot be considered as an averment that will aid the court in determining the question of jurisdiction, where citizenship is to be considered. The rule is that a joint-stock company like the Adams Express Company, although a legal entity, is not a corporation, and cannot be deemed to have citizenship. The same doctrine was declared in *Great Southern Fireproof Hotel Company v. Jones*, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. Ed. 482, and *Thomas v. Board of Trustees*, 195 U. S. 207, 25 Sup. Ct. 24, 49 L. Ed. —. The defendant, however, seeks to distinguish the case in hand from the cases decided by the Supreme Court above mentioned, because Levi C. Weir, the president of the Adams Express Company, has entered appearance for the defendant; he being a citizen of the state of New York. The argument is that inasmuch as the New York Code authorizes a suit to be brought by, or instituted against, the president of the association, as its representative, the case must now be regarded as one against him in his representative capacity. In *Boatner v. American Express Company (C. C.)* 122 Fed. 714, the Circuit Court for the Western District of Kentucky refused to remand a case in which the plaintiff was a citizen of Kentucky, and the defendant, the American Express Company, was a joint-stock association organized under the laws of the state of New York, and three other individual defendants were citizens of Kentucky. The cause had been removed to the United States Circuit Court upon the petition of James C. Fargo, a citizen of New York, and treasurer of the American Express Company, who voluntarily entered his appearance in the action in the state court, and there filed his petition for removal. The United States Circuit Court found that the three individual defendants had been improperly sued with the American Express Company, and refused to consider their citizenship on the

question of removal. The court held that Fargo, the treasurer of the association, had the right to enter appearance as treasurer, and that, being a citizen of New York, he could remove the action to the federal court. The court declared, also, that there was nothing in that decision inconsistent with the case of *Chapman v. Barney* and the *Great Southern Fireproof Hotel Company v. Jones*, above referred to. It does not appear in that case that the court acquired jurisdiction of the *American Express Company* before Fargo, its treasurer, entered appearance. The case before me differs from that case in this respect: that this case was instituted in the Supreme Court of the state of New Jersey against the unincorporated association under the provisions of section 40 of the practice act, above quoted. The record of the case shows that the summons was served upon "William H. Cawley, the agent in charge of the defendant's office at Trenton, New Jersey, personally, on March 29, 1904, and also by giving and delivering a true copy thereof to John C. McNeice, route agent of said defendant, personally, at Trenton, New Jersey, on March 31, 1904." This service has been held by the Supreme Court to be good. It will be observed, then, that the defendant here is the unincorporated association, and that it has been properly brought into court. Levi C. Weir, the president of the association, in one paragraph of his petition for removal, says that he has entered his appearance "as and for the defendant in the above-entitled suit" (that is, as and for *The Adams Express Company*), while in the next paragraph he speaks of himself as "the petitioner, the defendant herein." He is not the defendant in the suit, and his citizenship cannot be considered in determining the question of jurisdiction. The defendant is the *Adams Express Company*, and that company is without citizenship. Therefore, under the authority of the cases decided by the Supreme Court, this court has no jurisdiction.

There will be an order remanding the cause to the state court, with costs upon this motion to the plaintiff.

THE COTTAGE CITY.

(District Court, W. D. Washington, N. D. March 23, 1905.)

No. 2,130.

SALVAGE—TOWING DISABLED STEAMSHIP TO PORT OF DESTINATION—AMOUNT OF AWARD.

The steamship *Cottage City*, 1,885 gross tonnage, and worth, with her cargo, \$200,000, while on her regular trip from Alaska to Seattle, with passengers and cargo, on October 14th became wholly disabled from proceeding, when in Fitzhugh Sound, and, owing to the depth of water and the disabled condition of her winch, could not have safely anchored in case the weather had become rough, as was likely at that season. The steamship *Dirigo*, 843 gross tonnage, and worth \$80,000, also on her trip to Seattle, answered the distress signals of the *Cottage City*, and, with the consent of her master, towed her to Seattle, a distance of about 400 miles, being assisted by a tug during the last 90 miles. The weather

was fairly good, and the danger to the *Dirigo* was not great. *Held*, that the service was a salvage service, and that the *Dirigo* was entitled to an award of \$12,000 against the *Cottage City* and cargo.

[Ed. Note.—Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.]

In Admiralty. Suit to recover salvage for towing a disabled passenger steamer to her port of destination. Decree for libellant.

Ira Bronson, for libellant.

Piles, Donworth & Howe, for claimant.

HANFORD, District Judge. On the night of October 14, 1901, the *Dirigo*, a passenger steamship, on a voyage from ports in Alaska to Seattle, was called by signals of distress to the assistance of the steamship *Cottage City*, which was then in a disabled condition at anchor in Fitzhugh Sound; and, with the consent of Capt. Wallace, who was in command of the *Cottage City*, the *Dirigo* towed her to Seattle, having the assistance of a tugboat which had been sent to the relief of the disabled vessel in making the last 90 miles of the trip, for which service this suit was instituted to recover salvage. Notwithstanding the testimony given in behalf of the claimant which tends to minimize the peril of the *Cottage City* and the merit of the service rendered by the *Dirigo*, I consider that it has been proved by a preponderance of the evidence that, although there was no imminent danger of immediate destruction, the *Cottage City* was in a situation which justified her officers in giving the signals of distress which called the *Dirigo* to her rescue, and that the *Dirigo* rendered prompt, willing, and efficient service in bringing the disabled vessel to a port of safety. In doing this the *Dirigo* was not exposed to extreme danger, but in towing the *Cottage City* there was necessarily some degree of extraordinary strain upon her machinery, and her officers and crew performed labor and endured hardships which would not have been required of them in the performance of their ordinary duties in navigating their ship without the burden and responsibility of towing another vessel. All the elements of a meritorious salvage service have been clearly proved, entitling the owners, officers, and crew of the *Dirigo* to a reasonable reward.

The material facts, briefly stated, are as follows: The *Cottage City* is a steamship of 1,885.11 gross tonnage, and her value at the time referred to, with her cargo on board, was approximately \$200,000. She was employed as a carrier of passengers and freight, making regular trips between the ports of Puget Sound and Skagway, Alaska, touching at intermediate ports. On the 14th day of October, 1901, as she was on her regular voyage southward from Alaska, with a full list of passengers on board, on account of some derangement of her machinery her captain decided to turn around and take her into the nearest place of safety, to make needed repairs, and while executing that maneuver her thrust shaft was broken, which deprived her of all use of her propeller. She was then in Fitzhugh Sound, in the track of all the steamers running between Puget Sound and Skagway. Being without motive power,

as she had no sails bent, soundings were taken, and the depth of water was ascertained to be from 75 to 80 fathoms. Her winch, upon which she depended for power to lift her anchors, was in a disabled condition, and incapable of raising an anchor with chain cable from the bottom in that depth of water; and for that reason a 6-inch manilla hawser was attached to her starboard anchor, and a 5-inch manilla hawser was attached to the other end of the 6-inch hawser, and the anchor was dropped to a mud bottom, in 76 fathoms of water, and by that anchor she was held until the *Dirigo* came to her rescue, about 9 o'clock in the evening of the same day. The weather was mild, there being only a light breeze and an easy swell of the sea, and some fog; and, so long as those conditions of weather continued, the anchor would have held her until the hawser became weakened by chafing. But the testimony proves that in that locality calm weather or light winds do not usually continue more than one or two days, and in rough weather the 5 and 6 inch hawsers, with a single anchor, would have been insufficient to have held her more than one or two hours. If there had been necessity for doing so, her port anchor and chain could have been used for additional security, but, if dropped in that depth of water, it could not have been raised, and must have been sacrificed by slipping the chain whenever an opportunity came for her to get away. Considering the conditions described, the vessel and the people on board of her were in so much peril that the captain would have acted imprudently if he had declined assistance from the first steamer able to tow the *Cottage City* which came along. After the *Dirigo* had undertaken the task, and, before getting under way with her tow, another steamer bound for Puget Sound came along and offered assistance; and by her the captain of the *Cottage City* sent a message and a request for a tugboat, in response to which a tug was sent, which met the disabled steamer in the Gulf of Georgia, and assisted the *Dirigo* in towing her to Seattle, a distance of about 90 miles. The *Dirigo* was at the time employed making regular trips as a carrier of passengers and freight between the ports of Puget Sound and Southeastern Alaska; her tonnage is 843 tons, gross; and her value at that time was from seventy-five to eighty-five thousand dollars. She was making one of her regular trips from Skagway to Seattle, and had on board 47 passengers. Her supply of fuel was insufficient to make the run without stopping at one of the ports in British Columbia, where her bunkers could have been replenished. She received from the *Cottage City* 13 tons of coal, and 2 tons from the tugboat, which enabled her to proceed to her destination without stopping. She towed the *Cottage City* approximately 400 miles, and was delayed by the extra burden probably two days, but the testimony does not furnish data from which to calculate the actual additional expense occasioned by her service in bringing the *Cottage City* to Seattle. The weather was favorable all the way, except the prevalence of fog. In order to make the run through Seymour Narrows, it was necessary to wait for a favorable stage of the tide, and an attempt was made to anchor; but, owing to excessive depth of

water, it became necessary for the two vessels to keep moving all night, and there was considerable difficulty in raising the Cottage City's anchor, assistance from the hoisting power of the Dirigo being necessary for that purpose. No other extraordinary hardships or perils were encountered.

By reason of similarity of the facts, for the purpose of estimating a reasonable salvage award this case may properly be classed with *The Costa Rica*, Fed. Cas. No. 3,262, and *The Sirius*, 57 Fed. 851, 6 C. C. A. 614. In the latter case the Circuit Court of Appeals for the Ninth Circuit reversed a judgment of the District Court in favor of the salvor for \$20,000, and set aside a contract to pay \$20,000 for the service rendered, and awarded \$8,000. By taking into account differences in values and distances, and greater difficulties and perils of navigating the northern waters, I consider \$12,000 to be a reasonable amount of salvage in this case, 28 per cent. of which would be chargeable against the cargo; but, by reason of an agreement between the parties, the court cannot make any award for salvage of the cargo. Therefore it will be decreed that the libellant recover the total sum of \$8,640 and costs, but without interest. Said amount, when paid into the registry, will be distributed by the court to the owner, master, and crew of the Dirigo, upon a scale to be hereafter determined.

WHITEHILL v. WESTERN UNION TELEGRAPH CO.

(Circuit Court, E. D. Arkansas, W. D. April 4, 1905.)

No. 5,293.

1. PLEADING—DEMURRER—STATE PRACTICE.

Under the practice prevailing in the courts of the state of Arkansas, a demurrer to a plea goes back to the first defective pleading.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 542.]

2. TELEGRAPHS—MESSAGES—DELAY IN DELIVERY—RIGHT TO SUE.

Where a telegraph message on its face disclosed that it was sent for the benefit of a third person, the latter was entitled to sue for damages sustained by the company's delay in delivery.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 37.]

3. SAME—CONTRACT—CONDITIONS.

Where a telegraph company failed to promptly transmit and deliver a telegram sent for the benefit of a third person, and she brought suit for damages on the theory that the contract was made for her benefit, she was bound by a condition that the company would not be liable for damages in any case where the claim was not presented in writing within 60 days after the message was filed for transmission.

On Demurrer to Answer.

S. O. Courtney sent the following message from Arkansas City, Ark., to Blytheville, Ark., over the lines of defendant, addressed to Mrs. Belser: "Joe Whitehill died this morning. Tell Nely. [Signed] S. O. Courtney." The complaint alleges that "Nely" is the plaintiff, Cornelia Whitehill, and the sister of Joe Whitehill, mentioned in the telegram. It is charged that the telegram was never transmitted nor delivered, and she seeks in this action to

recover damages sustained by her. Originally, the action was instituted in one of the state courts, but by the defendant removed to this court upon the ground of a diversity of citizenship. The answer denies a failure to transmit or deliver the message, but, on the contrary, alleges that it was transmitted and delivered. In the third paragraph of the answer the defendant pleads that, though the said telegram was duly transmitted and delivered, although perhaps not promptly, one of the conditions upon which the message was accepted and sent provided that "the company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission," and that plaintiff did not present any claim in writing to the defendant within 60 days after the said message was filed with the defendant for transmission. Plaintiff demurs to this last paragraph of the answer.

X. O. Pindall and Vinson & Wooten, for plaintiff.
Rose, Hemingway & Rose, for defendant.

TRIEBER, District Judge (after stating the facts). Under the practice prevailing in the courts of the state of Arkansas, a demurrer to a plea goes back to the first defective pleading. *Logan v. Moulder*, 1 Ark. 320, 33 Am. Dec. 338; *Yell v. Snow*, 24 Ark. 554. It is therefore necessary to determine whether the complaint states a cause of action. As the plaintiff was neither the sender nor the addressee, it is contended on behalf of the defendant that she cannot maintain this action. In *McCormick v. Western Union Telegraph Co.*, 79 Fed. 449, 25 C. C. A. 35, 38 L. R. A. 684, and *Western Union Telegraph Company v. Schriver*, 129 Fed. 344, 64 C. C. C. 96, the United States Circuit Court of Appeals for this circuit held that a telegraph company cannot be held liable to a stranger to the company and to the telegram, one to whom it owes no duty whatever. But in neither of these cases did the message, as delivered to the company, show on its face that it was intended to be communicated to the party complaining, as is alleged and charged to have been the case in this action. In the *McCormick* Case the telegram was addressed to one Frink, and read, "May draw \$2,500.00 at sight." By some error or mistake in transmission, the message, when delivered to Frink, read, "May draw \$7,500.00 at sight." McCormick, a stranger to the telegram, cashed the draft of Frink for \$7,500, in reliance upon the telegram, and, only \$2,500 being paid by the sender of the telegram, sought to recover from the telegraph company the difference. In the *Schriver* Case a forged telegram was transmitted in the name of the Bank of Denison to the Commercial Bank of Britt, Iowa, that it would honor a draft for Barnes for \$8,972. Schriver, a stranger to the telegram, sold Barnes cattle, taking his draft on the Bank of Denison for the same, in reliance on that telegram. As in neither of these cases was the telegraph company advised, either by the contents of the telegram or the parties sending them, that any persons other than the addressees were interested in them, they are clearly distinguishable from the case at bar. The question the court now is called upon to determine is whether a telegraph company, accepting a message for transmission which shows on its face that it is to be communicated to a third person, or is for the benefit of a third person, is liable for its negligence in failing to transmit and deliver such telegram to such third person. While there is some conflict among the reported cases on that question, the decided weight of authority, and, in the

opinion of this court, the most convincing reasoning, is in favor of the rule that the person for whose benefit the message is sent, if that fact is apparent from the telegram itself, may maintain an action for damages sustained by reason of the negligence of the company. A few of the cases on that subject are: *Western Union Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920; *Western Union Tel. Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896; *Landie v. Western Union Tel. Co.*, 124 N. C. 528, 32 S. E. 886; *Western Union Tel. Co. v. McKibben*, 114 Ind. 511, 14 N. E. 894; *Reese v. Western Union Tel. Co.*, 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583. The complaint shows a good cause of action in favor of the plaintiff.

The demurrer to the third paragraph of the answer raises the question whether the condition on the telegraph blank that the company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within 60 days after the message is filed for transmission applies to the addressee as well as the sender when the message is actually sent, but negligently delayed in the delivery. It is conceded by counsel that the condition is reasonable, and binding upon the sender; but it is claimed that there is no contractual relationship between the addressee and the telegraph company, and therefore the condition does not apply to such a plaintiff. While there are some authorities which sustain this contention, the great weight of authority is the other way. The English rule is that an addressee cannot maintain an action at all, as there is no contract between the parties. They hold that, the contract being with the sender, he alone can recover. *Dixon v. Reuter's Telegraph Co.*, 19 Moak, Eng. Rep. 313, affirmed on appeal 30 Moak, Eng. Rep. 1. But the American courts with practical unanimity have declined to follow this rule, and have held that the addressee may recover. The ground upon which the American rule is based is that where two persons make a contract for the benefit of a third person, such party may maintain an action thereon. *West v. Western Union Tel. Co.*, 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530; *Russell v. Western Union Tel. Co.*, 57 Kan. 230, 45 Pac. 598; *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864; *Western Union Tel. Co. v. Fenton*, 52 Ind. 1; *Western Union Tel. Co. v. Culberson*, 79 Tex. 65, 15 S. W. 219; *De La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383. The reason of the American rule, as stated in 27 Am. & Eng. Ency. Law, 1052 (2d Ed.) is that:

"The right of the addressee to recover rests on the contract of sending and on the principle that, where two parties contract for the benefit of a third, the last may maintain an action in his own right for a breach of the agreement. It necessarily follows that the addressee can, as a rule, assert no rights except under the contract made by the sender."

If the right of the addressee to maintain the action depends solely upon the contract made by the sender, it is, of course, subject to the terms of the contract entered into by the sender with the company. It is true, counsel for plaintiff have cited the court to some authorities which place the American rule of the liability of telegraph companies to an addressee upon grounds other than that of contract, holding that such an action is based upon the negli-

gence of the company in the performance of its duty in its public capacity as a common carrier of messages, and that in such actions sounding in tort the injured party is not affected by the rule laid down in *Hadley v. Baxendale*, 9 Exch. 341. But the Supreme Court of the United States, in *Western Union Tel. Co. v. Hall*, 124 U. S. 444-456, 8 Sup. Ct. 577, 31 L. Ed. 479, and *Primrose v. Western Union Tel. Co.*, 154 U. S. 1-29, 14 Sup. Ct. 1098, 38 L. Ed. 883, expressly holds that the rule in *Hadley v. Baxendale* does apply to actions of that nature. As the decisions of that court are conclusive on this, as well as every other federal court, regardless of what other courts, no matter how eminent its judges, may determine, it is the duty of this court to follow them. Where the message was never transmitted or delivered, the stipulation requiring notice within 60 days is not binding, as it may frequently occur that the failure to transmit the message was not discovered until after the expiration of the 60 days.

The demurrer to the third paragraph must therefore be overruled.

WARD v. DAMPSKIBSELSKABET KJOEBENHAVEN.

(District Court, E. D. Pennsylvania. March 30, 1905.)

No. 42.

1. SHIPPING—LIABILITY FOR INJURY OF QUARANTINE OFFICER—NEGLIGENCE OF MASTER.

Where a quarantine physician in the performance of his official duties visited a vessel in the night when she was coaling, and her hatches were open, which was an unusual proceeding, it was the duty of the master to see to it that he passed the hatchways in safety while performing his duties, and a mere warning to him that the hatches were open, and to be careful, was not sufficient to relieve the vessel from liability for his death resulting from his falling through an unguarded and unlighted hatchway, or to charge him with contributory negligence when he had no knowledge or appreciation of the extent of the danger or of the exact location of the hatches.

2. CONTRIBUTORY NEGLIGENCE—RULE OF FEDERAL COURTS—BURDEN OF PROOF.

While contributory negligence is a defense in the federal courts, the burden of proof is on the defendant, the presumption being that due care was used.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 221, 229-231.]

In Admiralty. Final hearing.

Alfred Driver and Frank R. Savidge, for libellant.

Convers & Kirlin and J. Parker Kirlin, for respondent.

HOLLAND, District Judge. This is an action brought by the widow of John M. B. Ward, quarantine physician at Marcus Hook, on the Delaware river, against the owner of the steamship *Euxinia*, to recover damages for personal injuries sustained by the libellant's intestate in falling through a coal bunker hatch on the respondent's steamship on January 21, 1903. The accident resulted in the death of Dr. Ward. At the time of the accident the vessel was in the Dela-

ware river, near the quarantine station at Marcus Hook, and was taking in coal from two tugs alongside. It was about 7 o'clock in the evening when Dr. Ward boarded the Euxinia for the purpose of inspecting her officers and crew in the discharge of his duty as quarantine physician. Upon boarding the vessel the doctor was met at the rail by the master, and proceeded to inspect the crew, who were aft, and upon completing that examination was taken by the arm by the master, who conducted him to the master's cabin, and on their way thereto they passed between the open coal hatch on the port side, where there was a space of five feet wide, and Dr. Ward was on the side of the master farthest from the hatch opening. After performing his duties in the cabin, which occupied about 15 minutes, Dr. Ward, together with the master of the vessel and a Capt. Bellevou, who was superintending the coaling of the vessel, started to return from the cabin aft by the open hatch, and after walking about 12 feet were stopped to permit the workmen to pass a bucket of coal to the hatch. The open hatch was about 40 feet from the master's cabin, 3 feet wide by 5 feet long, and the passageway between it and the rail on the starboard side was 2 feet 5½ inches wide at its narrowest and 2 feet 11½ inches at the widest point. At a point 2 feet 4 inches aft the aft end of the open hatch, a smokestack guy, fastened to the deck near the rail, led off toward the port side at an angle requiring a man either to stoop or move in the direction of the open hatch to pass under it. After stopping to permit the bucket of coal to pass, Capt. Bellevou and the doctor continued their return journey, the master remaining behind. The captain was slightly in the rear of the doctor, and nearer the rail, and had his hand upon the doctor's shoulder. As they neared the hatch, Capt. Bellevou said to him, "Doctor, be careful," he answered, "That is all right." The captain again said, "Doctor, mind the hatch," and he responded, "That's all right, captain." They had proceeded to the aft end of the hatch, when Dr. Ward stepped into the open hatchway, and fell 35 feet to the bottom of the vessel. The hatch coverings had been placed in the passageway over which they traveled, filling the passage nearly to the top of the coaming of the hatch. The master of the vessel had called Dr. Ward's attention to the open hatch as they had passed forward to the cabin on the port side. The night was dark, and somewhat misty. There were no guards about the open hatchway, nor was there any light either under the open hatch, shining out, or above the hatchway, with the rays thrown directly upon the danger spot. Dr. Ward had been upon the vessel before in his official capacity. Coaling at night-time was an unusual proceeding, and, as to strangers aboard, the open, unguarded, unlighted hatchway unusually dangerous. This state of facts is relied upon by the libellant to sustain the charge that Dr. Ward's death was caused by the negligence of the master, officers, and crew of the steamship Euxinia in not having properly secured or guarded the open hatchway, and in not taking the necessary care and caution to see that accidents could not happen by reason of the uncovered opening, without lights near it, on a dark night, and further to show that the decedent was not guilty of contributory negligence, as a result of which the accident occurred. Dr. Ward had been on this vessel before, but was not thoroughly acquainted with all the details of its construction

and arrangement. He had been told the hatch was open, and no doubt saw it, but under circumstances with no light shining out of the hatch to show him exactly the dimensions and extent of the opening, and only a diffused light above, the rays of which were not especially directed to the opening, and so located as to rather blind the inexperienced more than light them. He was, no doubt, as careful as one could be expected to be who had no accurate information of the danger surrounding him. He had a right to assume that he was being properly directed by the master, who had full and complete knowledge of the dangerous surroundings and situation. It was the duty of the master to see to it that Dr. Ward passed the danger point in safety, and it was not sufficient to warn him of the open hatchway, and tell him to be careful, when the doctor was not informed of the extent of the danger which he was to avoid. He might have been as careful as it was possible for one to be possessing the information he had of the surroundings, and yet fail to realize the extent of the danger confronting him. This information the master possessed, and as Dr. Ward was on board in his official capacity, and required to perform his duties in regard to the inspection of the vessel, and the master saw fit to permit him to proceed while the vessel was coaling in the dark, it was his duty not only to tell him of the dangerous opening, but to see to it that he passed it in the performance of his duty without injury. It is not the case of a workman aboard the vessel, fully cognizant of the dangerous condition of the opening. Dr. Ward was a stranger, and the rule of care on the part of the officers, under the circumstances, required that they should be responsible for his safety, especially when there was an unusually dangerous condition existing aboard, as there was in this case, resulting from the open hatch without a guard or light to distinctly show the outlines of the opening. Experienced seamen assert that the invariable rule should be to place a light under the open hatch, in order that the rays might shine out, and distinctly show the extent of the opening, when coal was being taken on board at nighttime. This seems to me to be a precaution, the omission of which, under the circumstances in this case, indicates an inexcusable want of care. As to the crew and regular gangs of workmen from shore, who are familiar with the location and requirement of hatches, their knowledge of the situation and their continuance at work are held to be conclusive evidence that, as to the particular danger of which they are thus advised, they take the risk; but as to passengers, visitors, or workmen from shore, unaccustomed to the regulation of the ship's internal economy and arrangement, who are invited by the owner, either expressly or by implication, to be upon and to go about the vessel in the vicinity of open hatches, the owners of the vessel are responsible for their safety. *The Saratoga*, 94 Fed. 221, 36 C. C. A. 208.

Contributory negligence is a defense in a federal court, but the burden of proof is upon the defendant. The presumption that the decedent observed due care is in his favor. *Wabash Railroad Co. v. Central Trust Co.* (C. C.) 23 Fed. 738. If Dr. Ward knew and appreciated the danger surrounding him, which caused the injury, then he may be held to have voluntarily assumed the risk; but mere notice that there was some danger, without appreciating the extent of it, will not

of itself preclude a plaintiff from recovery. *Fickett v. Fibre Co.*, 91 Me. 268, 39 Atl. 996. To permit Dr. Ward to walk into a dangerous situation, the extent of which could only be guessed at by him, was gross negligence, and the simple warning to "beware of the hatch" cannot relieve the owners from liability, nor fasten upon the decedent the charge of contributory negligence. He could observe the warning only to the extent of his knowledge under the circumstances, and it was the master's business to see to it that he passed the danger safely. Contributory negligence or want of due care is not found in a failure to exercise the best judgment or to use the wisest precaution, but allowance must be made for the extent of information one may possess of the nature of the danger by which he is surrounded, or as to whether he fully realizes, from his limited knowledge, what he shall do to avoid the danger.

Let a decree be drawn in favor of the libelant.

BRUSH CREEK COAL & MINING CO. v. MORGAN-GARDNER ELECTRIC CO.

(Circuit Court, W. D. Missouri, W. D. April 8, 1905.)

FOREIGN CORPORATIONS—PROCESS—SERVICE ON OFFICER—JURISDICTION.

Service of process on a general officer of a foreign corporation, who voluntarily came into the state to adjust a difference between the corporation and plaintiff with reference to the subject-matter of the suit, while such agent was within the state, was sufficient to confer jurisdiction of the corporation.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 2613.

Service of process on foreign corporations, see note to *Eldred v. American Palace Car Co.*, 45 C. C. A. 3.]

Scarrett, Griffith & Jones, for plaintiff.
Frank Hagerman, for defendant.

AMIDON, District Judge. The defendant is an Illinois corporation, owning and operating a large manufacturing plant at Chicago, in that state, where it manufactures electric engines and apparatus necessary in the development of coal mines. It has never had an office or agency in Missouri, nor has it done any business therein except as hereinafter stated. Plaintiff was the owner and operator of a coal mine in Jackson county, Mo., which required extensive electrical machinery for its development, and an engine for the operation of such machinery. It signed at Kansas City, Mo., an order therefor, which was forwarded to the defendant at Chicago, Ill., where it was accepted. Under this contract defendant was to construct the engine and apparatus, forward the same to Kansas City, and send its mechanics here to set up the machinery in the mine and supervise its working. The machinery did not do satisfactory work, and the mechanics were in charge of the same, more or less, for about 11 months. Under the contract, if the engine and apparatus did not work, it was to be taken out of the mine

and returned by plaintiff at its cost. When it did not work, the plaintiff refused to take it out, and the defendant was required to send from Chicago its mechanics to take down the machinery and ship it back. Differences arose between the parties as to whether the appliances should be accepted, and upon what terms. Ralph T. Noble, who was an assistant to the defendant's general manager, and in the absence of such general manager was clothed with all his powers, was in Wyoming on the business of the corporation, and when returning passed through Kansas City, Mo., for the purpose of conferring with the plaintiff touching the transaction above described. He stopped at the office of the president of the plaintiff, and attempted to adjust the differences. While these negotiations were in progress, the president of the plaintiff caused the summons in this action to be served upon him. The evidence taken upon the plea, which was filed to the jurisdiction of the court, showed that the defendant had had two other similar business transactions in the state of Missouri, and that these three matters constituted the only business transacted by it in this state.

By its plea the defendant contends that the state court acquired no jurisdiction over the defendant by the service of process upon its officer while thus in the state, under the facts above set forth. The decisions of the Supreme Court are entirely plain that the service of process upon an officer of a foreign corporation which is not engaged in business in the state where the service is made, and has no agent there engaged in the transaction of its business, the officer being in the state simply as a traveler, or on his own private affairs, does not confer jurisdiction upon the court; and this is true without regard to the rank of the officer. On the other hand, it is equally plain that, if the corporation is engaged in business in the state where the service is made, or has an officer or agent there, appointed by it for the transaction of its business in the state, service upon such officer or agent, if authorized by the statute of the state, confers jurisdiction of the corporation upon the court. Neither of these situations, however, presents the precise question which is now before the court. It appears from the evidence taken upon the plea that the officer upon whom process was served in this case was a general officer of the defendant corporation; that he was in the state at the time of the service, engaged in the business of the corporation, having come into the state for that purpose alone; and that the matter in which he was then engaged on behalf of the defendant constitutes the very cause of action upon which the plaintiff bases its right to recover. The Supreme Court has not delivered any clear decision upon this state of facts, but much of the language employed in the leading case of *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222, throws a strong indirect light upon the question. That opinion quotes from the case of *Newell v. Great Western Railway Co.*, 19 Mich. 336, where the service was made upon the treasurer of the defendant company in the state of Michigan while he was there on private business. The whole ground of the reasoning of the Michigan court, which is quoted, goes to the effect that, if the

treasurer had been in the state of Michigan on any business of the corporation, the court would then have acquired jurisdiction of the corporation by service upon him. Commenting upon that case the Supreme Court said:

"According to the view thus expressed by the Supreme Court of Michigan, service upon an agent of a foreign corporation will not be deemed sufficient unless he represents the corporation in the state. This representation implies that the corporation does business or has business in the state for the transaction of which it sends or appoints an agent there."

Later in the opinion, at page 359 of 106 U. S., page 362 of 1 Sup. Ct. (27 L. Ed. 222), the court says:

"The transaction of business by the corporation in the state, general or special, appearing, a certificate of service by the proper officer on a person who is its agent there would, in our opinion, be sufficient *prima facie* evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another state, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employé, or to a particular transaction, or that his agency had ceased when the matter in suit arose."

Much of what is said in this case goes to the question whether the agent upon whom process was served was of sufficiently high grade so that he could be "properly deemed representative of the foreign corporation." As bearing upon that question, the fact whether the company was actually engaged in business in the state, and the extent of the business committed to the management of the agent, would be material. But if the officer served was a general officer of the corporation, then the extent of the business transacted by him in the state is of no importance in determining the question as to whether he is of an official rank such as to make him properly representative of the company. The precise question under consideration was before the Circuit Court for the Northern District of Illinois in the case of *Houston et al. v. Filer & Stowell Co.*, 85 Fed. 757, and it was there held that, when the manager of a corporation goes into another state on the business of the corporation, service of summons against the corporation in a suit relating to that business may be made on him there, although the corporation does not transact business in the state so as to make it an inhabitant thereof. In my judgment, the opinion in this case is a correct exposition of the law. Any individual may be served in any state where he is found without regard to the place of his residence. A corporation is entitled to no greater exemption. It ought to be held to be present in any state to which it sends its general officer for the transaction of its corporate business. The case of *St. Louis Wire-Mill Company v. Consolidated Barb Wire Company et al.*, 32 Fed. 802, arising in this circuit, and decided by Judge Thayer, does not present the precise question, for the officer upon whom service was there made did not enter the state for the purpose of carrying on any business on behalf of the corporation, but came there for the purpose of attending a fair at St. Louis; and the question now under consideration is not considered in the opinion. The case of *Eirich v. Donnelly Contracting Company (C. C.)* 104 Fed. 1, is in point, but seems to have been decided upon a misappre-

hension of the law. The court there quashed the service upon the ground that the defendant was not "found" in the district of Ohio; evidently basing the decision upon the earlier federal statutes requiring that the defendant be found in the district as a condition of federal jurisdiction. But under the present statute it is sufficient to confer jurisdiction if the plaintiff is a citizen of the district where the action is brought and service is obtained on the defendant. The facts in the case of *Clews v. Woodstock Iron Company* (C. C.) 44 Fed. 31, would also bring the case within the question now raised, but the question is not discussed in the opinion, although the decision is adverse to the validity of the service. The case of *United States Graphite Co. v. Pacific Graphite Company* (C. C.) 68 Fed. 442, is likewise in point on its facts, and held against the validity of the service; but the distinction which is pointed out by Judge Grosscup in the case in 85 Fed. 757, is not adverted to in the opinion.

The plea to the jurisdiction will therefore be overruled, and the cause will go to trial upon the merits on the answer, in which the plea is embodied.

AMERICAN SUGAR REFINING CO. v. UNITED STATES.

(Circuit Court, S. D. New York. March 10, 1905.)

No. 3,543.

CUSTOMS DUTIES—DATE OF EFFECT OF CUBAN TREATY—RETROSPECTIVE OPERATION.

In construing the treaty with Cuba, the ratifications of which were exchanged March 31, 1903, and which contained both the provision that it should take effect on the tenth day after the exchange of ratifications and the provision that it should "not take effect until approved by the Congress," and which Congress approved by act of December 17, 1903 (33 Stat. 3, c. 1), providing that it should apply "on the tenth day after the exchange of ratifications," *held*, that the treaty was intended to be retroactive, and to relate to Cuban goods imported 10 days or more after the ratifications were exchanged.

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 5,665, T. D. 25,255, which affirmed the assessment of duty by the collector of customs at the port of New York.

H. B. Closson, for importers.

Henry A. Wise, Asst. U. S. Atty.

WHEELER, District Judge. The convention for the reduction of 20 per cent. of the duties on Cuban products provided for exchange of ratifications before January 31, 1903, which was extended two months, and for going into effect on the tenth day after the exchange of ratifications. On the 19th of March the Senate added to that article: "This convention shall not take effect until approved by the Congress." Ratifications were exchanged March 31,

1903. These importations of Cuban products were made between July 14th and September 9th. Duties were assessed without reduction, against which protests were made before or on October 21, 1903, and were submitted to the Board of General Appraisers. On December 17, 1903, congress passed "An act to carry into effect" the convention, which provided that whenever the President shall receive satisfactory evidence that Cuba has made provision to give full effect to the convention, he was authorized to issue his proclamation declaring that he had received such evidence, "and thereupon on the tenth day after exchange of ratifications of such convention between the United States and the republic of Cuba, and so long as the said convention shall remain in force, all articles of merchandise being the product of the soil or industry of the republic of Cuba * * * shall be admitted at a reduction of twenty per cent. of the rates of duty thereon." 33 Stat. 3, c. 1. The President immediately made such proclamation. The board overruled the protests April 28, 1904, and confirmed the assessment without reduction. From that decision this review is brought.

When the collector assessed the duty there was no law in force relating to it but the general tariff law, and his assessment was clearly right; but if the assessment of duties is going on until the board is done with it—which seems to be the case—the question now is whether the decision of the board was right, according to the law of the subject, when that decision was made. If the President and Senate could fix duties by treaty without the concurrence of the Congress, they did not attempt to in this matter. While it was open its taking effect was fixed upon the approval of the Congress, and it derives its force from the act of Congress. No question is understood to be made, and there seems to be no doubt, but that Congress may well provide for the liquidation of duties at a different rate on goods imported before, and especially by reduction; which would be the disposing of what, for the relief of the importers, would be entirely within the power of Congress. *Stockdale v. Insurance Co.*, 20 Wall. 323, 22 L. Ed. 348. So far as the treaty went, it was made very plain that the reduction was to commence on the 10th day after the exchange of ratifications. Congress did not leave the subject open to any construction by using any other expression, but took the same, and thereby enacted of itself that "on the tenth day after the exchange of ratifications, * * * and so long as said convention shall remain in force, all articles of merchandise being the product of the soil or industry of the republic of Cuba * * * shall be admitted at reduction of the rates of duty thereon."

Merchandise is being admitted for tariff purposes until the duties are finally liquidated, which, as to this merchandise, was not till after that act of Congress was passed. These views do not seem to be contrary to *U. S. v. Burr*, 159 U. S. 78, 15 Sup. Ct. 1002, 40 L. Ed. 82. The intention of Congress appears to have been sought for there, and ascertained from other parts of the act than the one date left to stand after it had gone by; but here there are no such other provisions to control. This act affirms the treaty as it was

made with this date in it, and enacts the date itself in the same terms. The intention to relieve Cuban imports from that date seems clear.

Decision reversed

THE AMERICA.

(District Court, D. New Jersey. March 23, 1905.)

SALVAGE—ASSISTING IN MOVING VESSEL FROM BURNING DOCK—COMPENSATION.

Two libelants, who were in a skiff and, at the request of the master of a steam lighter moored to a burning dock in the night, took him and two deckhands to the vessel, and assisted them in casting it loose and pushing it off, rescuing it from a position of imminent peril, *held* to have performed a salvage service, and to be entitled to an award of \$200 therefor; the vessel being worth \$18,500.

[Ed. Note.—Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.]

In Admiralty. Suit to recover for salvage service.

Abe J. David and William Pintard, for libelants.

John F. Foley and Howard S. Harrington, for claimant.

LANNING, District Judge. The first question presented by the pleadings and proofs in this case is whether the libelants performed a salvage service. It appears that on the night of February 27, 1904, the steam lighter *America* was tied at the dock of the Borne Scrymser Company, on Staten Island Sound. One of the crew had been assigned to duty as watchman for that night. About midnight a fire broke out in the buildings covering the dock where the *America* was lying. When the alarm was given the owner of the vessel, Capt. Daniel McElroy, hastened to the dock; but, finding that his access to the vessel by the ordinary route was cut off by the fire, he reached the water's edge some 300 or 400 feet distant from his vessel. There he hailed three men, two of whom were the libelants in this case, who were in an oyster skiff about 50 feet distant from where he was standing. They came to him, and he and two of his deckhands jumped into the skiff, and, at his request, were rowed to the *America*. On reaching the *America* it was found that the member of the crew who had been assigned to duty as a watchman for that night, for some reason not explained in the testimony, was not on the vessel. There was no one on board to care for her. She had no steam. Her pilot house had already been scorched by the heat. She was in imminent peril, and it became necessary, in order to save her, to get her away from the dock as speedily as possible.

The libelants claim that when they reached the *America* in their oyster skiff they were the first to board the vessel, and that they threw off the lines which fastened her to the dock and pushed her bow out from the dock, so as to enable her to catch the ebbing tide and to float out and away from danger. They say that they did not, while they were performing this service, see either Capt. McElroy or any of his deckhands, and they claim that they alone performed the service which

saved the vessel. On the other hand, the captain and his deckhand, Samuel Rose, claim that they were the persons who loosened the lines of the vessel and pushed her away from the dock, and enabled her to float out into the sound and away from the burning dock. The testimony of the libelants that they performed service in saving the vessel is corroborated by that of other witnesses. So, also, is the testimony of Capt. McElroy as to the work done by him and the men in his employ likewise corroborated. I am satisfied that Capt. McElroy, his deckhand, Samuel Rose, and the two libelants all boarded the imperiled vessel the instant the oyster skiff reached her, and that they all joined in the effort to save her. The service performed by the libelants was, therefore, a salvage service.

It is insisted by the claimant that after his vessel had reached a place of safety he paid the libelants five dollars, and that they accepted that sum as full compensation for their service. The evidence, in my judgment, does not warrant such a conclusion. Neither do I think the claimant has established his defense that the libelants have lost their right of recovery by reason of the alleged larceny of a shovel from the vessel. The final question, therefore, is, what amount shall be allowed to the libelants for the salvage service rendered by them. There was no special danger in performing their service. I am convinced that Capt. McElroy assumed command of the vessel and that the libelants acted as his assistants merely. The whole time of their engagement upon the vessel did not exceed an hour. In the case of *The Oregon* (D. C.) 27 Fed. 871, \$200 was allowed to a tug which drew three lighters, worth with their cargoes about \$4,500, away from a burning building near which the lighters were moored. In *Wilson v. Winchester* (C. C.) 30 Fed. 204, the libelant's tug towed a schooner away from a pier near which certain oil works were in flames, and an award of \$200 for salvage services was made. In *The Rose* (D. C.) 31 Fed. 176, the libelant's tug towed a lighter laden with cotton from a burning pier to a place of safety, and \$140 was allowed for salvage services. It is admitted that the value of the *America* was \$18,500.

Considering this case in all its aspects, I think an allowance of \$200 to the libelants will be fair. There will be a decree to that effect.

In re GIRARD GLAZED KID CO. (No. 2.)

(District Court, E. D. Pennsylvania. March 27, 1905.)

No. 1,767.

BANKRUPTCY—JURISDICTION—CONTROVERSIES BETWEEN CREDITORS.

A claimed indebtedness from one creditor of a bankrupt to another, growing out of transactions not connected with the bankruptcy proceedings, cannot be litigated in such proceedings or adjusted in the distribution of dividends.

On Certificate by Referee Concerning Claim of Clara V. Illingsworth.

George L. Crawford, for Clara V. Illingsworth.
Arthur E. Weil, for trustee.

J. B. McPHERSON, District Judge. I regret to find myself compelled to disagree in part with the conclusions reached by the learned referee. As I look at the matter, no such question as the true amount of Clara Illingsworth's claim against the bankrupt was considered or decided in the opinion filed May 5, 1904, reported in 129 Fed., at page 841. All that is said there concerning the amount of her claim is mere narrative, in order to explain how the question arose that was decided, namely: Was Barbara Swartz so far disqualified from filing a petition in bankruptcy that the proceeding must be dismissed? The ground of her supposed disqualification was the alleged preferential payments that had been made to her, and these were held to be protected from attack by the lapse of time. I certainly had no intention of even appearing to sanction the wrong that had been done to Clara Illingsworth by the joint act of her agent and the son of Barbara Swartz, and I am unable to see that such an unintended result is necessarily involved in the decision, and has now become irrevocable under the doctrine of *res judicata*. I think, therefore, that the full amount of the claim in question should have been allowed, and to that extent the order of the referee must be reversed, with instructions to revise his scheme of distribution in accordance with this opinion.

But I agree with his conclusion that the equities between Barbara Swartz and Clara Illingsworth cannot properly be adjusted in this proceeding by deducting from the dividend payable to the former a sum that will make good to the latter the amount which she would have received under the agreement of January 20, 1903, if her claim had not been wrongfully reduced on the bankrupt's books. This is a dispute that has nothing to do with the bankruptcy proceedings, nor with the ascertainment of the true amount of the claim. It is a controversy growing out of a transaction that took place between these two persons before the petition was filed, and concerns a sum of money that came into Barbara Swartz's possession at that time, and has remained in her possession ever since. It is an independent controversy about the ownership of money that is not a part of the fund for distribution, and this court cannot take jurisdiction of the dispute and decide it in the roundabout manner that has been suggested. If Barbara Swartz has money in her possession that belongs to Clara Illingsworth, *ex æquo et bono*, the proper tribunal is open for an appropriate suit. To take other money from the former, and decree it to the latter in this proceeding, would be to confuse two distinct and separate suits having nothing to do with each other. Of the action in bankruptcy the district court has jurisdiction; but it has no jurisdiction of a suit to recover from Barbara Swartz any excess of payments that she may have received under the agreement of January 20, 1903. Such a suit is not involved in the settlement of the bankrupt estate.

The order of the referee refusing to allow a deduction of \$2,714.01, with interest, out of the dividend awarded to Barbara Swartz, is approved.

THE ALTA.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1905.)

No. 1,102.

1. COMMERCE—TONNAGE DUTIES—VESSELS SUBJECT TO DUTY.

A foreign-built vessel, owned entirely by a citizen of the United States, and entering a port of the United States from Manila, P. I., does not enter from a "foreign port or place," and is therefore not subject to tonnage duty under Rev. St. § 4219 [U. S. Comp. St. 1901, p. 2848], as amended by Acts June 26, 1884, c. 121, 23 Stat. 57, and June 19, 1886, c. 421, 24 Stat. 81 [U. S. Comp. St. 1901, p. 2850], nor is she subject to such duty under Act March 8, 1902, c. 140, 32 Stat. 54 [U. S. Comp. St. Supp. 1903, p. 349], extending such duties to "foreign" vessels entering from the Philippine Archipelago, since, while not "a vessel of the United States," because not entitled to registry, she is an American, and not a foreign, vessel, by virtue of the citizenship of her owner.

2. SAME—LIGHT MONEY—PROOF TO ENTITLE VESSEL TO EXEMPTION.

The fact that the affidavit and proof showing the American ownership of an unregistered vessel entered at a port of the United States required by Rev. St. § 4226 [U. S. Comp. St. 1901, p. 2855], to exempt such vessel from the payment of light money under the preceding section was not made by the owner or master at the time of the entry does not deprive the vessel of the right to the exemption where such proof in due form was made to the collector within a short time thereafter.

Appeal from the District Court of the United States for the Northern Division of the District of Washington.

In the libel of information filed by the appellant in the court below it is alleged that the barkentine in question "is a foreign vessel, of foreign build and manufacture, of 1289 tons net, which your informant believes, having been informed, that she was made and manufactured in Glasgow, Scotland," and that she entered the port of Port Gamble, Wash., on the 17th day of April, 1903, having come from the port of Manila, Philippine Islands, by the way of British Columbia, and was, on the 30th day of April, seized by the collector of customs of the district of Puget Sound for failure to pay the tonnage dues alleged to have been imposed by statute, and for failure to pay the light money there provided for; it being also alleged that the vessel is not, by reason of any of the exceptions contained in the laws, treaties, or proclamations of the United States, exempt from the payment of such tonnage duties and light money, and the captain thereof failing, upon entry of the vessel, or at any other time, to take or make the oath or affidavit required by section 4226 of the Revised Statutes [U. S. Comp. St. 1901, p. 2855]. The libel further alleges that by reason of the facts stated the vessel became forfeited to the United States, and that she, her boats, tackle, apparel, and furniture, and her owners, became liable to the government in the sum of \$644.50 tonnage dues under section 4219 of the Revised Statutes [U. S. Comp. St. 1901, p. 2848], and in the further sum of \$77.34 by virtue of the act of June 19, 1886, and in the further sum of \$644.50 by virtue of section 4226 of the Revised Statutes, no part of which has been paid, and all of which the vessel, her captain, owners, and agents, refused to pay. In consequence of which the government sought the usual decree of condemnation and sale. The libel was answered by D. H. Ward, the sole owner of the barkentine, who is a citizen of the United States, residing at Manila. In his answer the claimant admitted "that the defendant, the barkentine Alta, is a foreign vessel, of foreign build and manufacture, of 1,289 tons net, and that she was made and manufactured in Glasgow, Scotland"; but the claimant in his answer further alleges:

"(1) That said barkentine Alta was built in Glasgow, Scotland, in the year 1900, and prior to and on the 7th day of February, 1903, was owned by the Philippine Shipping Company, a corporation organized and existing under and

by virtue of the laws of the United States relating to the Philippine Archipelago, and on the 7th day of February, 1903, the said Philippine Shipping Company duly sold, transferred, and set over unto D. H. Ward, this claimant, the whole of the barkentine Alta, her tackle, apparel, and furniture, and thereupon executed and delivered a bill of sale of the said barkentine Alta, her tackle, apparel, and furniture, to this claimant, which said bill of sale was duly and properly executed.

"(2) That at said time said D. H. Ward was and now is a native-born citizen of the United States, and residing at Manila, Philippine Islands.

"(3) That thereupon, on February 10, 1903, the said barkentine Alta then and there being an unregistered vessel, owned by a citizen of the United States, to wit, this claimant, said claimant applied to the collector of customs of the United States for the Philippine Archipelago for the issuance to him of a certificate of ownership and a certificate of protection under the laws of the United States, and thereupon the said claimant delivered to the collector of customs of the United States for the Philippine Archipelago the bill of sale hereinbefore described; said bill of sale has been ever since and now is retained by said collector of customs; and thereupon and at said time this said claimant made and delivered to the said collector of customs an affidavit in the words and figures following, to wit:

"Affidavit.

"City of Manila, Philippine Islands—ss. Sall Alta.

"Personally appeared before me the undersigned, one D. H. Ward, who, being duly sworn, deposes and says: That he is a citizen of the United States of America, and that he acquired his citizenship in the following manner: by birth in the United States in the town of Columbia, state of California, in the year of 1858, and that he is a resident of the Philippine Islands.

"D. H. Ward.

"Sworn to and subscribed before me this 12th day of Febr'y, 1903.

"[Official Seal.]

Chas. Steinhiller.

"Empowered to administer oaths under the provisions of Sec. 21, Act No. 355."

"(4) That thereupon, in pursuance of the laws of the United States, said collector of customs of the United States for the Philippine Archipelago made and issued under his official seal to said D. H. Ward, as the owner of said barkentine Alta, the following certificate of ownership and the following certificate of protection:

"1st Cl. No. 430.

Original.

"Certificate of Ownership.

"I, W. Morgan Shuster, collector of customs for the Philippine Archipelago, do hereby certify that the within bill of sale, bearing date of 7 day of Febr'y., 1903, of the barkentine vessel called the Alta, 1,385.07 gross tons, 1,289.38 net tons, sold and transferred by the Philipp. Shippg. Co. to D. H. Ward of Manila, P. I., has been proved satisfactorily to me to have been duly executed, and I further certify that D. H. Ward herein mentioned as the purchaser of said vessel is a citizen of the United States, and a resident of the Philippine Islands.

W. Morgan Shuster,

"Collector of Customs for the Philippine Archipelago.

"[Official Seal.]

By H. B. McCoy,

"Deputy Collector of Customs for the Philippine Archipelago.

"Collector of Customs for the Philippine Archipelago.

"Port of Manila, P. I.

"Date Febr'y. 10, 1903.

"[50 ct. stamp attached and canceled.]"

"Certificate No. 1,858.

1st Cl. No. 430.

"Port of Manila, Philippine Islands.

"The United States of America.

"Philippine Islands.

"Certificate of Protection.

"In pursuance of executive order, approved July 3, 1899, by the President of the United States, H. Ward, residing at Manila, Philippine Islands, ceded

to the United States by Spain, on April 11, 1899, having sworn that he is a citizen of the United States and having sworn that he is the owner of the vessel called the Alta, and that said vessel was built in the year 1900, at Glasgow, Scotland, and that said vessel is a barkentine of 1,385.07 gross tons and 1,289.38 net tons, and that said vessel has one deck and four masts, and that her length is 69.06 ms., her breadth 13.45 ms., and her depth 6.10 ms., and that said vessel is engaged in legitimate trade. Therefore, said vessel is by this certificate entitled to the protection and flag of the United States.

"Given under my hand at the Port of Manila, Philippine Islands, this 10th day of Febry. in the year one thousand nine hundred and three.

"[Official Seal.]

[Signed] W. Morgan Shuster,

"Collector of Customs for the Philippine Archipelago.

"A true copy from the original.

W. Morgan Schuster.

"Collector of Customs for the Philippine Archipelago.

"By Letto P. Mobley,

"Chief Consular and Statistical Division.

"[50 ct. stamp attached and canceled.]

—Which said certificate of ownership and said certificate of protection and each of them have been ever since retained in the possession of the said claimant and the master of said vessel, though the originals thereof were at the time of the filing of the affidavit with the master of said vessel herein-after mentioned with the collector of customs at the port of Port Townsend, duly submitted to said collector for inspection.

"(5) That on or about the 20th day of February, 1903, said barkentine Alta cleared from the port of Manila, Philippine Islands, in ballast, and without carrying any cargo whatsoever, for a voyage to Port Townsend, Wash., being then and there owned by this claimant, as aforesaid, and carrying the said certificate of ownership and the said certificate of protection, as aforesaid, and on or about the 30th day of April, 1903, arrived at Port Townsend, the district of Washington aforesaid, and was thereupon seized by the collector of customs of the United States of the district of Puget Sound for the non-payment of tonnage dues and light money as is set out in the information of libel herein.

"(6) That on the arrival of said vessel at Port Townsend, and before her seizure as set out in said information of libel, the master of said vessel tendered to said collector of customs the sum of \$77.34 in payment of tonnage taxes, under the act of June 19, 1886.

"(7) That upon the seizure of said vessel for the causes set forth in said libel, and said W. Thonagel, the master thereof upon being advised of the cause of said seizure, duly filed with the collector of customs for the district of Puget Sound the affidavit required by section 4226 of the Revised Statutes, and in the words and figures following, to wit:

"State of Washington, District of Puget Sound, County of King—ss.

"W. Thonagel, being first duly sworn, on oath deposes and says: That he is, and for thirty years last past has been, a citizen of the United States, and that he is, and has been ever since the launching thereof, master of the barkentine Alta, and that during all the times herein mentioned all of the officers of said vessel have been and are now citizens of the United States. That the said barkentine Alta was built in the year 1900, at Glasgow, Scotland, and that on the 7th day of February, 1903, the whole of said barkentine Alta was sold and transferred by the Philippine Shipping Company to D. H. Ward of Manila, Philippine Islands. That the said barkentine is of 1,385.07 gross tons and 1,289.38 net tons measurement, and has one deck and four masts. That the said D. H. Ward is a native-born citizen of the United States, having been born in the town of Columbia, state of California, in the year 1858, and is now temporarily a resident of Manila, in the Philippine Islands. That on the 10th day of February, 1903, there was issued to the said D. H. Ward, the sole owner of said vessel, a certificate of protection, signed and under the seal of the collector of customs for the Philippine Archipelago, at Manila, a copy of which is hereto attached and marked "Exhibit A." That on the 10th day of February, 1903, there was issued to the

said D. H. Ward a certificate of ownership under the hand and seal of the said collector of customs, a copy of which is hereto attached, and marked "Exhibit B"; and there is hereto attached, marked "Exhibit C," a copy of the affidavit of the said D. H. Ward before the collector of customs at Manila, P. I., as to the citizenship of the said D. H. Ward. That on or about the 27th day of February, 1903, the said barkentine Alta, under the command of this affiant, cleared from the port of Manila, P. I., for the port of Port Townsend, in the district aforesaid, where she arrived on the 30th day of April, 1903. That soon after her arrival she was seized by the collector of customs for the district of Puget Sound for her failure to pay a duty of fifty cents per ton as light money under the provisions of section 4225, Revised Statutes of the United States. That the said D. H. Ward, the owner of said vessel, is now a resident of the said port of Manila, and is not within the district of Puget Sound; and that this affiant, as the master of said barkentine, makes this affidavit under the provisions of section 4226 of the Revised Statutes of the United States, for the purpose of relieving said vessel from the said duty of fifty cents per ton as light money. That the said barkentine Alta is an unregistered vessel, owned solely by the said D. H. Ward, a citizen of the United States, and is carrying the said certificate of protection issued as aforesaid from the custom house of the United States at Manila, P. I., and the said certificate of ownership issued from said custom house, proving the said vessel to be American property, and that the said certificate of protection and certificate of ownership possessed by said barkentine Alta contain the name of the said D. H. Ward, who is the sole owner of the said barkentine Alta. That no part of the said barkentine Alta has been sold or transferred since the date of such certificate of ownership and certificate of protection, and that no foreign subject or citizen has, to the best of the knowledge and belief of this affiant, any share, by way of trust, confidence, or otherwise, in such vessel, or any part thereof. That this affiant herewith submits to the said collector of customs of the district of Puget Sound the original of the documents, copies of which are hereto attached. W. Thonagel.

"Subscribed and sworn to before me this 14th day of May, A. D. 1903.

"[Notarial Seal.]

H. J. Ramsey,

"Notary Public in and for the State of Washington, Residing at Seattle."

The claimant, in his answer, admits the seizure of the vessel by the collector of customs, as alleged in the libel, for its failure to pay the moneys alleged to be due to the government, and admits that the vessel entered the port of Port Townsend from the port of Manila, and that she came by way of Victoria, British Columbia, but alleges that she did not enter at or clear from that port, and alleges that it is not true that the vessel is not, by reason of the exceptions contained in the laws, treaties, and proclamations of the United States, exempt from the payment of the dues and light money alleged to be due to the government, and that it is not true that the captain of the vessel failed to make the oath or affidavit required by section 4226 of the Revised Statutes.

The answer admits that there became due and owing to the United States the sum of \$77.34 under and by virtue of the act of Congress of June 19, 1886, c. 421, 24 Stat. 81 [U. S. Comp. St. 1901, p. 2850], which sum it is averred "has been heretofore tendered, and which said sum was before the filing of said information of libel and upon her (the vessel's) entry at the port of Port Townsend duly tendered to the collector of customs by the master of said vessel," but denies that either of the other sums claimed ever became due or owing to the government.

"Exceptions to this answer were filed by the United States in the court below, and, being by that court overruled, the government elected to stand upon the exceptions, and submitted to judgment against it, and has brought the case here for review."

Edward E. Cushman, Asst. U. S. Atty.

W. T. Dovell, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Section 4219 of the Revised Statutes [U. S. Comp. St. 1901, p. 2848] provides as follows:

"Sec. 4219. (Upon vessels which shall be entered at any custom-house in the United States, from any foreign port or place, there shall be paid the respective duties following: On vessels of the United States, thirty cents a ton; on vessels built within the United States, but belonging wholly or in part to subjects of foreign powers, sixty cents per ton; on foreign vessels entered in the United States from any foreign port to and with which vessels of the United States are not ordinarily permitted to enter and trade, two dollars and thirty cents per ton; on other vessels, thirty cents per ton: provided, that the President of the United States shall be satisfied that the discriminating or countervailing duties of any foreign nation to which such vessels belong, so far as they operate to the disadvantage of the United States, have been abolished; otherwise, eighty cents per ton: and provided, that nothing in this section shall impair any rights or privileges which have been or may be acquired by any foreign nation, under the laws and treaties of the United States, relative to the duty of tonnage on vessels.) (Upon vessels which shall be entered in the United States from any foreign port or place there shall be paid duties as follows: On vessels built within the United States but belonging wholly or in part to subjects of foreign powers, at the rate of thirty cents per ton; on other vessels not of the United States, at the rate of fifty cents per ton. Upon every vessel not of the United States, which shall be entered in one district from another district, having on board goods, wares, or merchandise taken in one district to be delivered in another district, duties shall be paid at the rate of fifty cents per ton. Nothing in this section shall be deemed in any wise to impair any rights or privileges which have been or may be acquired by any foreign nation under the laws and treaties of the United States relative to the duty of tonnage on vessels. On all foreign vessels which shall be entered in the United States from any foreign port or place, to and with which vessels of the United States are not ordinarily permitted to enter and trade, there shall be paid a duty at the rate of two dollars per ton; and none of the duties on tonnage above mentioned shall be levied on the vessels of any foreign nation if the President of the United States shall be satisfied that the discriminating or countervailing duties of such foreign nations, so far as they operate to the disadvantage of the United States, have been abolished. In addition to the tonnage-duty above imposed, there shall be paid a tax, at the rate of thirty cents per ton, on vessels which shall be entered at any custom-house within the United States from any foreign port or place; and any rights or privileges acquired by any foreign nation under the laws and treaties of the United States relative to the duty of tonnage on vessels shall not be impaired; and any vessel any officer of which shall not be a citizen of the United States shall pay a tax of fifty cents per ton.)"

The above section was amended by section 14 of the act of Congress of June 26, 1884, c. 121, 23 Stat. 57 [U. S. Comp. St. 1901, p. 2850], as follows:

"Sec. 14. That in lieu of the tax on tonnage of thirty cents per ton per annum heretofore imposed by law, a duty of three cents per ton, not to exceed in the aggregate fifteen cents per ton in any one year, is hereby imposed at each entry on all vessels which shall be entered in any port of the United States from any foreign port or place in North America, Central America, the West India Islands, the Bahama Islands, the Bermuda Islands, or the Sandwich Islands, or Newfoundland; and a duty of six cents per ton, not to exceed thirty cents per ton per annum, is hereby imposed at each entry upon all vessels which shall be entered in the United States from any other foreign ports: provided, that the President of the United States shall suspend the collection of so much of the duty herein imposed, on vessels entered from any port in the Dominion of Canada, Newfoundland, the Bahama Islands,

the Bermuda Islands, the West India Islands, Mexico and Central America down to and including Aspinwall and Panama, as may be in excess of the tonnage and light house dues, or other equivalent tax or taxes, imposed on American vessels by the government of the foreign country in which such port is situated and shall upon the passage of this act, and from time to time thereafter as often as it may become necessary by reason of changes in the laws of the foreign countries above mentioned, indicate by proclamation the ports to which such suspension shall apply, and the rate or rates of tonnage duty if any to be collected under such suspension. And provided further, that all vessels which shall have paid the tonnage tax imposed by section forty-two hundred and nineteen of the Revised Statutes for the current year, shall not be liable to the tax herein levied until the expiration of the certificate of last payment of the said tax. And sections forty-two hundred and twenty-three and forty-two hundred and twenty-four and so much of section forty-two hundred and nineteen of the Revised Statutes as conflicts with this section, are hereby repealed."

The last-mentioned section was so amended by section 11 of the act of June 19, 1886, c. 421, 24 Stat. 81 [U. S. Comp. St. 1901, p. 2850], as to read as follows:

"Sec. 11. That section fourteen of 'An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying-trade, and for other purposes,' approved June twenty-sixth, eighteen hundred and eighty-four, be amended so as to read as follows:

"Sec. 14. That in lieu of the tax on tonnage of thirty cents per ton per annum imposed prior to July first, eighteen hundred and eighty-four, a duty of three cents per ton, not to exceed in the aggregate fifteen cents per ton in any one year, is hereby imposed at each entry on all vessels which shall be entered in any port of the United States from any foreign port or place in North America, Central America, the West India Islands, the Bahama Islands, the Bermuda Islands, or the coast of South America bordering on the Caribbean Sea, or the Sandwich Islands, or Newfoundland; and a duty of six cents per ton, not to exceed thirty cents per ton per annum, is hereby imposed at each entry upon all vessels which shall be entered in the United States from any other foreign ports, not, however, to include vessels in distress or not engaged in trade: provided, that the President of the United States shall suspend the collection of so much of the duty herein imposed, on vessels entered from any foreign port, as may be in excess of the tonnage and light-house dues, or any other equivalent tax or taxes, imposed in said port on American vessels by the government of the foreign country in which such port is situated, and shall, upon the passage of this act, and from time to time thereafter as often as it may become necessary by reason of changes in the laws of the foreign countries above mentioned, indicate by proclamation the ports to which such suspension shall apply, and the rate or rates of tonnage-duty, if any, to be collected under such suspension: provided, further, that such proclamation shall exclude from the benefits of the suspension herein authorized the vessels of any foreign country in whose ports the fees or dues of any kind or nature imposed on vessels of the United States, or the import or export duties on their cargoes, are in excess of the fees, dues, or duties imposed on the vessels of the country in which such port is situated, or on the cargoes of such vessels; and sections forty-two hundred and twenty-three and forty-two hundred and twenty-four, and so much of section forty-two hundred and nineteen of the Revised Statutes as conflicts with this section, are hereby repealed."

By section 3 of the act of March 8, 1902, c. 140, 32 Stat. 54 [U. S. Comp. St. Supp. 1903, p. 349], Congress enacted:

"That on and after the passage of this act the same tonnage taxes shall be levied, collected, and paid upon all foreign vessels entering into the United States from the Philippine Archipelago which are required by law to be levied, collected, and paid upon vessels entering into the United States from foreign countries. * * *

It is, we think, quite manifest from the foregoing statutory provisions, that the tonnage tax there provided for is only to be levied on foreign vessels, or vessels coming from some foreign port or place. That the barkentine in question is not "a vessel of the United States" within the meaning of its statutes, is clear, for section 4131 of the Revised Statutes [U. S. Comp. St. 1901, p. 2803] in terms declares that:

"Vessels registered pursuant to law, and no others, except such as shall be duly qualified, according to law, for carrying on the coasting trade and fisheries, or one of them, shall be deemed vessels of the United States, and entitled to the benefits and privileges appertaining to such vessels; but they shall not enjoy the same longer than they shall continue to be wholly owned by citizens and to be commanded by a citizen of the United States. And officers of vessels of the United States shall in all cases be citizens of the United States."

"A vessel of the United States" therefore means more than a vessel whose nationality is American. It means such a vessel as is defined in section 4131 of the Revised Statutes, and no other. According to the averments of the libel itself, the barkentine *Alta* was not entitled to register here, for section 4132 of the Revised Statutes [U. S. Comp. St. 1901, p. 2805], provides:

"Vessels built within the United States, and belonging wholly to citizens thereof, and vessels which may be captured in war by citizens of the United States, and lawfully condemned as prize, or which may be adjudged to be forfeited for a breach of the laws of the United States, being wholly owned by citizens, and no others, may be registered as directed in this title."

But while the *Alta* was not "a vessel of the United States," as spoken of and defined in its statutes, she was an American vessel because of the nationality of her owner. *The Merritt*, 17 Wall. 585, 21 L. Ed. 682; *United States v. Jenkins*, 26 Fed. Cas. 603; *The San Jose Indiano*, 2 Gall. 268, Fed. Cas. No. 12,322; 25 Am. & Eng. Encyc. of Law (2d Ed.) pp. 863, 864. Having come from Manila, which is not a "foreign port or place" (*The Diamond Rings Case*, 183 U. S. 176, 22 Sup. Ct. 59, 46 L. Ed. 138), the *Alta* was not subject to the tonnage tax prescribed by section 4219 of the Revised Statutes, as amended by the acts of 1884 and 1886, and, not being a foreign vessel, she was not subject to the tax prescribed by section 3 of the act of March 8, 1902, above quoted. Even if she could be regarded as a British vessel, by reason of the fact that she was built in Scotland, she would be exempt from the tonnage tax here claimed by the government because of that provision of the treaty between the United States and Great Britain of July 3, 1815, providing that:

"No higher or other duties or charges shall be imposed in any of the ports of the United States on British vessels than those paid in the same ports by vessels of the United States; nor in the ports of any of His Britannic Majesty's territories in Europe, on the vessels of the United States, than shall be payable in the same ports on British vessels."

The contention that the government was entitled to light money under the provisions of section 4225 of the Revised Statutes [U. S. Comp. St. 1901, p. 2855] is not, in our opinion, well founded, in view of the facts shown by the pleadings. That section declares:

"A duty of fifty cents per ton, to be denominated 'light money,' shall be levied and collected on all vessels not of the United States, which may enter

the ports of the United States. Such light-money shall be levied and collected in the same manner and under the same regulations as the tonnage duties."

But the next section (Rev. St. § 4226 [U. S. Comp. St. 1901, p. 2855]) provides that:

"The preceding section shall not be deemed to operate upon unregistered vessels, owned by citizens of the United States, and carrying a sea-letter, or other regular document, issued from a custom-house of the United States, proving the vessel to be American property."

It is true that the last-mentioned section proceeds to declare that:

"Upon the entry of every such vessel from any foreign port, if the same shall be at the port at which the owner or any of the part owners reside, such owner or part owners shall make oath that the sea-letter or other regular document possessed by such vessel contains the name or names of all the persons who are then the owners of the vessel; or if any part of such vessel has been sold or transferred since the date of such sea-letter or document, that such is the case, and that no foreign subject or citizen has, to the best of his knowledge and belief, any share, by way of trust, confidence, or otherwise, in such vessel. If the owner or any part owner does not reside at the port or place at which such vessel shall enter, then the master shall make oath to the like effect. If the owner or part owner, where there is one, or the master, where there is no owner, shall refuse to so swear, such vessel shall not be entitled to the privileges granted by this section."

It is true that the proof of the facts exempting the *Alta* from light money was not made by her owner or master at the time of her entry at Port Gamble, but such proof was made to the collector of that port within a few days after such entry, and was shown to the court below; which, in our judgment is sufficient. As said by Judge Benedict in the case of *The Miranda* (D. C.) 47 Fed. 815, the intent of section 4226 of the Revised Statutes is that the fact that the vessel is American property shall exempt her from liability to pay light money; and in reply to a similar objection made in that case Judge Benedict further said:

"The law is complied with if the fact be shown to the collector by any competent evidence. Moreover, the fact has been duly proved before the court in this case, and is not denied. How can this court be asked to condemn this vessel to pay light money, in face of the fact proved that she is an unregistered vessel, owned by a citizen of the United States, when the declaration of section 4226 is that such a vessel so owned is not liable to pay light money?"

That the government was entitled to the 6 per cent. tax imposed by the act of June 19, 1886, amounting to \$77.34, is conceded by the appellee; but, as the same concession was made in the appellee's answer, the modification of the judgment which must be made should be without costs to the appellant.

The judgment will be so modified as to award the government the \$77.34, without costs, and, as so modified, it will stand affirmed.

NEW ENGLAND WATER WORKS CO. et al. v. FARMERS' LOAN & TRUST CO. et al.

(Circuit Court of Appeals, Seventh Circuit. February 7, 1905.)

No. 1,073.

1. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.

Where a bill against numerous defendants for the foreclosure of a mortgage alleged that certain property nominally owned by a defendant other than the mortgagor was within complainant's mortgage, under a clause covering after-acquired property, in which claim some, but not all, of the defendants were interested, such claim created a separable controversy, which rendered the cause removable by the defendant claiming ownership of the property; the requisite diversity of citizenship being shown between the parties interested therein.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, §§ 102, 103, 106.]

Separable controversy ground for removal of cause to federal court, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Valleytown Mineral Co.*, 35 C. C. A. 155.]

2. MORTGAGE—AFTER-ACQUIRED PROPERTY—EXTENSIONS OF WATER PLANT.

A water company owning a plant and a franchise for supplying water to the inhabitants of a city executed a mortgage to secure an issue of bonds largely in excess of its then indebtedness, a part of which were to be retained by the trustee, and issued only when required for the extension of the plant. The mortgage covered the company's property and franchises, and all extensions and additions thereto, and all after-acquired property. The reserved bonds were issued on the sworn certificate of the officers that extensions were to be made, and a new pumping station, necessary to obtain a supply of pure water and to fulfill the company's contract obligations to the city, was built, and mains extended therefrom and connected with those of the company. Such station and mains were nominally constructed and owned by a second company controlled by the same stockholder, but the station was equipped with the engine from the old station, and they had no purpose or function except to supply water to the pipes of the original company. *Held*, that they constituted the extensions and additions contemplated and provided for by the mortgage, and came within its lien, as after-acquired property, without regard to whether or not they were actually built with the proceeds of the bonds sold for the purpose.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

The bill on which the decree appealed from was based, filed originally in the Circuit Court of Madison County, Illinois, is by the Farmers' Loan and Trust Company, trustee, a corporation of New York, against the New England Water Works Company, a corporation of Rhode Island, the Alton Water Works Company, a corporation of Illinois, the American Loan and Trust Company, a corporation of Massachusetts, the United Water Works Company, a corporation of New York, the Boston Water and Light Company, a corporation of Maine, the International Trust Company, trustee, a corporation of Massachusetts, Charles A. Caldwell, trustee, a citizen of Illinois, and Anson A. Lyman, trustee, a citizen of Massachusetts.

The purpose of the bill is to foreclose a deed of trust executed by the Alton Water Works Company to the Farmers' Loan and Trust Company, to secure an issue of two hundred thousand dollars of bonds, one hundred sixty-nine thousand dollars of which were then outstanding, thirty-one thousand dollars being still held to take up the bonds issued under a prior mortgage to Caldwell, trustee. The property mortgaged was the franchises of the Alton Water Works Company, together with the plant, and all after acquired property.

The bill avers that subsequent to the execution of these mortgages, the Alton Water Works Company conveyed its property and franchises to the New

England Water Works Company, subject to the mortgages mentioned; that, thereupon, a year later, the New England Water Works Company executed its trust deed to the American Loan and Trust Company of Boston, purporting to cover all its property and franchises, to secure an issue of three hundred thousand dollars of bonds, two hundred thousand of which was to be reserved by the trustee to take up the bonds outstanding under the previous mortgages; that after the making of such mortgage, the mortgaged property was extended and enlarged by the installation of a new pumping station, on the banks of the Mississippi above the town of Alton, and the laying of mains connecting such pumping station with the water works system of Alton; and that such new pumping station and connecting mains were "after acquired property" within the meaning of the mortgages.

The bill sets forth that the Boston Water and Light Company claims to have an interest in the property described, particularly in the new pumping works; that the International Company claims to have an interest as trustee, in a mortgage by the Boston Company, on an issue of bonds by the Boston Company upon the property claimed by it; that the United Water Works Company claims to have a judgment lien for the sum of twenty-five thousand, sixteen dollars, and sixty-five cents, upon the property of the New England Company conveyed; and that Lyman claims to have a chattel mortgage lien upon the property conveyed. The bill denies the existence of any of these interests or liens, calls for strict proof thereof, and avers that whatever interests or liens such defendants may have, are subject and subordinate to the lien of the said trust deeds.

The prayer of the bill is, that an accounting be taken of the amount due on the bonds issued under the Caldwell trust deed, and of the amount due on the bonds issued under the Farmers' Loan and Trust Company deed; that the amount found to be due may be decreed to be a lien upon the property mortgaged, including all after acquired property; that the equitable ownership of the new pumping works, and connecting water mains, may be ascertained, and the amounts due thereon and paid thereon, provided for; and that it be decreed that after a day fixed for payment of the amount so found due, the property and franchises, including the after acquired property covered by the trust deeds, be foreclosed.

Thereupon, before any other pleadings were filed by it, the Boston Water and Light Company removed the case into the United States Circuit Court, for the Southern District of Illinois, the petition for removal averring that as between the Farmers' Loan and Trust Company, a citizen of New York, and the Boston Water and Light Company, a citizen of Maine, there was a separable controversy growing out of the Farmers' Loan and Trust Company's claim that the trust deed to it covered, in addition to the property specifically mentioned, the new pumping station and connecting water mains already mentioned; and a motion by the Farmers' Loan and Trust Company to remand having been overruled, the case went to hearing in the United States Circuit Court. Answers were filed by the Boston Water and Light Company, the Alton Water Works Company, the New England Water Works Company, the American Loan and Trust Company, the International Trust Company, Lyman and Charles A. Caldwell; and also a cross bill by Charles A. Caldwell, setting up the trust deed executed to him, and asking for its foreclosure. The answers admit the execution of the mortgages, the amount of bonds outstanding thereunder, the default in interest payments thereon; the answers of the Boston Company, the International Company, the Alton Company, Lyman, and the New England Company, denying that the new pumping station, with its connecting mains, are after acquired property within the meaning of the mortgages sought to be foreclosed. On the hearing on the issue thus made, the following facts were brought out:

The original water company in the city of Alton was the Alton Water Works Company. It had a franchise that ran until 1902. On this franchise, together with the plant, the company executed its trust deed to Caldwell, as trustee, to secure an issue of bonds not to exceed seventy-five thousand dollars.

In 1886, of the bonds thus authorized, forty-six thousand had been actually issued. At that time, the stock of the company was purchased by one C. H.

Vennor, who almost immediately caused the company to make the new mortgage in question for two hundred thousand dollars, to the Farmers' Loan and Trust Company, covering its property and franchises, and all extensions and additions thereto, and all after acquired property. In this mortgage it was provided that fifty thousand dollars of the new bonds should be retained by the trustee for future extensions and improvements; that one hundred and four thousand dollars should be issued forthwith to the company; and that forty-six thousand dollars should be retained by the trustee to take up the forty-six thousand dollars outstanding under the Caldwell mortgage.

Under this arrangement the one hundred and four thousand went to Vennor; the fifty thousand, on the sworn certificate of the president and secretary of the company that extensions were to be made, were delivered to Vennor; and fifteen thousand of the Caldwell bonds were taken up by fifteen thousand of the forty-six thousand in the trustee's hands.

In 1893, the Alton Water Works Company conveyed its property and franchises to the New England Water Works Company, subject to the mortgages mentioned. Thereupon, a year later, the New England Company executed its trust deed to the American Loan and Trust Company of Boston, covering all its property and franchises, to secure three hundred thousand of bonds, two hundred thousand to be reserved by the trustee to take up the bonds outstanding under the previous mortgages, and one hundred thousand to be issued to the New England Company. It is said by Vennor in his testimony, that the one hundred thousand thus issued to the company, were sold by him at par.

The property of the Water Works Company at this time consisted of a reservoir, or tank, a pumping station equipped with a Corliss pump, and about twenty-six miles of water mains. Other than a bill of two thousand dollars for current expenses, it is not shown that the earnings of the company did not meet the current expenses. The record traces into the hands of Vennor, as stockholder of the two companies, fifty thousand dollars of bonds issued for extensions, and the one hundred and four thousand issued to the Company. What was done with those bonds, or their avails, is not clearly shown. What is clear, however, is that under any honest financing, these bonds or their proceeds, except such as had already been utilized in improvements and extensions, would have been available for the improvements and extensions that the city was about to demand.

In 1897 the Water Works Company was informed by the city that the water distributed was contaminated above the pumping station, and was asked to take water from a point further up the river; as also that the water be improved by the use of a filter. Instead of making these changes, and installing, if necessary, a new pumping station in the right of the existing water company, and under an extension of its franchises, Vennor, who had control of the company, caused the Boston Water and Light Company, of which he also had control, to install, as a separate enterprise, the new pumping station, and to lay the necessary lines of pipe for that purpose; at the same time dismantling the pumping station of the old company, and transferring its machinery to the new; and joining the pipes of the new with the pipes of the old, in the city of Alton. To cover the supposed cost of this, the Boston Company executed to the International Trust Company of Massachusetts, a trust deed to secure the issue of two hundred thousand dollars of bonds, but eighty-five thousand of which were actually needed. And, thereupon, a contract was entered into between the two companies, that the New England Company, for the water thus obtained for distribution, should pay all the interest of the bonds thus issued, all the expenses of operating the pumping works, all taxes and insurance, and, in addition, five thousand dollars a year, to be applied as dividend on the capital stock of the Boston Company.

The next step taken by Vennor was to cause the New England Company to put upon its property a chattel mortgage for the sum of fifty thousand dollars, to Anson M. Lyman of Boston, June 5th, 1900, and then to cause the New England Company to execute a judgment note to the United Water Works Company, of which Vennor was also president, on which note a judgment was taken June 9th, 1900, against the New England Company. Thereupon in the County Court of Madison County, Illinois, a creditors bill was filed by the

United Water Works Company, and Taylor, an employ  of Vennor, appointed receiver. The defendants to the creditors bill, were the New England Company, the Alton Water Works Company, the American Loan and Trust Company, the Farmers' Loan and Trust Company, Lyman and Caldwell. Besides asking that the property and franchises of the New England Company be put under the management and administration of a receiver, the bill prayed for the sale of such property and franchises, and the distribution of the same among the creditors of the New England Company.

The Farmers' Loan and Trust Company appeared and answered; and on the next day, and in the same court, filed in an independent suit, the bill for the foreclosure now under review, bringing in, as additional parties defendant, the Boston Water and Light Company, and the International Trust Company.

The State Court had proceeded far enough to consolidate the two cases, and to extend the receivership in the New England case over the property ostensibly owned by the Boston Company, when the Boston Company, controlled by Vennor, removed the case into the United States Circuit Court, on the ground, as above stated, that as between it, a corporation of Maine, and the Farmers' Loan and Trust Company, a corporation of New York, there was a separable controversy respecting the question, whether the trust deed to the Farmers' Loan and Trust Company reached to, and covered, the new pumping station, filters, fixtures and water mains ostensibly belonging to the Boston Company.

In its decree of foreclosure, the Circuit Court found that there was due on the Caldwell mortgage, thirty-seven thousand, three hundred thirty-seven dollars, and twenty-two cents, exclusive of twenty-seven hundred dollars represented by past due coupons held by the C. H. Vennor Company; all questions relating thereto being reserved for further consideration. And that there was due on the Farmers' Loan and Trust Company mortgage, two hundred thirteen thousand, five hundred sixty-nine dollars, and twenty-one cents, exclusive of the thirteen thousand, nine hundred eighty dollars represented by past due coupons, held by the C. H. Vennor Company; all questions relating thereto being reserved for further consideration.

The decree further found that the transfers by the Alton Water Works Company to the New England Company, were subject and subordinate to the deeds of trust in suit; that the trust deed to the American Loan and Trust Company was subject and subordinate to the trust deeds in suit; that the trust deed to the International Company, by the Boston Company, was subject and subordinate to the trust deeds in suit; that the contracts between the New England Company and the Boston Company, relating to the supply of water from the new pumping works, were subject and subordinate to the trust deeds in suit; and that the new pumping station, with the connecting mains, including the land on which the station was situated, and all buildings, franchises and privileges relating thereto, were subject to the trust deeds in suit.

Thereupon it was ordered that unless the Alton Water Works Company, within thirty days after the entry of the decree, paid the sum thus found due—being exclusive of the past due coupons held by the C. H. Vennor Company as above stated—together with costs of suit, counsel fees, and other expenses, the property, including the pumping station with the connecting mains, should be sold as an entirety, in the manner therein described. It is from this decree that the appeal under review was prosecuted.

James Hamilton Lewis and S. S. Gregory, for appellants.

William Burry, for appellees.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge (after stating the facts as above) delivered the opinion:

The case turns chiefly, on two questions: Had the Circuit Court jurisdiction of the cause; and, jurisdiction being assumed, did the court rightly decree that within the meaning of the mortgage to Caldwell,

and the mortgage to the Farmers' Loan and Trust Company, the new pumping station, with its connecting mains, were after acquired property covered by the mortgages.

We are of the opinion that the court had jurisdiction. The whole case created by the bill of the Farmers' Loan and Trust Company, it is true, was the foreclosure of its mortgage, involving thereby all the questions that foreclosure would raise. But within that case as a whole—standing apart from the other questions and from the parties involved therein—was the controversy, between the Farmers' Loan and Trust Company on one side, and the Boston Water and Light Company, and its mortgagee, on the other, whether the mortgage covered the new pumping station, with its connecting mains, or not. To our minds, that controversy is a separable controversy. It involved, not all the questions involved in the foreclosure suit, but only one of them. It involved, not all the defendants to the foreclosure suit, but only the Boston Company, the International Company, and possibly the New England Company, under the latter's promise to pay the interest on the Boston Company's bonds. It had no relation to the questions, the interests, or the parties in the foreclosure suit as a whole, except to add something, that otherwise would have been extraneous, to the property available to the payment of the mortgage debts. And it is a controversy determinable, in and of itself, without reference to the other questions involved in the foreclosure case.

To such separable controversy, the party on one side was a citizen of New York, and on the other side, citizens of states other than New York. The United Water Works Company, a citizen of New York, is not a necessary party; for apart from its being a general creditor, it had no interest in any of the property of the New England Company, except such as grew out of the judgment lien; and the judgment lien of the United Water Works Company did not extend to the new pumping station and mains; for, in the absence of statute to the contrary, judgment liens do not extend to equitable interests; and the New England Company had, at most, only an equitable interest in the new station and mains. *Morsell et al. v. First National Bank*, 91 U. S. 357, 23 L. Ed. 436. There is no statute in Illinois that changes this common law rule.

The parties to this separable controversy, therefore, having such diversity of citizenship as permits of removal, and the controversy being removed by a party entitled to make the removal, the whole foreclosure suit came with it into the court below. The arguments at bar, in this connection, lose sight of the difference in the language employed by the statute in relation to removal of separable controversies, and the language relating to the removal of cases generally. True it is, that to remove a case from the state into the federal courts on account of diversity of citizenship, the defendant—that is to say, as interpreted by the Supreme Court, all the defendants—must join in the removal. On the contrary, the removal of a separable controversy may be effected "by one or more of the defendants." *Chicago, Rock Island & Pacific R. R. Co. v. Martin*, 178 U. S. 247, 20 Sup. Ct. 854, 44 L. Ed. 1055.

This brings us to the question whether the new pumping station,

with the connecting mains, within the meaning of the mortgages in suit, are after acquired property; and if so, what equities, if any, have intervened that prevent the enforcement of the equitable lien of the mortgages thereon.

The mortgages purport to grant, as security to the bonds, all the pipes laid in the streets of the city of Alton, including their extensions; the franchises and their extensions; the real estate on which the pumping station was located; and all pipes of every name, nature, or description, which were used, or which would be used, in operating the water company.

It is apparent from these provisions of the mortgage, and from the transactions already detailed in the issuing of bonds under the mortgage, that the mortgage transaction contemplated, not simply an existing water works system to remain as it then was, but a growing system, that would, from time to time, require new expenditures for extensions. And the bonds, for which provision in the mortgage was made were meant, not simply for the then present needs, but for such additional needs as would be occasioned by the future growth and extension of the city. The mortgage transaction, in short, was one that looked forward, as well as to the present; providing, primarily, for the financing of the future as well as of the present. What constitutes, in case of such a mortgage, "after acquired property," turns upon the question whether the particular property, said to be after acquired within the meaning of the mortgage, fairly and reasonably comes within the contemplated additions and extensions for which financial provision has been made. *Wade v. Chicago, Springfield, etc., R. R. Co.*, 149 U. S. 327, 13 Sup. Ct. 892, 37 L. Ed. 755.

With this test in mind, the case before us is without difficulty. The Alton and New England Companies were under franchise agreement to furnish the people of Alton with water. Unquestionably this engagement required that the people of Alton should be furnished, so far as that was possible, with water not unhealthful. The old pumping station had ceased to meet that requirement. The removal up the river, therefore, to a point where healthful water could be obtained, was but the fulfillment of a franchise obligation.

The new station was erected on land purchased by an officer of the New England Company, and as such officer; and was equipped in its main essential, the Corliss engine, with property belonging to the New England Company, removed from the old station; and the evidence satisfies us that the provision for bonds under the then existing mortgages, honestly carried out, would have met the expenditures necessitated by such removal.

To these facts can be added another: The new pumping station, with its connecting mains, had no relation, substantially, to any new scheme of water distribution, or to the distribution of water over any territory not embraced in the New England Company's system. The sole function of the new station, with its connecting mains, was to supply the old company with the quality and quantity of water that, to fulfill its public undertaking, the old company was obliged somewhere to obtain. The old company remained the water company of the city, obliged, under its franchise, to distribute healthful water. The new

station was but a new mouth and throat to this old system. The organization of the Boston Company, and the creation in its name of the new pumping station with the connecting mains, was nothing less, and nothing more, than an attempt by Vennor, through corporate manipulation, to sever from this old water company, the mouth and throat through which, alone, that company could fulfill its franchise obligations.

Here, then, in a sentence, is the whole case: A mortgage on a necessarily expanding water works system—looking forward, as well as to the present, and contemplating that the new property, as fast as created, shall be drawn under the mortgage; a requirement that new property be created, constituting, in connection with the old property removed, the mouth and throat of the whole enterprise; and, finally, the actual creation of such new property, having no function other than to act as mouth and throat for the old. Can any one doubt, that under such circumstances the new property, whatever may be the legal form given to it, is equitably but after acquired property, within the meaning of the mortgage? Does not such a case, on its physical aspects alone, constitute a case of after acquired property?

Thus viewed, we need not concern ourselves with the question whether the new station was actually built out of bonds issued under the prior mortgages, or not. It is enough that the mortgage bond issue contemplated just such extensions. Nor need we concern ourselves with the question whether the bonds issued by the Boston Company to the International Company have been sold or not. The status of the new station as after acquired property does not, on facts such as are disclosed here, turn on the source from which the money was actually obtained. It is enough, that upon the physical facts visible to the whole world, and the provisions of the mortgage open to the whole world, there is made out a case that, within any fair interpretation of the mortgage transaction, necessarily includes the new pumping station and mains as an integral part of the water works system mortgaged, and therefore, equitably, a part of the property mortgaged.

The decree of the Circuit Court is affirmed.

PAINE v. GERMANTOWN TRUST CO.

(Circuit Court of Appeals, Eighth Circuit, March 13, 1905. On Rehearing, April 13, 1905.)

No. 2,111.

1. TAXATION—ASSESSMENT—DESCRIPTION OF LAND—SALE.

An assessment of land for taxes, describing it as the N. W. $\frac{1}{4}$ of section 9, under a caption in the assessor's book "Real Property Assessed for the Township of Dahlen, County of Nelson, and State of North Dakota," but containing no range or government surveyed township number, was insufficient to support a sale thereof.

2. SAME—PAROL EVIDENCE.

Where the description of property sought to be assessed for taxes was fatally defective, in that it contained no township or range number, parol

evidence was inadmissible to show that a township "named" in the assessment embraced a certain specified government surveyed township of a certain range.

3. SAME—TAX DEED—OBJECTIONS—STATUTES.

Where a tax assessment was wholly void for want of a sufficient description of the property, a sale of the land for the taxes so levied and the tax certificate issued to the purchaser was void, notwithstanding Laws N. D. 1890, p. 404, c. 132, § 72, limiting the grounds of attack on the certificate of purchase at a tax sale.

4. SAME—STATE BOARD OF EQUALIZATION—LEVY—PERCENTAGES—STATE DECISIONS—FEDERAL COURTS.

A ruling by the Supreme Court of North Dakota that its state board of equalization was entitled to levy taxes in percentages under the statutes of that state would be followed in the federal courts with respect to land located in that state and sold for taxes there assessed.

[Ed. Note.—State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

On Rehearing.

5. TAXATION—REDEMPTION—EQUITY.

Where a bill was filed to determine the validity of successive tax levies and certificates issued under tax sales, and to have the deeds made or threatened to be made thereon set aside as casting clouds on title, the court having obtained jurisdiction of the whole matter and found that several of the assessments were void, complainant, being entitled to redeem as to the only valid assessments at the time the bill was filed and having offered to do equity, was not deprived of the right to a decree quieting his title by the termination of his right to redeem pendente lite.

6. SAME—VOID SALE—TENDER OF TAXES.

Where a tax sale of land was void, the payment of the taxes by the purchaser was the act of a mere volunteer, so that the landowner was not bound to pay the taxes and interest so paid by such purchaser as a condition to his right to have the purchaser's certificates and deeds vacated.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 1612.]

Appeal from the Circuit Court of the United States for the District of North Dakota.

In January, 1890, one William Ottinger, of Philadelphia, Pa., died testate, owning the N. W. $\frac{1}{4}$ of section 9, township 154, range 57 W., Nelson county, N. D. The designated trustees under the will of said Ottinger by death and resignation retired from the testatorship thereunder, and the appellee in due form of law became the administrator of the estate with the will annexed, and under proper proceedings became the ancillary administrator in said Nelson county, state of North Dakota. Under certain foreclosure proceedings of a mortgage and mesne conveyances the Germantown Trust Company became possessed of the legal title to said real estate for the use and benefit of said estate, and thereupon brought its bill in equity, alleging that the appellant under certain sales of said land for delinquent taxes for certain designated years had obtained tax deeds, and held tax certificates of sale on which he was threatening to proceed to obtain deeds to said land. The validity of said deeds and tax certificates were assailed for reasons which will appear in the following opinion. The prayer of the bill was to remove said tax deeds and certificates of sale as clouds on appellee's title, and to enjoin the appellant from taking further steps to obtain deeds under maturing certificates. On the proofs the court found and decreed that the deed obtained on sale of the lands for the year 1891 was null and void, and ordered the same canceled from the records of the county; that the tax certificate issued to the appellee on November 20, 1896, on sale for taxes for the year 1895 was wholly void, and the certificate was ordered canceled from the records of the county; that

the tax certificates held by appellant on tax sales for the years 1897, 1899, and 1900 were valid. But, after finding and stating the amount of taxes, interest, and penalties paid by appellant thereon, and what had accrued thereafter, aggregating the sum of \$201.96, the court ordered that said sum should be paid by appellee within five days after the entering of the decree, upon the payment of which the appellant should stand restrained and enjoined from asserting or attempting to assert any claim, right, or title to the premises by virtue of the tax certificates so found to be valid, or by virtue of the taxes paid by him on said premises, and that upon the payment of said sum the county auditor of Nelson county be restrained and enjoined from issuing to said Paine any tax deed or deeds upon the certificates aforesaid, and from taking any steps or action in relation thereto, except to cancel the same from the records, and that, in the event of the failure on the part of the appellee to pay said sum of money within the period aforesaid, the appellant should have the right, and he might proceed, to perfect his title to said real estate under the tax certificates adjudged to be valid in the manner prescribed by law. From this decree the defendant below, J. A. Paine, has appealed.

Seth Newman, for appellant.

C. J. Murphy and Fred S. Duggan, for appellee.

Before SANBORN, Circuit Judge, and PHILIPS and RINER, District Judges.

PHILIPS, District Judge, after stating the case as above, delivered the opinion of the court.

Discussion as to the validity of the deed based on the assessment for the year 1891, on valuation of 1890, is rendered unnecessary, as counsel for appellant concedes in his brief that the description of the land given in said assessment and the amount based thereon "were absolutely void, and for the purpose of this appeal it may be eliminated from consideration."

The tax certificate issued November 20, 1896, based on tax of 1895, assessment roll of 1894, is assailed for invalidity of description of the land. The assessment roll is as follows:

"Real Property Assessed for the Township of Dahlen, County of Nelson, and State of North Dakota for the Year 1894.

Owners' Name.	Description.	Sec. or Lot.	Twp. or Range.	Blk.
F. W. Iddings	N. W. 1-4	9"		

It will be observed that under the heading "Twp. or Range" the description is blank. Neither township nor range is given. The validity of this assessment is controlled by the decision of the Supreme Court of North Dakota in *Sheets v. Paine*, 10 N. D. 103, 86 N. W. 117, involving the claim of this same appellant to lands in the same county, under a description in the assessment roll better, if anything, than the one in question. Notwithstanding in that case the assessment list itself, perhaps, was sufficient to show that Andrew Lewis, the reputed owner of the land, owned land in sections 18 and 19, and although these sections were located in township 150, range 58, yet the assessment, tax certificate, and deed based thereon were held to be absolutely void, because "it is impossible to determine by an inspection of this assessment either town or range in which the lands in question are situated."

Counsel for appellant seeks to differentiate the case under review

from that by directing attention to the fact that the land here is designated by the caption in the assessor's book, to wit, "Real Property Assessed for the Township of Dahlen, County of Nelson, and State of North Dakota for the Year 1894." Aside from the suggestion made in appellee's brief that the assessment roll in the Sheets Case contained a like heading, and has caused to be filed here a certified copy of the record in that case from the clerk's office of the Supreme Court of North Dakota showing that fact (which we need not consider), it is to be assumed that the assessor's book, giving a list of the names of the owners and the lands set opposite their names, naturally had some heading as to the proper name of the township in which the land was situated. The name of "Dahlen" would not, ipso facto, advise the court of the congressional township and range in which section 9 was located. In the Sheets Case the defendant, as in this case, undertook to cure the infirmity on the face of the description by evidence aliunde to the effect that the lands opposite the name of Lewis were in fact in township 150, range 58. The appellant here sought to show by parol evidence that Dahlen township embraced the government surveyed township 154 of range 57. Of this the court said in the Sheets Case:

"To cure this glaring omission in the assesment, the defendant, against objection, introduced oral evidence tending to show that the lands opposite the name of Andrew Lewis were in fact located in congressional township numbered 150 of range 58. This evidence was wholly incompetent to supply a radical defect in description in an assessment. An assessment of land is required to be written in a public record, and all subsequent steps in the process of laying the tax relate back to such written description. This rule is no longer open to debate in the courts of this state. In *Power v. Bowdle*, 3 N. D. 107, 54 N. W. 404, 21 L. R. A. 328, 44 Am. St. Rep. 511, this court said: 'There can be no such thing as a parol assessment of land. The law requires a definite record, and no other evidence of the assessment is competent.' To this may be added that the rights of a purchaser at a tax sale are fixed at the time of his purchase, and his title depends upon the validity of the proceedings had anterior to the purchase. Nor can his rights be enlarged by any evidence introduced to supply fatal omissions which constitute defects which are fundamental and jurisdictional to the tax."

Contention in the Sheets Case was made, as in the brief of appellant here, that the statute gave such force to the certificate of purchase at the tax sale as to limit the grounds of attack, such as do not include the method adopted by appellee. Of this the court said:

"Appellant's counsel cites section 72, c. 132, p. 404, Laws 1890, and argues that the deed can only be attacked upon grounds named in said section as grounds upon which a tax sale can be attacked. The tax sale and certificate are not directly assailed in this case. The certificate has merged in the deed, and has been surrendered, and defendant stands on a tax deed. He has no rights which are assured by the certificate. But the certificate issued on the sale would, upon grounds already stated, be as worthless and inoperative as the deed, and, upon the proof in this case, would therefore be ineffectual as a lien if no deed had been issued. * * * The sale and tax certificate issued thereon are void, and said certificate is therefore not a lien upon the lands in suit. It is beyond the power of the Legislature to either transfer land or incumber it by a lien under the pretense of a sale for delinquent taxes in a case where no valid tax has been assessed or levied."

In answer to the contention of the defendant in that case that, as he had redeemed the lands from such sale, he was entitled to have the sum paid created as a lien on the land superior to that of the plaintiff, the court said:

"The defendant had no right to make such redemption or to pay such taxes, other than the rights which he acquired under the tax deed and tax certificate, which have been considered and held to be worthless. The defendant, therefore, was, as to these lands, a mere volunteer. He may have paid the taxes and redeemed the land in good faith, but this does not change his legal relation to the land; nor does such good-faith payment enable the court in this action to fasten a lien upon the lands superior to the plaintiff's mortgage lien. Defendant's remedy, if any, is against the county."

In respect of the assessments of the lands for 1897-98, the description was held by the Circuit Court to be sufficient. There was, therefore, left to be considered only the objection made by appellee that the levy by the State Board of Equalization was made in percentages, instead of specific amounts. It had been the established holding of the Supreme Court of North Dakota, when this suit was brought, that a levy of taxes made by county commissioners in percentages rendered the sales and deeds based thereon absolutely void. *Wells County v. McHenry*, 7 N. D. 246, 74 N. W. 241; *Dever v. Cornwell et al.*, 10 N. D. 123, 86 N. W. 227. It was, therefore, apparently natural for the profession to assume that this ruling applied as well to the action of the State Board of Equalization. But, pending this suit, the Supreme Court, in *Fisher v. Betts*, 96 N. W. 133, differentiated the action of the assessment made by county commissioners from that of the State Board of Equalization, and held that a levy in percentages by the latter is valid. Without discussing the reasons for this distinction, it is sufficient that the statute is so construed by the Supreme Court of the state, which ruling this court will follow. It results, therefore, that there was no error in the action of the Circuit Court in adjudging the tax deed for taxes levied for the year 1891, and the tax certificates issued on the taxes for the year 1895, to be invalid.

The only remaining question to be considered is as to that part of the decree which, after finding that the tax certificates held by appellant for sales made in 1898 and 1899 are valid, ordered that on the payment of the taxes paid on said land by appellant, together with all penalties and interest, amounting in the aggregate to \$201.96, within five days after entering the decree, the appellant should stand perpetually enjoined, etc. It appears that, pending this suit, notwithstanding the bill alleged that appellant was threatening to have the auditor issue a warning order fixing a time for the redemption of the land, and that the appellant was seeking to obtain a deed which would foreclose the right of the appellee to redeem, the appellant did cause said auditor to issue such warning order for the foreclosure of appellee's right of redemption, whereby the appellant claims that the right to a deed has ripened. The insistence of appellant now is that, when the Circuit Court found the last certificates of sale valid, the only decree it could make was a dismissal of the bill as to such certificates, thereby remitting the

appellee to the operation of the statutory method of redemption, feeling assured that in the present status of the case the day of grace is gone for redemption.

A court of equity, with its plenary power for administering exact justice, will not permit such a coup de main as attempted by appellant, pending the controversy within its jurisdiction, to obtain such an unconscionable advantage. The appellee had the right to appeal to the court to have the validity of the tax deeds and certificates determined and annulled, if invalid, as casting clouds on its title. As to several of them, the court rightly found they were invalid, and decreed their annulment. The state of the rulings of the local court at the time the suit was brought was such as to warrant the belief that the appellee in good faith assailed the validity of all of the certificates. Recognizing the obligation of him who seeks equity to do equity, the complainant below very properly stated in the 22d paragraph of the bill:

"That in case it shall be adjudged and determined that any of the claims of the defendant, Paine, to said real estate on account of taxes paid thereon by him, or on account of tax certificates thereon held by him, or otherwise, are valid, that it stands ready and willing to repay to said defendant any and all sums and amounts paid out by him on account thereof, with reasonable interest thereon."

And in the prayer of the bill (paragraph 24) it is stated:

"That in case any of the claims or demands of said defendant, Paine, for or on account of taxes paid upon said premises, or tax certificates or demands held by him against the same, be declared valid, that your orator be permitted to pay and discharge the same, with reasonable interest. And your orator asks for such other and further relief in the premises as may be just and proper."

What more could the appellee do? Its bill challenged the validity of the taxes. It could not be known until the end of the litigation what amount, if any, would be required to be paid. The bill, therefore, offered to do all the appellant could have rightly demanded at the time it was filed; that is, to pay to him whatever amount of taxes, interest, and penalties the court might find to be justly due to the appellant. The decree, when made, had relation back to the status of the rights of the parties as they existed when the suit was instituted, and no intermedial act of the appellant, dehors the court, could intercept its operation. A court of equity, after acquiring jurisdiction over the parties and subject-matter, does not administer justice by halves. It stops not short of adjusting to a finality the full rights and interests of both parties which pertain to the subject-matter brought by the bill and the answer within its jurisdiction, and "thus do complete justice to all the litigants, whatever may be the amount or nature of their interest, in the single proceeding, and thus bring all possible litigation over the subject-matter within the compass of one judicial determination." *Pomeroy's Equity*, vol. 1, pars. 181-242.

The decree of the Circuit Court is affirmed, with directions, on entering the mandate herein, to allow the appellee five days there-

after in which to pay the sum awarded, by the decree appealed from, to be paid to the appellant.

On Rehearing.

In the motion for rehearing counsel for appellant complains of the statement, made in the opinion filed herein, to the effect that pending this suit the appellant caused the county auditor to issue a notice, designated in the opinion as "a warning order," fixing a time in which the appellee should redeem the land from taxes, whereby the appellant sought to obtain a deed to the land foreclosing the right of redemption. The writer of the opinion is frank to concede that he was led into the statement as to the time when said action was taken by the appellant from the statement made in appellee's brief; and, although counsel for appellant filed a reply brief, he did not controvert the fact. Naturally enough, therefore, the statement was assumed to be correct. It is claimed on the motion for rehearing that the said notice was in fact given prior to the institution of this suit to have the certificates set aside and the execution of the deeds enjoined.

Let it be conceded, for the purposes of this motion, that appellant is correct. It in no degree should modify the conclusion reached by the court, to wit, that inasmuch as the purpose of the bill was to have determined the validity of the successive tax levies made and certificates issued under sales for delinquent taxes, and the deeds made or threatened to be made thereon, set aside as casting clouds on the title, finding several of the assessments void, the court rightly decreed that the certificates and deeds based thereon should be nullified; that, the court having obtained jurisdiction over the whole subject-matter, it would retain jurisdiction to the end of doing full and complete justice between the parties and settle the whole controversy. So, notwithstanding on final hearing it transpires that as to the last assessments they were good, the court would regard the rights of the parties as they stood at the time of the institution of this suit; and as at that time the complainant had the right to redeem, and having offered in the bill to do equity by paying all the taxes found to be justly due and owing, with all interest and penalties, the rights of complainant at the time of entering the decree should have relation back to the date of the suit. To that rule of instinctive justice we adhere.

It is now insisted in the motion for rehearing that the Circuit Court and this court should have required, as a condition to the decree respecting the other assessments, etc., that the appellee pay to appellant the taxes, with interest paid out by him on the void assessments, certificates, and deeds. The quotation made in the former opinion herein from the decision of the Supreme Court of North Dakota in *Sheets v. Paine*, 10 N. D. 103, 86 N. W. 117, effectually answers this contention. The assessment being void, the appellant, Paine, was a mere volunteer, paying the taxes without the authority either of the landowner or the law. He could, therefore, acquire no lien in law or equity on the property for the sums

bid and paid by him. Therefore, as said by the Supreme Court of North Dakota, if he have any remedy at all, it is against the county, and not against the owner of the land, whose title he sought to acquire for the inconsequential sum of the taxes.

The motion for rehearing is denied.

LAZARUS v. BARBER et al.

(Circuit Court of Appeals, Second Circuit. March 8, 1905.)

No. 119.

1. SHIPPING—INJURY TO GOODS—CAUSE OF DAMAGE—EVIDENCE—REVIEW.

Where, on a libel for damage to cargo, the trial judge saw none of the witnesses and the controversy involved a sharp conflict of evidence on the issue of the cause of the damage, the entire record will be examined on appeal.

2. SAME—BURDEN OF PROOF.

Where the evidence shows that the damage to a cargo was occasioned by one of the causes for which the vessel was exempted from liability, in the absence of some fault, such as negligent stowage, the burden is on the libellant to show that it might have been prevented by reasonable skill and diligence on the part of the servants of the vessel.

3. SAME—EVIDENCE.

On a libel for damage to a shipment of green goatskins, evidence *held* to justify a finding that the injury was caused by brine leaking from citron barrels negligently stowed near the skins.

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 124 Fed. 1007.

This is an appeal from a final decree of the United States District Court for the Southern District of New York, in favor of libellant for cargo damage.

J. Parker Kirlin, for appellants.

Anson M. Beard, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The libellant is the assignee of bills of lading covering some 280 bales of goatskins, delivered to respondents' agents at Constantinople for shipment on the steamship Brand, chartered by respondents under a bill of lading which provided, *inter alia*, that the carrier—

"Shall not be liable for * * * any loss or damage arising from the nature of the goods, * * * nor for any loss or damage caused by * * * decay, putrefaction, * * * sweat, * * * nor for any country damage."

The skins on arrival were found to be in a badly damaged condition. The libel alleged as the cause of said damage such negligent stowage in the hold of the vessel that the skins became wet—

"Either from the contact with water in the hold or from leakage through the decks, but in what precise way they took the water libellant cannot now say;

and they were farther more seriously damaged from the fact that they were negligently stowed in the hold under a large number of casks of citron, which for some reason became broken and badly leaked, and the fluid substance in the said casks dripped down upon the said skins in large quantities, and caused them to heat, sweat, sour, and rot, and rendering them unfit for market as prime goods."

The answer denied these allegations, and alleged that the damage "was caused by heat, sweat, or decay," within the exceptions of the bill of lading.

The goatskins in question are known as "salted skins," also spoken of herein as "green salted" or "dry salted" skins, as distinguished from dry or air cured or "flint dried" skins. They absorb moisture more readily than the latter class, and therefore reasonable care should be taken to stow them where they will be protected from dampness or from coming in contact with leakage from wet cargo. When loaded on board at Constantinople, "the general appearance was sweaty, like all salted hides," and they were receipted for as in good order and condition.

The facts as to stowage are as follows: In the bottom of hatches Nos. 3 and 4 were stowed manganese ore, covered with dunnage planks; on top of these planks were stowed 885 casks of pickled citron, extending from the after part of hatch No. 3 into the forward part of hatch No. 4. The skins were stowed in hatch No. 4, aft of the citron and next to it, and about six inches from the floor. There were no permanent bulkheads between the hatches, but between the barrels of citron and the skins was a temporary bulkhead, consisting of three inch planks placed up and down against the citron barrels and athwart-ship outside, a short distance apart, and leaving open spaces between, and aft of the bulkhead and next to the skins were some bamboo mats. The space between the barrels and skins was about six inches. No barrels of citron were stowed on or above the skins, and the bales of skins and the barrels were probably about on a level on top. Next aft of the skins in question was another shipment of bales of skins from Salonica, and next forward of the barrels of citron was another shipment of 200 bales of skins, neither of which was damaged. On top of the skins and citron were stored a quantity of bales of wool.

The court below found that the injury was due to the brine escaping from the citron barrels and its absorption by the skins, and that this was the result of the want of due care in the stowage of the skins. If this conclusion had been reached upon the testimony of witnesses before the court, we should be reluctant to disturb its finding upon this question of fact. But as the judge saw none of the witnesses, and as the controversy involves a sharp conflict of evidence, we have felt bound to examine the entire record, under the rule stated in *The Frey*, 106 Fed. 319, 45 C. C. A. 309.

Respondents base their appeal on the following contentions:

"(1) As the damage alleged in the libel is within the exceptions of the contract of carriage, and the exemption of the third section of the Harter act [Act Feb. 13, 1893, c. 105, 27 Stat. 445 (U. S. Comp. St. 1901, p. 2946)], the respondents should have been absolved from liability, unless it appears by a fair preponderance of the testimony that the damage complained of resulted from some fault or neglect on their part which is distinctly set forth in the libel.

"(2) The court below erred in holding that the skins became wet with brine from the barrels of citron.

"(3) The court erred in finding that there was an 'absence on the part of the respondents of the special care that they were required to exercise [in stowage] by reason of the character of the cargo.'

"(4) The damage was caused by heating and sweating and decay, or by the inherent vice of the skins, within the meaning of the exceptions contained in the bills of lading and the third section of the Harter act."

In support of these contentions respondents rely on the fact that the bales of skins next forward of the barrels of citron were not wet or damaged, and that there was no leakage on the manganese under the barrels, and that the bottom of the ship was dry. The established rule is that where the evidence shows that the damage was occasioned by one of the causes for which the vessel was exempted from liability, in the absence of some fault, such as negligent stowage, the burden is upon the libellant to show that it might have been prevented by reasonable skill and diligence on the part of those employed by the vessel. *Clark v. Barnwell*, 12 How. 272, 13 L. Ed. 985; *Cau v. Texas & Pacific Railway Co.* (194 U. S. 427, 432, 24 Sup. Ct. 663, 48 L. Ed. 1053.

But libellant contends, not only that the goods were negligently stowed, but that the character of the damage is such that it must have been caused by the brine from the citron, and could not possibly have occurred through any of the excepted causes in the bill of lading. In support of this contention the following facts appear to be proved: (1) Damage by sea water produces a dark blue color on the flesh side of the skins. (2) Heating or sweating or country damage produces a kind of reddish color on the flesh side of the skins.

The testimony of Lazarus, the libellant, Kutschbach, his manager, and of Cooper and Friel, experts, to this effect, is confirmed, except so far as concerns "country damage," by that of respondents' witness Parker, an expert appraiser. He was of the opinion that the damage was "country damage," he meaning thereby damage occurring from exposure to weather or rain, which took place prior to shipment, and therefore would have been apparent at the time of shipment. The testimony that in the course of decay these colors disappear and the skins become brown from rot does not materially help the respondents, because the evidence here shows that, even if the skins were brown, as testified to by some witnesses, they were not generally rotten, except in spots in some cases, and that the hair did not readily come off. It was not claimed that there was warmth or heat in the skins on arrival. It is not contended that the skins were damaged by sea water. The skins were neither of a dark blue nor reddish color. It would seem, therefore, that the damage was not due to any of the causes excepted in the bill of lading.

The bill of lading admitted that the skins were received in good condition. There is some intimation that the skins were not in good order when received, and that the mate of the vessel so stated. But he was not called, and no evidence was introduced to prove this point.

It did not appear that the damage was from the nature of the goods when received, for there is no proof that they were not properly cured, and the master testified they were in the condition in which such skins

were usually received; nor from decay or putrefaction, through heating or sweating or country damage, for they were not warm, the flesh side of the skins was not of a reddish color, and they were not sufficiently decayed to turn brown; no country damage was proved, and it appeared that, if there had been country damage, it would probably have been manifest when the goods were shipped. But as this is a close question, and it may not be clear that the conclusion is supported by a sufficient preponderance of testimony, we will further inquire whether the damage was caused by the dampness and wet from the citron brine due to negligent stowage.

There is a sharp conflict of testimony on this point. The libellant's witnesses swore that the skins were wet, and covered with slime inside and out, so that the normal weight of a bale of say 350 pounds was in some cases increased to 700 pounds. They testified that this slimy substance was not salty or briny, but sticky, and had a sweetish gummy taste. In fact, citron brine has no such taste, but is even more salty than sea water. Apparently the sweet taste referred to came from the contact of barrels and skins with crushed currants and raisins, which constituted about one-third of the cargo and had been spilled on the dock. The testimony of Kutschbach, libellant's main witness, is discredited by manifestly erroneous statements that the barrels of citron were piled on top of the skins and unloaded over them, and by extravagant testimony concerning broken and leaky citron barrels. The skins, however, were wet and damaged, and libellant's witnesses claimed to show this was due to leakage. Several witnesses swore they saw some of the casks leaking badly. It is proved that usually about half the casks in such importations leak, and that the casks lose about half or more of the brine, and that this leakage must have occurred during the voyage because, if it had occurred before shipment, the citron would rot.

The witnesses for the respondents swear that they saw only one or two barrels leaking. These leaks were claimed to be due to accidents in unloading. Vincent, respondents' clerk, who delivered the cargo, testified as follows:

"Q. Have you any independent recollection about them apart from your books? A. About the casks? Q. Yes. A. I kind of think they was about as good as we have had; in fact, better, because I imagine they were the new casks. * * * Q. Do you know anything about the condition in which citron generally comes? A. Yes, sir. Q. The barrels are quite apt to leak, aren't they? A. Yes. Q. They leak occasionally? A. Occasionally. Q. Quite often? A. In some cases; yes, sir. * * * Q. When you say 'some cases,' you mean how often? A. About 60 per cent. is not leaking; that is in receiving. Q. Say about 60 per cent. of the barrels— A. Are in good condition. Q. And 40 per cent. leaking? A. Yes, sir. Q. That is your general experience? A. Yes, sir. Q. That was your experience with this cargo? A. No, sir. Q. Do you know whether these were leaking or not? A. Yes, sir. Q. What proportion were leaking? A. One barrel I saw myself. Q. Did you look all the barrels over? A. Yes, sir; I saw them loaded on the lighter. Q. Are you positive they were full of brine? A. Yes, sir. Q. And not any leaked out? A. Yes, sir. Q. Notwithstanding the evidence of the last witness, Mr. Bell, to the effect that all the citron that comes in leaks out from a third, half or three-quarters? A. Yes, sir. Q. You didn't open any of those? A. No, sir. Q. Not one? A. No, sir."

Much stress is laid by respondents on the fact that other goat-skins, stowed next forward of the citron, were received dry and in good order; and by libellant that the skins next aft of the skins in question were received in good order. But the latter appear to have been air cured or flint dried, which do not so readily absorb moisture, and it does not appear which kind of skins were stowed forward of the citron, so that this testimony, which might otherwise have had great weight, seems almost immaterial. Weight, however, is properly attached to the following admission of respondents' witness J. McCarroll, who sorted libellant's skins:

"Q. Was there any difference between those that were on top and those which were on the bottom? A. Those that were on top seemed to be all right. * * * Q. They took off some of the bales that seemed to be good skins? A. The bales of wool and skins came out first. Q. Answer my question. They took off some of the skins from the top of the pile that seemed to be without this blue mold or slime on. Is that right? A. Some of them; yes. Q. And as they worked down they commenced to take out these skins that had the slimy substance on and blue mold. Is that right? A. Yes."

Furthermore, respondents' witness Tiffany testified as follows:

"Q. So you think you are enough of an expert to tell whether a skin is damaged by brine from citron, by brine from any other merchandise, or by sea water? A. I couldn't tell the difference whether skins were damaged from brine from citron, or from a barrel of beef, or anything else. But I could tell the difference from brine damage and salt water damage. Q. How? A. By the fomentation of the salt that would be left on any piece of cloth, skin, or board. Q. Do you know how sea water damage shows itself on skins? A. It would naturally blacken the skin. It would naturally blacken the piece of pine board. Q. Do you know how citron damage shows itself on the flesh side of the skin? A. I couldn't tell you, only it would leave lots of granulated fine specimens of salt there from the brine."

The witness for libellant, Lowery, had already testified that this was the appearance of these skins—

"All stained with salt, and as if they had been salted over again in the ship, and come out of a packing house."

And respondents' witness C. McCarroll testified as follows:

"Q. How did they become damp, in your opinion? A. In my opinion they was dry salted, and on the mats absorbed moisture and melted the salt."

In view of the whole testimony, it must be found that the barrels were in the usual condition of such barrels, and must have leaked considerably during the voyage. The court below has found that the damage was due to leakage and absorption. The court also held that:

"There was an absence on the part of the respondents of the special care that they were required to exercise by reason of the character of the cargo, and the libellant is entitled to recover."

The construction of the temporary bulkhead has already been described. It was constructed in the expectation that wet cargo would be received at Constantinople; but it was put up chiefly in order to keep the barrels from falling, and it would not keep out water or dampness from the barrels. As to whether the stowage is the usual kind, and proper and sufficient, the witnesses are directly in conflict. They agree, however, that it would be better

stowage to put such cargo in separate compartments, or to stow the dry cargo on top. The logic of this review of the testimony seems to lead to the following conclusions:

The libellant bought this consignment on the faith of a bill of lading in which respondents receipted for the skins as in good order and condition. They arrived damaged, and the preponderance of testimony indicates that this damage was not due to any of the excepted causes. The method of stowage was not the best. The temporary bulkhead was not tight. It was not adapted to protect this peculiar kind of skins from damage from absorption. That they were damaged by leakage or absorption appears from the fact that the top ones were dry, that the damage was unequally distributed among the different part of the skins, that the brine was leaking from the citron barrels, and that the damage was of an unusual kind; and while it resulted, not from dampness in the hold, nor from sea water, it was due to some absorption of moisture, which left the skins covered with salt. In these circumstances, we think the respondents were liable for negligence in the stowage of the cargo, under the decision of this court in *Botany Worsted Mills v. Knott*, 82 Fed. 471, 27 C. C. A. 326, affirmed by the Supreme Court 179 U. S. 69, 21 Sup. Ct. 30, 45 L. Ed. 90.

The decree is affirmed, with interest and costs.

DENNIS v. ATLANTA NAT. BUILDING & LOAN ASS'N et al.

(Circuit Court of Appeals, Fifth Circuit. April 11, 1905.)

No. 1,348.

1. CORPORATIONS—AGENTS—AUTHORITY—NOTICE.

Where a person who transacted the negotiations for a loan by complainant loan association was its local representative, adviser, and secretary and treasurer, in the city where the loan was made, and had general supervision and advisory powers with reference to loans made and the general policy of the association's business in that territory, notice to him of facts affecting the title of borrowers to land mortgaged to the association was notice to the association.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 1748-1754.]

2. MORTGAGES—DEFECTIVE TITLE.

Certain residence property occupied by a mother and her daughters was sold for taxes in 1882; the certificate being subsequently assigned to the husband of one of the daughters, who took no deed until 1890, when a deed was issued to him, reciting a consideration of \$175. The property, which was worth at least \$10,000, was subsequently conveyed by the husband to his wife and sisters-in-law for \$10 and love and affection, and they thereafter mortgaged it to complainant for \$5,000. At the time the mortgage was executed the mother was living on the property, and inquiry of her would have disclosed that she claimed to be the owner of the property, and that the tax sale was void. No inquiry, however, was made of her, and after the mortgage was executed she instituted a suit in the state court, in which the tax sales and conveyance to the daughters were set aside. *Held*, that the mortgagee was charged with notice of the mother's equity, and was not, therefore, entitled to enforce the mortgage against the property.

Appeal from the Circuit Court of the United States for the Middle District of Alabama.

For opinion below, see 128 Fed. 293.

This case is an appeal from a decree of the Circuit Court for the Middle District of Alabama foreclosing a mortgage in favor of the Atlanta National Building & Loan Association against an undivided one-half interest in certain real estate in the city of Montgomery, Ala. The issues in the case arose under the following state of facts: In 1873 Mrs. Susan W. Gilmer was left a widow with nine children—three sons and six daughters. In 1875 Mrs. Gilmer became the owner of a house and lot in Montgomery described as the east half of lot No. 5, square No. 9, East Alabama, city of Montgomery. Mrs. Gilmer lived in the house continuously from the time of the purchase until she died, in March, 1893, and had probably lived there before she bought and before her husband's death. In 1873 Mrs. Gilmer's daughter Susan married A. Campbell Jones, who thereafter boarded with his mother-in-law. In 1873, when Mrs. Gilmer's husband died, most of the children appear to have been minors. Mrs. Gilmer kept a boarding house in the premises in question, although in 1886 Mrs. Jones, and three other daughters who were unmarried, took the more active management and control of the boarding house. In 1882 the property in question was sold for state and county taxes. The description of the property as sold was "a house and lot situated on the corner of Bibb and Washington streets in the said City of Montgomery." The property was purchased at this sale by one Martin, and he took a certificate of purchase in accordance with the laws of Alabama with reference to tax sales. During the same year Martin assigned the certificate to one Stoelker, who afterward, in the same year, assigned the certificate to A. Campbell Jones, Mrs. Gilmer's son-in-law, who, at the time he received the certificate, was living with his mother-in-law on the premises bought. Jones held this certificate in his possession until April 22, 1890, when he presented it to the probate judge, and obtained a tax deed which described the property as "being situated at the corner of Washington and Bibb streets, the property of Susan W. Gilmer." This deed was duly recorded in the office of the judge of probate of Montgomery county April 22, 1890. The property was sold by the city of Montgomery on regular proceedings for unpaid taxes due the city of Montgomery, and, being described as "the property of Susan W. Gilmer, assessed to her as the east half of lot five, square nine, in that part of the City of Montgomery, known as East Alabama." At this last sale the property was bought by one Martin, who received a deed to the same, and he afterwards conveyed the property to one Stoelker, and Stoelker conveyed the same to A. Campbell Jones. After this, A. Campbell Jones conveyed the property to S. W. Jones (his wife), W. E. Gilmer, R. C. Gilmer, and A. E. Pentecost, all daughters of Susan W. Gilmer, and all of whom before, at the time of the transaction, and afterwards, lived in the house on the premises so conveyed. The last-mentioned deed was executed on the 17th day of June, 1890, and, according to the agreed statement of facts, recorded in the office of the judge of probate of Montgomery county on the 10th of July, 1890. In June, 1890, S. W. Jones, E. E. Gilmer, R. C. Gilmer, and A. E. Pentecost executed and delivered to the Atlanta National Building & Loan Association a mortgage on the property in question for \$5,000. Charles Wilkinson, an attorney at law, was the representative of the Atlanta National Building & Loan Association. He negotiated the loan, examined the title, and appears to have acted for it generally as its agent and attorney in arranging and completing the transaction.

In 1892 Susan W. Gilmer filed her bill in the chancery court of Montgomery county against A. Campbell Jones and the four daughters named, but not against the building and loan association, seeking to set aside the tax sales and other conveyances by which her four daughters claimed title to the property in controversy; and such proceedings were had that a decree was rendered setting aside the tax titles and conveyances, so far as the four daughters and A. Campbell Jones were concerned, and ordering a sale of the property, but a reimbursement to Jones and the four daughters of all money paid out for or on account of the property, and a division of the balance of the proceeds among the heirs of Susan W. Gilmer, she having died during the

progress of the chancery suit. At the sale made under this decree the appellant, Dennis, became the purchaser, and has been in possession of the same since the said sale, which occurred in 1897. The decision of the Supreme Court of Alabama on appeal in this chancery suit is reported. Waller, *Adm'r, v. Jones et al.*, 107 Ala. 331, 18 South, 277.

The bill now before the court was filed against J. M. Dennis, Rebecca C. Gilmer, Eleanor E. Gilmer, Susan W. Jones, and A. E. Pentecost. The real issue in the case as made by the answers is between Dennis and the building and loan association. The case was submitted to the Circuit Court (Hon. David D. Shelby, Circuit Judge) who on the 21st of January, 1904 (128 Fed. 293), rendered a decree foreclosing the mortgage against an undivided one-half interest in the property. The reason for foreclosing the mortgage on only an undivided half is shown by the following extract from the opinion of the Circuit Judge: "It is urged in defense of this suit by the solicitors of the only defendant who contests the foreclosure that the mortgage cannot be foreclosed, so far as the interest of Mrs. S. W. Jones and Mrs. A. E. Pentecost is concerned, because they were married women at the time of the execution of the mortgage, and that their husbands did not join in the mortgage as required by the Alabama statute. In reply the solicitor for the complainant, in his brief, says: "It really is not of much importance whether it be held that the mortgage is good or bad as to the two quarter interests of Mrs. Jones and Mrs. Pentecost, because, the property being worth \$20,000, a half interest is worth \$10,000—more than enough to pay complainants in full—and, as the obligation of the four daughters was joint, each of them, and the property interest of each, is liable for the whole debt." As complainants are content to have the mortgage foreclosed on the interest in the lot vested at the date of the mortgage in the two Misses Gilmer, it is unnecessary to decide whether the mortgage is a valid charge, or not, on the shares of the two married women mortgagors. A decree will be entered foreclosing the mortgage on the one-fourth interest of Eleanor E. Gilmer and on the one-fourth interest of Rebecca C. Gilmer in the lot described in the mortgage."

John M. Chilton, Edgar H. Farrar, B. F. Jonas, and E. B. Kruttschnitt, for appellant.

Thos. H. Watts, for appellees.

Before PARDEE, Circuit Judge, and NEWMAN and MEEK, District Judges.

NEWMAN, District Judge (after stating the facts). We are unable to agree with the conclusion reached by the learned judge who decided this case in the Circuit Court. In the view we have taken of this case, the question raised as to the sufficiency of the description of the property in the tax deed recorded and relied upon here is unimportant. In January, 1892, a bill was brought by Mrs. Susan W. Gilmer and her children not named as defendants against A. Campbell Jones, Susan W. Jones (his wife), Eleanor E. Gilmer, and Annie E. Pentecost, in the chancery court of Montgomery county, Ala. Mrs. Gilmer died pending the suit, and it was prosecuted to a conclusion by her administrator and the other complainants. The suit resulted in an adjudication by the Supreme Court of Alabama (Waller, *Adm'r, et al. v. Jones et al.*, 107 Ala. 331, 18 South, 277) that the title of Mrs. Gilmer to the property in this case had never been divested by the tax sales in question, and that she was entitled to a decree adjudging the property to be hers, subject to the amount expended by Jones and the other defendants for taxes and certain improvements. It being thus determined by the state court that as between her and her son-in-law, Jones, and the

daughters to whom Jones conveyed the property in 1882, Mrs. Gilmer had the title to the property, subject to certain charges, the real question we have to determine is whether or not the complainant here, the building and loan association, could have ascertained this fact by the exercise of proper diligence on its part. No question whatever was made that Mrs. Gilmer lived on the property in controversy. There is some difference as to the character of her occupancy of the property. She was getting old, and had surrendered the active management of the house to her daughters; but she had a room, and occupied it continuously until her death, subsequent to the execution of the mortgage. A tax sale was made and a tax certificate was issued in 1882, and yet Jones, who became the holder of the tax certificate, took no deed to the property from the probate judge until 1890. The amount paid for the property, as set out in the tax deed, was \$175; and yet the property was valuable enough to enable the parties to whom Jones conveyed it to obtain a loan on it for \$5,000 within a year after the deed from Jones to the ladies was made. This, it seems to us, should have been sufficient to have caused special inquiry on the part of any one about to take a conveyance of the property. The deed from Jones to the ladies, as therein recited, was for \$10 and love and affection.

Charles Wilkinson, who was examining the title on behalf of the building and loan association in June, 1891, wrote to the general counsel of that association in Atlanta as follows:

"Enclosed find abstract of Gilmer, Jones property. The tax sale has been critically examined and found perfect. The parties have been holding under the State since 1882. Although the tax deed was made in 1890, the [they] had the certificate. Mrs. Gilmer did not care for it was bought by her son-in-law, deeded by him to his sisters-in-law, the children of Mrs. Gilmer."

This letter shows two things: In the first place, that Wilkinson had the abstract of title and the facts connected therewith, showing how Jones obtained the property, and how it was conveyed by Jones to his wife and her sisters. It also shows that Wilkinson understood that the natural inquiry would be, on the part of any one examining the title, does Mrs. Gilmer still claim to be interested in the property, and what does she say about this loan? The evidence in the case shows conclusively, we think, that, if Mrs. Gilmer had been consulted, it would have been ascertained that she objected most strenuously to the execution of the mortgage on this property, and that she claimed then, as she did in the suit brought soon thereafter, that she still had the legal title.

Wilkinson, in his testimony, says that:

"At the time of the loan secured by Jones and others in this case from the complainant, the Atlanta National Building & Loan Association, I was the local representative, adviser, and also secretary and treasurer—*id est*, Poo-bah—of said complainant in the city of Montgomery. I had general supervision and advisory powers in reference to any loan, advancement, or the general policy of their business in this territory."

There can be no question, therefore, that whatever knowledge Wilkinson had, and what he might have ascertained by reasonable

inquiry, must be charged to the building and loan association. He stood in such relationship to it in Montgomery as that it is certainly bound by what he knew or could have known.

The law in Alabama applicable to this case (and it is not materially different, as we understand it, from the law elsewhere) is stated by the Supreme Court of that state in *Wilson v. Wall*, 34 Ala. 288-305, as follows:

"It is well settled that, if the purchaser be put in possession of such facts concerning the title which the vendor offers to sell as would cause a prudent man to inquire further before he would proceed with the purchase, he cannot claim the protection which is accorded to an innocent purchaser without notice. *Center v. P. & M. Bank*, 22 Ala. 755; *McGehee v. Gindrat*, 20 Ala. 101. Information which makes it the duty of a party to make inquiry, and shows where it may be effectually made, is notice of all facts to which such inquiry, if conducted with ordinary diligence and prudence, would have led. *Carr v. Hilton*, 1 Curt. 390 [Fed. Cas. No. 2,437]; [*Williamson v. Brown*] 1 Smith (N. Y.) 354; *Ringgold v. Bryan*, 3 Md. Ch. 488; *Wilson v. McCullough*, 23 Pa. 440 [62 Am. Dec. 347]; *Kennedy v. Green*, 3 Md. & K. 699. A purchaser has notice of what appears upon the face of every title deed which constitutes a necessary link in his chain of title, and will not be allowed to deny notice by asserting that he had not read the deed. *Johnson v. Thweatt*, 18 Ala. 747; *Walles v. Cooper*, 24 Miss. 208; *Tiernan v. Thurman*, 14 B. Mon. 277."

See, also, *Hodges Bros. v. Coleman & Carroll*, 76 Ala. 103-113.

To the same effect is the decision in *Lockwood v. Tate*, 96 Ala. 353-356, 11 South. 406. In the opinion in this last case it is said:

"Information which makes it the duty of a party to make inquiry, and shows where it may be effectually made, is notice of all facts to which such inquiry, if conducted with ordinary diligence and prudence, would have led. *Hodges v. Coleman*, 76 Ala. 113; 2 Brick. Dig. p. 520, § 183. Good faith is an essential element of a valid claim to protection as a purchaser without notice, and lack of good faith is to be imputed to one who, having such information as would put a prudent man on inquiry, failed to pursue the inquiry, which, if diligently followed up, would have led him to a knowledge of the superior right of another. *Taylor v. Agricultural & M. Ass'n*, 68 Ala. 229; *Whelan v. McCreary*, 64 Ala. 319; *Craft v. Russell*, 67 Ala. 9; *Barton v. Barton*, 75 Ala. 400."

The property in controversy in this case at the time of this transaction must, from the evidence in the record, have been worth something like \$10,000—at least that much. Counsel for complainant admits, as stated by Judge Shelby in his opinion, that it was worth last year \$20,000; and, as the loan was made on it for \$5,000, we may reasonably admit, in view of the margin usually required in loans of this character, that it was worth considerably more than the amount of the loan. The title which the complainant accepted was a tax deed made to the son-in-law of the owner eight years after the tax sale was made, in consideration of \$175, and the subsequent conveyance to the daughters for \$10 and love and affection. We are unable to understand how any one in the exercise of reasonable diligence in examining the title to this property before making a loan on it would not have most carefully questioned Mrs. Gilmer as to her interest. We think the facts were sufficient to put Wilkinson, as the representative and attorney of the building and loan association, on inquiry of Mrs. Gilmer. If Wilkinson had made this inquiry, it would have elicited facts and information from

Mrs. Gilmer which would undoubtedly have caused him to decline the loan for the building and loan association, if he properly regarded its interests.

Mr. Wilkinson was a witness in behalf of the complainant in this case, and at one point in his testimony he says this:

"It was never brought to my notice, incidentally, inferentially, or otherwise, that Susan W. Gilmer or any other person whatsoever had any claim, right, interest, equity, legal or otherwise, in and to said property, conveyed by said mortgage, other than said mortgagors mentioned. My best recollection is that at the time of the execution of said mortgage said Susan W. Gilmer was living with said mortgagors."

Afterwards in his testimony he makes this statement:

"I do not state positively that I ever had any exclusive or personal conversation with Mrs. Gilmer, although I remember distinctly going to the residence and seeing the parties generally in reference to this loan. I went down there myself. While it is true that I do not remember (it being several years anterior to the present) of a personal conversation with Mrs. Gilmer, still, as a basis of my recollection on the letter that I have just read, I must and will state that I do not believe that I would have written the letter of date 8th April, 1891 (Exhibit E) unless I had had a conversation with Mrs. Gilmer upon which to predicate said letter; and, as refreshed by said letter, I am of opinion that such conversation, the concrete of which is included in said letter, was had between me and the said Susan W. Gilmer."

In view of what this record shows Mrs. Gilmer's attitude to have been all along as to the transaction in question here, we do not think this evidence sufficient to show that Mrs. Gilmer was informed of the purpose of her daughters to mortgage the property, or had any notice of it when it was done.

While the agreed statement of facts concedes that the tax deed from the city of Montgomery was recorded in the office of the probate judge, it is not set out in the abstract of title furnished by Wilkinson to the building and loan association, and could not have been relied upon by the association in making the loan. Even if it had been so set out and relied upon, it would not have materially strengthened the complainant's case, as we regard it.

We put our decision in this case upon two grounds: First, that the legal title to the property in question at the time the mortgage to complainant was executed was, as between Mrs. Gilmer and the mortgagors, in Mrs. Gilmer, as determined by the Supreme Court of Alabama; second, that the facts shown in the record were such as to have made it incumbent on the representative of the building and loan association to have made inquiry of Mrs. Gilmer as to her interest in the property in question, and that any reasonable inquiry would have informed him of the real situation as it was afterward determined in the state court.

The decree of the Circuit Court must be reversed, and the case remanded, with directions to dismiss the bill, with costs against the complainant.

DIECKERHOFF et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February, 1905.)

No. 22.

CUSTOMS DUTIES—BOND FOR RETURN OF UNEXAMINED MERCHANDISE—DAMAGES FOR BREACH—NECESSITY OF PROOF.

Certain importers failed to return, on demand of the collector of customs, merchandise delivered to them without examination; this failure constituting a breach of the conditions of a bond given by them, under section 2899, Rev. St. [U. S. Comp. St. 1901, p. 1921], in double the estimated value of such merchandise. The collector, without proof of any damage suffered, sought to recover such double value. *Held*, that the penalty of the bond is not to be considered as liquidated damages; that the object of the bond is to protect the government in the assessment, valuation, and collection of duties, and to make good, within the limit named in the penalty, any damages incurred in case of breach; and that without proof of actual damages there could be no recovery.

Wallace, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a judgment of the Circuit Court, Southern District of New York, in favor of the United States, for \$369.12 on a customs bond. Note *United States v. Dieckerhoff* (C. C.) 103 Fed. 789.

W. Wickham Smith, for plaintiff in error.

Chas. D. Baker, for the United States.

Before WALLACE and LACOMBE, Circuit Judges, and HOLT, District Judge.

LACOMBE, Circuit Judge. On or about January 13, 1897, the plaintiffs' firm imported seven cases of goods. The collector sent one of these packages, case 418, to the public stores, and delivered the remaining cases to the importers. Prior to this importation a bond for the delivery of unexamined packages, commonly known as a "six months' bond," had been executed by these importers, with sureties. On or about January 18, 1897, the collector, having received a report from the appraiser, called upon the defendants to send case No. 420 to the public stores, which request was not complied with. Subsequently suit was brought on the bond for \$3,044, being double the estimated value of the importation. It was conceded on the trial that there was no proof that the United States suffered any damage by reason of the failure of the importers to return said package No. 420, and that there could be no proof. A clerk from the custom house testified, against objection and exception, that he had made an estimate of the value of package 420 from the invoice, and that the value thereof was \$184.56. The court directed a verdict for double that amount.

Imported merchandise is examined by the customs officers, so that it may be properly appraised and classified. In order to facilitate such examination, the collector, under authority of statute, usually directs that one package out of every ten in each entry be

examined. If the result is satisfactory, the others are not opened; or the collector may, for any cause, within 10 days after the result of the examination of the package or packages first selected is reported to him, order another or as many other packages as he pleases to be also examined. If all the packages comprising each importation were kept in the custody of the government during this period, greater warehouse capacity would be required, and as far back as 1830 provision was made for a delivery of part of his importation to the importer. That statute is now section 2899, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1921], and reads as follows:

"No merchandise liable to be inspected or appraised shall be delivered from the custody of the officers of the customs, until the same has been inspected or appraised, or until the packages sent to be inspected or appraised shall be found correctly and fairly invoiced and put up, and so reported to the collector. The collector may, however, at the request of the owner, importer, consignee, or agent, take bonds with approved security, in double the estimated value of such merchandise, conditioned that it shall be delivered to the order of the collector, at any time within ten days after the package sent to the public stores has been appraised and reported to the collector. If in the meantime any package shall be opened, without the consent of the collector or surveyor given in writing, and then in the presence of one of the inspectors of the customs, or if the package is not delivered to the order of the collector, according to the condition of the bond, the bond shall, in either case, be forfeited."

This statute contemplated a separate special bond for each importation. In practice it has been found convenient to take a general bond running for six months, which is based upon a scheme by which this general bond, by a system of indorsements, authorized to be made and made by the collector, of the estimated value of each importation, is transferred into a series of separate bonds, with penalties in double the estimated value of each importation, and the statutory conditions stated applicable to each separate entry. Such general six months' bond is authorized by treasury regulations, and the propriety of exacting it in place of separate special bonds is not disputed. The bond sued upon is in the amount of \$50,000, and provides:

"The condition of this obligation is such, that if each and every package or packages of each and every importation made by the said principals at any time within six months from and after the date of these presents, and delivered from the custody of the officers of the customs, in pursuance of section 2899, Revised Statutes of the United States, shall, within ten days after the package or packages designated by the collector and sent to the public store to be opened and examined have been appraised and reported to him, be returned to the order of the collector without having been opened, except with the consent of the collector or surveyor, given in writing, and then in the presence of one of the officers of the customs, or if the above-bounden obligors shall, in lieu of such return, pay to the proper collecting officer of said port double the estimated value of the package or packages of merchandise not so returned, then this obligation is to be void; otherwise, to remain in full force and virtue. And the above-bounden obligors do, for themselves, their heirs, executors, administrators, and assigns, jointly and severally covenant and agree with the United States that the collector of customs aforesaid shall indorse on this bond the estimated value of each importation as made, and the date thereof, and that the penalty of this bond shall be held to be double the value of each importation as made and indorsed as aforesaid, and that the value of the importation, where there is no

violation of the conditions of this bond, shall not in any way affect the liability in those cases where there shall be a violation thereof."

It will be observed that in one respect the bond fails to conform to the statute. In the first paragraph above-quoted it is provided that the bond shall be void if the "obligors shall, in lieu of such return, pay to the proper collecting officer of said port double the estimated value of the package or packages of merchandise not so returned." The statute provides that the security shall be in double the value of the merchandise delivered to the importer, and that if "any package" is improperly opened, or is not delivered to the order of the collector, "the bond shall, in either case, be forfeited." This error in phraseology is corrected, however, in the second paragraph, where the obligors covenant that the penalty of the bond shall be held to be double the value of each importation as made and indorsed. The defendants concede that such is the proper construction of the bond, and that it is a valid bond providing such penalty; and, inasmuch as the only bond the collector was authorized to take was one conformable to the statute, the bond in suit is to be considered as if the inconsistent words in its first paragraph were eliminated.

It is elementary law that the penalty named in a bond will be considered as covering, to the extent of the sum named, the damages which the party in whose favor the stipulation is made may have sustained from the breach of contract by the opposite party. It is incumbent upon the party who claims that the penalty is liquidated damages to show that they were so considered by the contracting parties. *Taylor v. Sandiford*, 7 Wheat. 13, 5 L. Ed. 384. Certainly there is nothing on the face of this bond to indicate that the parties agreed that it should be so considered. There is a line of authorities, some of which are cited on the briefs, holding that, where the sum named in the bond is a fixed penalty imposed by law as a punishment for a breach of duty enjoined by law, the court will not undertake to alter or refuse the penalty which the Legislature has fixed for the nonperformance of a statutory duty. It was so held in *Clark v. Barnard*, 108 U. S. 436, 2 Sup. Ct. 878, 27 L. Ed. 780, where the statute granting authority to extend a line of railroad provided that the railroad company should deposit with the State Treasurer "their bond, in the sum of \$100,000, that they will complete the said road before January, 1872." In *United States v. Pingree*, 1 Spr. 339, Fed. Cas. No. 16,050, the bond was for rewarehousing, and the statute expressly provided that if the goods were not rewarehoused the collector should levy and collect the original duty plus an additional duty of 100 per cent. In *United States v. Oteri*, 67 Fed. 146, 14 C. C. A. 344, the law required that in cases of withdrawal for export the exporter should give bond in a penal sum equal to double the amount of the estimated duties to produce the proof required by law of the landing of the same beyond the limits of the United States. In *United States v. Hatch*, 1 Paine, 336, Fed. Cas. No. 15,325, the statute required the master to enter into a bond in the sum of \$400 that he shall exhibit a cer-

tain certified copy of a list of his crew, and also the crew (except such as may have died, absconded, etc.), to the boarding officer at the first United States port he might reach. In *United States v. Montell, Taney*, 47, Fed. Cas. No. 15,798, the statute required a bond to be given, in an amount which varied with the tonnage of the vessel, conditioned that the certificate of registry of the vessel shall be solely used for the vessel for which it is granted, and shall not be sold, lent, etc. The court said:

"It would be difficult by any course of proof, or by any process of reasoning, to show that the United States had sustained any particular amount of damages in a case of this description, or to adopt any rule by which the damages could be measured by a jury or be liquidated by agreement between the parties. The sum for which the parties are to become bound is manifestly a penalty or forfeiture, inflicted by the sovereign power for a breach of its laws. It is not a liquidated amount of damages due upon a contract, but a fixed and certain punishment for an offense."

The case here presented is more like that in *United States v. Cutajar*, 67 Fed. 530, 14 C. C. A. 515. The object of the bond is to protect the government in assessment, valuation, and collection of its duties. By inspection of the contents of any package the customs officers ascertain what the goods are and what their value is. They are thus enabled to liquidate the amount of duty, in the event of undervaluation to impose excess duties, and in the event of fraud to proceed to forfeit the goods. With the package in their possession it is a very easy matter to ascertain its contents, but such information may be obtained otherwise. The persons who packed it or saw it packed, the persons who unpacked it or who took possession of its contents, could show what those contents were. It might be an expensive matter to procure this testimony as to any missing package, but the penalty of the bond is large enough to cover such expenses and all additional duties besides. These are the damages which the government sustains by reason of the non-return of the package, and in our opinion the bond is conditioned to make good such damages within the limit named in the penalty, double the estimated value of the importation.

The argument that great hardship might result from any particular construction of an act of Congress is not usually of much weight; but it may fairly be considered that, if the sum named in the bond were held to be liquidated damages, an importer might not infrequently be fined \$50,000, or \$100,000, when his importation was a large one, merely because he had opened a single package, worth maybe \$100, in the presence of an inspector, but without the written consent of the collector or surveyor.

The judgment is reversed, and cause remanded for a new trial.

WALLACE, Circuit Judge (dissenting). As I do not wholly concur in the opinion of Judge LACOMBE, I will briefly state the reasons why I think the judgment should be reversed.

If the bond, instead of being a statutory, were only a voluntary, bond, it is too plain to admit of discussion that the double value would be regarded as a penalty, and the obligors would be liable

only for the damages actually sustained by the obligee by a breach of any of the conditions. *Bignall v. Gould*, 119 U. S. 495, 7 Sup. Ct. 294, 30 L. Ed. 491. Being a statutory bond, however, it is to be treated as imposing upon the obligors the liability contemplated by the statute.

If it is the meaning of section 2899, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1921], that the importer shall become liable under his bond for double the value of his entire importation of merchandise in case he fails to redeliver a single package of it to the customs officers for reappraisement within the 10 days specified, the judgment below ought to be affirmed, upon the ground that it is a more favorable one to the defendants than they were entitled to.

I think this is not the meaning of the statute, and that its language does not require such a harsh construction. It permits the collector to estimate the value of all the packages, and requires him to exact a bond from the importer in double the estimated value of the whole number, which is to be so conditioned that it shall be forfeited if within a specified time all those delivered to the importer are not redelivered to the collector, or if any one of them is not redelivered, or if any one of them in the meantime shall have been irregularly opened. The obvious purpose of the bond is to amply protect the government in the event that none of the packages should be redelivered, or any one of them should not be redelivered, or any one of them should have been opened without the consent of some of the officers of the customs; and the circumstance that the undertaking is to be in double the sum of any conceivable loss is convincing that the sum is in the nature of a penalty, and not of liquidated damages.

If the construction contended for by the government is correct, and the bond liquidates the damages recoverable of the importer, without any regard to the loss which may accrue to the government, and makes him liable to the same extent, whether a single package is inadvertently opened or the redelivery of all the packages is refused, such a construction is so inequitable that it is impossible to believe it was contemplated by Congress.

The language of the statute is satisfied by regarding the double value as the penalty of the bond and the maximum of the importer's liability. *Van Buren v. Digges*, 52 U. S. 461, 476, 13 L. Ed. 771.

If this construction is correct, it follows that the penalty, like that of bonds ordinarily, when the parties do not agree that it shall be construed as liquidated damages, is recoverable only to the extent of the damage accruing upon the breach. It was incumbent upon the government upon the trial to prove the damages arising from the breach of the condition. The breach consisted in the refusal or neglect of the importers to redeliver to the collector one of the packages of their importation.

The government was entitled to the redelivery of that package, and I think its measure of damages for the breach was the value of the package. In other words, the government was entitled to recover the damages ordinarily recoverable for the breach of a prom-

ise to redeliver goods which the promisee has temporarily intrusted to the possession of the promisor.

An estimate of the value of the package from the importers' invoice was competent evidence, and the government was entitled to a recovery of the value thus shown. But the government was not entitled to a verdict of double that value, as directed by the court below.

UNITED STATES v. BROWN & EADIE.

(Circuit Court of Appeals, Second Circuit. March 2, 1905.)

No. 117.

1. CUSTOMS DUTIES—CLASSIFICATION—CRAVENETTE CLOTH—WOOLEN CLOTH.

Certain woollen goods known as "cravenette cloths," which have been subjected to a process intended to make them rain-repellent, which are chiefly used for outer garments to be worn in rainy weather, and which, for all ordinary purposes, are waterproof, are dutiable as "waterproof cloth," under paragraph 369, Tariff Act Oct. 1, 1890, c. 1244, § 1, Schedule J, 26 Stat. 593, and not under paragraphs 392 and 395, Schedule K, of said act, 26 Stat. 596-97, relating, respectively, to "woolen or worsted cloths" and "dress goods * * * of wool, worsted," etc.

2. SAME—SCHEDULE TITLES—EJUSDEM GENERIS.

The titles of the various schedules in tariff acts are not intended to be perfectly accurate, but furnish general information only of the articles enumerated in the paragraphs therein; and the principle of ejusdem generis should not be applied to exclude waterproof woollen cloth from the provision for "waterproof cloth" in paragraph 369, Tariff Act Oct. 1, 1890, c. 1244, § 1, Schedule J, 26 Stat. 593, because the subject of that schedule is flax, hemp, and jute.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 126 Fed. 446.

This is an appeal from a decision of the Circuit Court for the Southern District of New York reversing a decision of the Board of General Appraisers which had sustained the action of the collector in assessing certain woollen or worsted cloths, imported in the spring of 1893, and known as "cravenette cloths," under paragraph 392 of the tariff act of October 1, 1890, c. 1244, § 1, Schedule K, 26 Stat. 596, as "woolen or worsted cloths not specially provided for." The paragraph is as follows:

"392. On woollen or worsted cloths, shawls, knit fabrics, and all fabrics made on knitting machines or frames, and all manufactures of every description made wholly or in part of wool, worsted, the hair of the camel, goat, alpaca, or other animals, not specially provided for in this act, valued at not more than thirty cents per pound, the duty per pound shall be three times the duty imposed by this act on a pound of unwashed wool of the first class, and in addition thereto forty per centum ad valorem; valued at more than thirty and not more than forty cents per pound, the duty per pound shall be three and one-half times the duty imposed by this act on a pound of unwashed wool of the first class, and in addition thereto forty per centum ad valorem; valued at above forty cents per pound, the duty per pound shall be four times the duty imposed by this act on a pound of unwashed wool of the first class, and in addition thereto, fifty per centum ad valorem."

The importers protested, insisting that the merchandise should have been classified as "waterproof cloth," under paragraph 369, c. 1244, § 1, Schedule J, 26 Stat. 593, which is as follows:

"369. Oil-cloth for floors, stamped, painted, or printed, including linoleum, corticene, cork-carpets, figured or plain, and all other oil-cloth (except silk

oil-cloth), and water-proof cloth, not specially provided for in this act, valued at twenty-five cents or less per square yard, forty per centum ad valorem; valued above twenty-five cents per square yard, fifteen cents per square yard and thirty per centum ad valorem."

The appellant also advances the contention that if the goods in question were not properly assessed by the collector, under paragraph 392, they should have been classified as "dress goods." under paragraph 395 (chapter 1244, § 1, Schedule K, 26 Stat. 597) of the act, which is as follows:

"395. On women's and children's dress goods, coat linings, Italian cloth, bunting, and goods of similar description or character composed wholly or in part of wool, worsted, the hair of the camel, goat, alpaca or other animals, and not specially provided for in this act, the duty shall be twelve cents per square yard, and in addition thereto fifty per centum ad valorem: Provided, That on all such goods weighing over four ounces per square yard the duty per pound shall be four times the duty imposed by this act on a pound of unwashed wool of the first class, and in addition thereto fifty per centum ad valorem."

The decision of the Circuit Court is reported in 126 Fed. 446.

D. Frank Lloyd, Asst. U. S. Atty.
Albert Comstock, for appellees.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, Circuit Judge. The question to be determined is whether or not the imported merchandise was "waterproof cloth," under the provisions of paragraph 369 of the tariff act of October 1, 1890, c. 1244, § 1, Schedule J, 26 Stat. 593. If so, the decision of the Circuit Court was right; if not, the decision of the board was right.

The merchandise consists of woolen or worsted cloth, known as "cravenette cloth," which has been subjected to a process intended to make it rain-repellent. The cloth after being proofed draws and retains dust to such an extent as to render it unfit for dress goods. It was generally imported in pieces 60 inches in width, whereas the average width of dress goods is 45 inches. A dress could, of course, be made of cravenette as one could be made of oil skin, assuming that a woman were found eccentric enough to desire such apparel. The evidence is, however, overwhelming that this cloth was rarely sold or used as dress goods and that the predominant use was for the outer garments of men and women, intended to be worn in rainy weather. A few hundred pieces were at one time made in 46-inch width and an unsuccessful effort was made to sell them as dress goods, but only 100 pieces were sold in three years and the remainder were sold at a sacrifice. There can be no doubt that 60 inches was the standard width. One of the witnesses says: "If a woman makes her dress out of it and it sweeps through the dust, and the dust settles in the skirts, she could never get it out again." This is due to the paraffine used in the process of proofing. Cravenette is not absolutely waterproof; in this respect it resembles gossamer rubber cloth and other materials universally recognized as waterproof. Few so-called waterproof cloths are absolutely impervious to water. Practically and relatively cravenette is waterproof. It would offer slight protection to a sailor constantly dashed with spray on the deck of a storm-tossed vessel,

but it would be a fair substitute for an umbrella and would keep the wearer dry in an ordinary shower of rain. Many so-called fire-proof buildings disappeared in the conflagration which recently swept over Baltimore and it is probably true that cravenette cloth would furnish inadequate protection in an unusually severe down-pour of rain. Nevertheless for all ordinary uses it is waterproof and that term is properly used in describing it. A practical and, we think, common-sense trade definition of waterproof cloth is found in the record. One of the witnesses says:

"From my standpoint as a manufacturer of waterproof garments, any cloth of which I can make a garment that will keep the wearer dry in a rainstorm is waterproof cloth."

This testimony is inadvertently attributed to the wrong witness in appellant's brief, and is criticised mainly for reasons growing out of this mistake. The definition may be too broad, but it is valuable as the opinion of a practical business man who has had 13 years' experience as manufacturer, importer and trader in making and selling waterproof garments. That cravenette will answer the requirements of this definition is not disputed. The testimony taken in the Circuit Court is to the effect that in texture and appearance it has all the characteristics of the waterproof cloths of commerce, its primary use being for mackintoshes and other waterproof garments, and that it is in fact one of the waterproof cloths of commerce. The testimony shows further that the term "waterproof cloths" has been used in trade in this country for years to designate a cotton or woolen cloth which by any process has been rendered rain-repellent. The merchandise in question is woolen cloth, but it is also waterproof cloth and we think the latter is the more specific designation.

The suggestion that the principle of ejusdem generis is applicable is met by the fact that although paragraph 369 is in the flax, hemp and jute schedule the exception as to "silk oil cloth" is a clear indication that Congress regarded the words "oil cloth" as broad enough to cover silk oil cloth, but for the exception. Counsel for appellant interprets the paragraph as if it read "and waterproof cloth made of flax, hemp or jute," or as if it read "and waterproof cloth (except woolen or worsted waterproof cloth)." There is, we think, nothing to warrant such an interpretation. An examination of the law in question and, indeed, of every tariff law which has ever been enacted in this country, will demonstrate the fact that the title of the various schedules is not intended to be perfectly accurate; it furnishes general information only of the articles enumerated in the following paragraphs. There is no reason why woolen cloth may not be waterproofed and thus become waterproof cloth. When this is done it is taken out of the broad class of woolen cloths and placed in the more precise and restricted class of waterproof cloths—a class made more precise by the addition of a new, distinguishing characteristic. The position taken by the appellant in the proceedings below would seem to indicate that it was the government's contention that any cloth—cotton, woolen

or mixed—which is subjected to a process which fills the interstices of the cloth and prevents water from going through is waterproof cloth. Cravenette cloth is treated with wax, and that water will not readily pass through is proved by a conclusive test. One of the witnesses made a bag of the cloth and filled it with water and at the end of 48 hours not only was the water held but the underside of the bag was not even wet. The process invented by Craven is a secret process, but whether the interstices of the cloth are filled with wax, rubber, or other material is not important so long as the main result is accomplished and a waterproof cloth is produced. We are, therefore, of the opinion that the merchandise in question was waterproof cloth and that it was and is so known commercially.

The testimony in the Walker case was taken by the board in 1892, before—as is asserted by counsel for appellees—the rules of procedure there had been definitely established. The importer was not represented by counsel and the witnesses were not cross-examined. This testimony was introduced in the case at bar and we think the most favorable view for the appellant to be deduced therefrom is that it leaves the question in doubt. When, however, it is supplemented and explained by the testimony subsequently taken in the Circuit Court we think the vast preponderance of proof favors the contention of the importers.

The appellees are charged with laches in not appearing and contesting the case before the board and in delaying unduly the proceedings in the Circuit Court. An examination of the record does not disclose any irregularity in these respects which would justify a reversal even if the error were properly assigned.

The decision of the Circuit Court is affirmed.

HOLFORD v. JAMES et al.

(Circuit Court of Appeals, Eighth Circuit. March 29, 1905.)

No. 2,024.

1. JUDGMENTS—DOCKET ENTRIES—INDEFINITENESS.

Docket entries of a judgment in a former action to recover the land in controversy recited, after title of the case and notations of adjournments: "Trial commenced January 18, 1887, and concluded January 27, 1887, and decided in favor of the defendant. Costs assessed against plaintiff, \$1,389.15. Rents and money, \$1,340. Total amount, \$2,729.15. Appeal to the Supreme Court granted." And in the Supreme Court: "Court met pursuant to adjournment. The bench all present. The evidence in the case was then concluded, and, after some arguments by counsel on both sides, the case was submitted to the court for their decision. The court, after some deliberation, decided that the will is good, and hereby confirms the decision of the lower court." *Held*, that such recitals, though indefinite, sufficiently indicated that the action proceeded to final judgment.

2. SAME—RES JUDICATA—PLEA—PROOF.

It is sufficient to support a plea of res judicata if the record of the court having cognizance of the prior case shows final disposition of it on the merits, and this though the issues did not appear in the entry of judgment.

3. SAME—ISSUES—PROOF.

Where, on a plea of *res judicata*, the issues involved in the former case did not appear in the entry of judgment, it was competent to establish such issues by parol; the pleadings in the case having been destroyed by fire.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 585.]

In Error to the United States Court of Appeals in the Indian Territory.

For opinion below, see 76 S. W. 261.

This was an action in ejectment brought by Virginia C. James and her children against George M. D. Holford in the United States Court for the Southern District of the Indian Territory, for the possession of a tract of land in the Chickasaw Nation. Both plaintiffs and defendant claimed title through one George D. James, a member of the Chickasaw Tribe of Indians, who was conceded to have been the owner of the property at the time of his death. The plaintiffs are the widow and children of a son and only child of George D. James, who died shortly before the death of his father. The defendant is the grantee of Margaret James, the surviving widow of George D. James. One of the grounds set forth in plaintiffs' complaint was that the controversy over the title to the property had been previously adjudicated in their favor. It was averred that after the death of George D. James an action was brought by Margaret, his widow, against one Overton Love, as the administrator of his estate, and also the representative of the widow and children of the deceased son (the plaintiffs in the action now under review), in the district court of the Chickasaw Nation, for the possession of the identical property now in controversy; that such court had jurisdiction of the parties and of the subject-matter of the action; that judgment was therein rendered in favor of Love in his representative capacity; that Margaret James thereupon appealed the cause to the Supreme Court of the Chickasaw Nation, and the judgment of the district court was affirmed, and therefore, as Holford, the defendant in the present action, claimed through Margaret James, he was conclusively estopped from asserting title to the property.

Upon the trial, which was to a jury, the plaintiffs, to sustain their claim of *res adjudicata*, introduced in evidence the records of the judgments of the Indian courts. That of the district court was in the following form:

"Civil Docket, District Court, Chickasaw Nation.

"Mrs. Margaret E. James vs. Overton Love, administrator. Disputed property. G. D. James estate. Case continued until January term, 1887. July, 1886, called, and set to be called again on the seventeenth. Mutual agreement 1—4—87. Trial commenced January 18, 1887, and concluded January 27, 1887, and decided in favor of the defendant. Costs assessed against plaintiff, thirteen hundred and eighty-nine dollars and fifteen cents. Rents and money, thirteen hundred and forty dollars. Total amount, twenty-seven hundred and twenty-nine dollars and fifteen cents. Appeal to the Supreme Court granted."

The judgment of the Supreme Court, after the title of the cause and some immaterial preliminary recitations, was as follows:

"Court met pursuant to adjournment. The bench all present. The evidence in the case was then concluded, and, after some arguments by counsel on both sides, the case was submitted to the court for their decision. The court, after some deliberation, decided that the will is good, and hereby confirms the decision of the lower court."

It was conclusively shown that Love represented in that litigation the rights of the plaintiffs, Virginia C. James and her children. They also introduced evidence tending to show that the title to the land now in controversy was in issue in the action in the Indian courts, and was determined by the judgments referred to. Holford duly objected to the admission of the judgments of the Indian courts and of the extrinsic explanatory evidence.

Under the Indian laws, Margaret James was the sole heir of her deceased husband; and it may be assumed that, aside from the adverse adjudication

of the Indian courts, Holford, her grantee, appears from the record before us to be the owner of the property in controversy. He sought to have reconsidered the matters which entered into the prior litigation, and the grounds upon which rested the title confirmed by those judgments; but the trial court, by appropriate instructions, submitted to the jury the question whether the title to the property was an issue and was determined in the action in the Indian courts, and said, in substance, that upon an affirmative finding as to that matter their verdict should be for the plaintiffs. A verdict for the plaintiffs resulted. The judgment thereon was affirmed by the United States Court of Appeals in the Indian Territory, and this proceeding in error was prosecuted.

C. L. Herbert, E. A. Walker, and H. M. Cannon, for plaintiff in error.

W. B. Johnson and A. C. Cruce, for defendants in error.

Before VAN DEVANTER and HOOK, Circuit Judges, and LOCHREN, District Judge.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Although other questions are presented by counsel for plaintiff in error, the case turns upon the admissibility, to establish the claim of *res adjudicata*, of the judgments of the district and supreme courts of the Chickasaw Nation, and of the extrinsic evidence which was received to show the connection of the present parties with that litigation, and the issues which were involved and determined therein. Those judgments and the explanatory evidence were admitted by the trial court, and the jury were fully justified in finding therefrom that the title now in dispute was in issue and was determined in the action in the Indian courts, which possessed jurisdiction of the subject-matter and of the parties.

The judgment entries received in evidence are brief and somewhat indefinite, but they sufficiently indicate that the prior action proceeded to final judgment. It is not our province to prescribe how a tribunal of another jurisdiction shall conduct its proceedings, or the language in which its conclusions shall be expressed. It is sufficient, in a plea of *res adjudicata*, if the record of the court having cognizance of the prior cause has finally disposed of it upon the merits. Nor need the issues which were determined appear in the entry of the judgment. Resort may be had to the pleadings for that information, and, if they do not afford it, evidence *aliunde* is admissible. It is well settled that, when necessary, extrinsic evidence may be received to establish the identity of the issues involved and determined with those which it is sought to again litigate, as well as to show the identity of the parties, or their relation of privity. *Young v. Black*, 7 Cranch, 565, 3 L. Ed. 440; *Washington, etc., Packet Co. v. Sickles*, 24 How. 333, 16 L. Ed. 650; *Miles v. Caldwell*, 2 Wall. 35, 17 L. Ed. 755; *Packet Co. v. Sickles*, 5 Wall. 580, 18 L. Ed. 550; *Campbell v. Rankin*, 99 U. S. 261, 25 L. Ed. 435; *Burthe v. Denis*, 133 U. S. 514, 522, 10 Sup. Ct. 335, 33 L. Ed. 768; *Doty v. Brown*, 4 N. Y. 71, 53 Am. Dec. 350; *McGrath v. Seagrave*, 2 Allen, 443, 79 Am. Dec. 797; *Estill v. Taul*, 2 Yerg. 467, 24 Am. Dec. 498; *Emery v. Fowler*, 39 Me. 326, 63 Am. Dec. 627.

In *Washington, etc., Packet Co. v. Sickles*, *supra*, the court approved of the admission of brief docket entries of a verdict and judgment, and extrinsic evidence that they were based upon the same matters then in litigation. It was said:

"The defendants objected to these docket entries as evidence of a verdict and judgment, but insisted they were simply memoranda or minutes, from which a record of a verdict and judgment were to be made. It appears that in the courts of this District, as in Maryland, the docket stands in the place of, or perhaps is, the record, and receives here all the consideration that is yielded to the formal record in other states. These memorials of their proceedings must be intelligible to the court that preserves them, as their only evidence, and we cannot, therefore, refuse to them faith and credit."

In *McGrath v. Seagrave*, *supra*, the court affirmed the admission, to prove a judgment, of the papers and minutes and the explanatory evidence of the magistrate; the record not having been extended.

In *Miles v. Caldwell*, *supra*, it was said:

"We are of opinion that the prevailing doctrine of the courts at present is that, whenever the form of the issue in the trial relied on as an estoppel is so vague that it does not determine what questions of fact were submitted to the jury under it, it is competent to prove by parol testimony what question or questions of fact were before the jury, and were necessarily passed on by them."

In *Estill v. Taul*, *supra*, the court said:

"Parol evidence is admissible to show the fact or issue tried and determined by the justice. It is even so in cases where the pleadings are in writing, but the judgment general and uncertain. It must be so of necessity where the defense is not on paper."

It is equally clear that if the judgment is in general terms, and the pleadings are lost, parol evidence should be received to prove what was adjudicated. It appears to have been the settled practice of the courts of the Chicksaw Nation to rely almost entirely upon the pleadings for a description of the subject-matter of the controversy; and, when a cause was appealed from the district court to the Supreme Court, the record sent up consisted of the original pleadings and a transcript of the evidence, all of which were returned to the former court upon the disposition of the appeal. It was shown in the case at bar that after the judgment of the district court was affirmed on appeal, and the pleadings and transcript were returned to it, they were lost or destroyed by fire. The evidence concerning the issue involved in that action which was admitted by the court below was therefore the best obtainable.

Holford contends that under no circumstances should land known as the "Boon Holford Tract" have been included in the judgment against him, for the reason that Margaret James, his grantor, acquired it by purchase from Boon Holford years before the present controversy arose. But we do not understand that it was so included. While there is some confusion in the record before us regarding the matter, it appears to be settled by a plat which was received in evidence, and agreed to by the parties to the cause as correctly representing the property in controversy and the surroundings. The tract marked, "Sold by Boon Holford to Margaret E. James," is not included in that designated as "Property

in Controversy," and we so construe the judgment which was rendered. Moreover, this construction is in accord with the description of the property in controversy contained in plaintiffs' complaint, wherein it is alleged to be bounded on the south by the Margaret James farm.

The judgments of the United States Court of Appeals and of the United States Court for the Southern District of the Indian Territory are affirmed.

In re WALSH et al.

(Circuit Court of Appeals, Fifth Circuit. March 28, 1905.)

No. 1,420.

COLLISION—LIABILITY OF TUG FOR COLLISION WITH TOW FLEET UNDER DIRECTION OF PILOT OF TOW.

A tug employed solely to furnish motive power to another vessel, to whose side she is lashed, and which is in all things with respect to the navigation of the fleet subject to the orders of a pilot employed by and on board of the tow, is not liable for a collision occurring without her own fault, although it may have been caused or contributed to by the fault of the pilot or of the tow.

Appeal from the District Court of the United States for the Southern District of Alabama.

Harry T. Smith, Gregory L. Smith, and W. S. Benedict, for appellants.

H. Pillans, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. The steamboat Alma, while descending the Mississippi river on the night of November 22, 1901, at a point opposite the Stuyvesant Docks of the city of New Orleans, collided with a fleet composed of the James G. Pendleton, a three-masted, schooner-rigged vessel, known as a tank or oil barge, in tow of the steam tug Echo, which was lashed alongside on her starboard quarter, and with a barge, the Texas No. 1, astern and in tow of the Pendleton with a 20-fathom hawser. The Pendleton was a vessel of about 800 tons burden, and carried a master, mate, and crew. She stood high out of the water, although carrying a full cargo of oil. The actual collision was between the port bow of the Pendleton and the Alma, and the effect was to crush a hole in the starboard side of the Alma, so that, soon after being towed to the other side of the river, she sank and became a total loss. Henry W. Gribble was a clerk on board of the Alma, and was thrown down and injured by the concussion. The owners of the Echo filed their petition for a limitation of their liability, and the Red River Line, as the owner of the Alma, and Henry W. Gribble in his own right, filed their respective petitions setting forth the liability on the part of the Echo on account of the collision. The District Judge dismissed both these petitions, holding that the Echo was without

fault in the collision, and that the Alma was in fault in several particulars. In his opinion, printed in the transcript, the judge says:

"The first question raised on the evidence and argument is whether the Echo is, under the circumstances of the case, responsible for the faults or acts of omission of the pilot on the tow, or of the crew of the tow, even if such faults or acts appear to have caused the collision. My opinion is that, in respect to a compliance with the general navigation laws, the tug Echo, so far as her own lights and signals are concerned, would be liable for her own faults or acts of omission, but that, so far as the faults or negligent acts of the pilot or crew of the barge Pendleton are concerned, as regards their own vessel, the latter was a separate and independent vessel, and would be solely liable. That is to say, if the collision was caused by the failure of the Echo to carry and display proper lights or to make the proper signals, as required by the rules, it would be liable. If the collision was caused by the failure of the Pendleton to carry and display the proper light, the tug Echo would not be liable therefor; or if the collision was caused by the tug and tow not being in their proper place ascending the river, according to the custom, the tug would not be responsible. The barge Pendleton had her master and crew in charge of her, and a special river pilot aboard, employed by her owners to control and navigate the fleet, which consisted of the tug and two barges in tow. The tug was bound to obey the orders of the pilot, at least so far as they did not conflict with the navigation rules. This certainly was true as relating to the fleet's proper place in the river; and I think the tug's non-liability as regards the lighting of the barge equally clear. *Spencer on Marine Collisions*, § 123; *Hughes on Adm.* p. 119; *Sturgis v. Boyer*, 24 How. 110, 16 L. Ed. 591.

"Under the authorities, I have some doubt that I am correct in the opinion that the tug would be liable for the failure to give proper signals irrespective of the tow pilot's orders, in view of the circumstances of this case. However, from my view of the case, this is immaterial.

"There is a great volume of testimony in the case, and, as is usual in cases of collision, much conflict of evidence on important questions involved in it."

The judge then proceeds at length to analyze and consider the evidence with regard to the lights and the respective navigation of the Alma and the fleet, and, in regard to the liability of the Echo, concludes:

"I think that the evidence is absolutely conclusive as to the fact that the Echo and tow were on the New Orleans side of the river—their proper place in the river according to the customary course of its navigation. The burden is on the libelants to establish their case. *Donald v. Guy* (D. C.) 127 Fed. 228, and authorities therein cited. It is incumbent upon them to point out some negligence or infraction of duty on the part of the tug Echo that contributed to the collision. They have done so in their libel, but have failed to sustain its allegations by the evidence."

The evidence in the case clearly establishes that the Echo was properly lighted and was without fault in the premises, unless she and her master were responsible for the faulty navigation of the fleet. It is undisputed in the evidence that before and at the time of the collision the fleet was under the charge of a regular Mississippi river pilot employed by the owners of the Pendleton, and that said pilot, from his position on the cabin of the Pendleton, commanded and directed the navigation of the whole fleet. The pilot testifies that he was employed by the owners of the Pendleton to pilot the fleet up the river; that he went on board the Pendleton and took charge, issuing orders to the helmsman of the Pendleton, and to the captain of the Echo as to the entire navigation of the Echo. It is also undisputed in the evidence that the Echo, while

furnishing the propelling power moving the whole fleet, in regard to navigation followed in all things exactly and implicitly the orders given by the Pendleton through the pilot in charge. Corroborated by the pilot and undisputed in the evidence, the captain of the *Echo* testifies that he received from the pilot and obeyed all orders issued as to navigation, and, further than such obedience to orders, took no part in the navigation of the fleet. And there is no evidence entitled to credit to the contrary.

As the *Echo* was not responsible for the proper navigation of the fleet, and in all respects complied with the laws and regulations applicable to her handling and management in the premises, and in no way by her fault contributed to the collision, she ought not to be held responsible for faults, if there were any, in the navigation of the *Pendleton*. In *Sturgis v. Boyer*, 24 How. 110-121, 16 L. Ed. 591, after full argument, the Supreme Court said:

"Cases arise, undoubtedly, when both the tow and the tug are jointly liable for the consequences of a collision; as when those in charge of the respective vessels jointly participate in their control and management, and the master or crew of both vessels are either deficient in skill, omit to take due care, or are guilty of negligence in their navigation. Other cases may well be imagined when the tow alone would be responsible; as when the tug is employed by the master or owners of the tow as the mere motive power to propel their vessels from one point to another, and both vessels are exclusively under the control, direction, and management, of the master and crew of the tow. Fault in that state of the case cannot be imputed to the tug, provided she was properly equipped and seaworthy for the business in which she was engaged; and if she was the property of third persons, her owners cannot be held responsible for the want of skill, negligence, or mismanagement of the master and crew of the other vessel, for the reason that they are not the agents of the owners of the tug, and her owners in the case supposed do not sustain towards those intrusted with the navigation of the vessel the relation of the principal."

Sturgis v. Boyer has been cited approvingly and followed in many cases in the admiralty courts. See Winslow's Digest, vol. 3, p. 4837. The same principles for determining the responsibility as between tug and tow are found in the text-books (Spencer on Collisions, § 124; Parsons on Shipping and Admiralty, vol. 1, p. 534; Hughes' Admiralty, 119), and have been recognized and followed generally in the admiralty courts. See *The Connecticut*, 103 U. S. 710-712, 26 L. Ed. 426; *The Civilta and Restless*, 103 U. S. 699, 26 L. Ed. 599; *The Virginia Ehrman*, 97 U. S. 313, 24 L. Ed. 890; *The Imperial* (D. C.) 38 Fed. 614, 3 L. R. A. 234; *Westhoff v. Oluf*, 3 Woods, 667, Fed. Cas. No. 17,449. The opinion in *The Edgar Baxter*, 8 Ben. 162, Fed. Cas. No. 4,278, by a distinguished admiralty judge, afterwards an ornament to the Supreme Court of the United States, is so clear and pointed, and so applicable here, that we quote in full:

"Blatchford, District Judge. The evidence shows that the movements of the propeller were under the direction of a pilot who was on board of, and belonged to, and was in the employ of, the schooner. The tug furnished only the motive power, while the guidance of the two vessels, considered as one in their relations to other vessels, the schooner being lashed alongside of the tug, was under the direction of the schooner, through such pilot. Under those circumstances the tug is not liable for the damage complained of in this case, and the libel must be dismissed, with costs."

On principle, and after full consideration of the subject in the light of the text-books and adjudged cases, we concur with Parsons, *supra*:

"The question has arisen, when a vessel is in tow of a steam tug, and collision occurs with another vessel, which is responsible, the steam tug or the vessel in tow? It is obvious that two perfectly distinct views may be taken of the relation between them. According to one, the vessel towing is but the servant of that which is towed; this latter is the master, and is responsible for the acts of the former as his servant. According to the other, the vessel towed is for the time under the absolute control of the vessel towing, and this latter is therefore responsible for any mischief done. We apprehend it to be an error to assume that either of these relations must exist in any particular case. The inquiry should always be, which party is the principal, and which the servant? And, wherever the relation of principal and agent exists, the case should be decided on the principles of agency. Generally, we should say that the tug was probably the servant, and the vessel which employed her the principal, and responsible as such. But it will be seen that the cases are in irreconcilable conflict."

In this case, we think the Echo was the servant, and without fault, and the Pendleton was the principal, and responsible as such.

For the reasons given, it is clear that the decree of the District Court should be affirmed, irrespective of faults of navigation which may have been committed by the fleet and the pilot in charge thereof, and therefore it is unnecessary to lengthen this opinion by reviewing the evidence as to the lights and signals and steering of the Pendleton and Alma.

Affirmed

L. N. DANTZLER LUMBER CO. v. CHURCHILL.
(Circuit Court of Appeals, Fifth Circuit. April 4, 1905.)

No. 1,436.

1. SHIPPING—DEMURRAGE—LAY DAYS FOR LOADING.

Under a provision of a charter party that lay days for loading should commence on notice of readiness by the master, to render such notice effective to start the lay days to running the vessel must have been at her wharf, ready to load, when it was given.

2. SAME.

Evidence considered, and *held* to show that a delay of several days in loading a vessel with lumber was due to the fact that the stevedore employed by the master to stow the cargo did not have men to do the work during such days, and not to the failure of the charterer to furnish cargo.

[Ed. Note.—Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

Appeal from the District Court of the United States for the Southern District of Mississippi.

J. I. Ford, for appellant.

W. M. Denny, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. This is a libel for demurrage claimed because the charterers of the barkentine Hornet did not furnish

cargo for loading within the loading days stipulated in the charter party. The charter party provides:

"It is agreed that the lay days for loading and discharging shall be as follows, (if not sooner dispatch), commencing from the time the captain reports his vessel ready to receive or discharge cargo.

"Lay days not to commence before Friday, Dec. 18th, 1903. Loading and discharging with all possible dispatch, but not less than 25 M. ft. daily loading and discharging Sundays and legal holidays excepted. And that for each and every day's detention by default of said party of the second part, or agent \$40 per day shall be paid by the party of the second part, or agent, to the said party of the first part, or agent. The cargo or cargoes to be received and delivered alongside, within reach of vessel's tackles."

The amount of cargo loaded on the *Hornet* was 298,794 superficial feet, requiring, at 25 M feet delivery per loading day, 12 days for loading. At the time the charter party was entered into in Mobile, Ala., December 16, 1903, the *Hornet* was at Ship Island. When she was removed to Gulfport, the port of loading, does not exactly appear. The master testifies she was ready to receive cargo on the 16th; that he gave verbal notice to the Dantzler Company, through some one belonging to the Dantzler Company (he does not know who), on the 17th, he thinks, to employ a stevedore; and that he had his stevedore ready. He further testifies, "We came in on the 16th, 17th, and 18th." On the morning of the 18th he mailed written notice as follows:

"Gulfport, Dec. 18th, 1903.

"L. N. Dantzler Lumber Co., Moss Point—Gentlemen: I beg to give you notice that the Bktn. *Hornet* is ready for cargo. Lay day commence, according to Charter Party, from this day.

"Yours truly,

J. S. Churchill,

"Master of Bktn. *Hornet*."

Moss Point was 30 miles away, and in due course of mail the written notice was received on the afternoon of the 18th. As the evidence fails to show that the *Hornet* was at her wharf in Gulfport before the 18th, and as the general rule is that notice of a ship's readiness to receive cargo can be properly given only after the ship is ready and at her proper place for loading (see *MacLachlan*, 411), we take it that the only sufficient notice given in this case was the written notice given December 18th, and that, as that notice was not received until the afternoon of that day, the loading days did not commence against the charterers, under a fair construction of the charter party, until the next day, which was Saturday, the 19th of December. The vessel was not loaded with full cargo until January 11, 1904, a period of 18 days, including December 19th and January 11th, and excluding Sundays and holidays. This was 6 days more than the loading days allowed under the charter party, for which the libellant would be entitled to recover demurrage if the delay was caused by the charterer's failure to furnish cargo.

The case shows that six working days were lost from the 23d of December to and including December 31st, and the real issue on this libel is whether the charterers are responsible for this loss through failure to deliver cargo as stipulated. Under the charter party it was incumbent upon the ship to furnish a stevedore and

load the cargo. The master testifies that he let the loading of the cargo to a Mr. Ladnier, who sublet to another man—Mr. Ladnier's foreman, he believed. An extract from the master's cross-examination shows:

"Q. How many days about Christmas time did you not receive any cargo abroad? A. Four or five days there— I don't know how many in the vessel on the 20th or the 24th loading the cars— I think so. Q. Which one? A. I don't know. Q. Do you swear that the stevedore that loaded your vessel had a force of men sufficient to take on board twenty-five thousand feet of lumber per day from the 18th to the 24th and from the 26th to the 1st of January? A. I suppose he did. He never made any complaint. The only trouble, we didn't have any cars. Q. He didn't have any reason to complain to you about the men? A. No, sir. Q. You didn't have anything to do with the employment of the men? A. Yes, sir; I was there every day, and they told me there was no cars. Q. That man was your agent? A. No, sir. Q. Whose was he? Dantzler's? A. I employed him. Q. Do you know that the man had a full force of men ready all the time to receive the cargo alongside of your vessel from the 18th? A. Yes, sir; I think so. He told me he didn't have any trouble. Q. Did you know the stevedore that had the subcontract? A. He could not put the cargoes on board, for there was none there for him to do it. That is certain. Q. Give me the days cars were delivered alongside, and the days there were none? A. I have on here. (Pulling a paper from his pocket.) Q. Let's see it? (Witness hands counsel a paper.) Q. You had nothing to do with the employment of the men that the stevedore employed? A. No, sir. Q. You had nothing to do with it? A. No, sir. Q. You didn't pay the wages of the men that were employed? A. No, sir; I paid the stevedore in full for the job."

A witness of the charterers (John Poke) testified that he was the stevedore who had charge of the employment of the necessary men and of the loading of the Hornet. Among other things, he testified:

"Q. Did you have anything to do with the barkentine Hornet, which loaded at Gulfport December, 1903, and January, 1904? A. Yes, sir. Q. What did you have to do with the loading of that vessel? A. I was supposed to be the contractor. It was made through Mr. Ladnier with the captain of the vessel. He asked us himself. Q. Which Mr. Ladnier made the contract with the captain? A. Mr. Will Ladnier was the one that spoke to him. Q. Who employed the men that stored the cargo in that vessel? A. I did. Q. Was any time lost in loading that vessel along about Christmas time of the year 1903? If so how much time was lost? A. Near as I can get at it, something about four or five days. About five days, I reckon. Q. What caused the loss of that time? A. Could not get the men. Q. Who could not get the men? A. I could not get them. Q. If you could have gotten the men to work during that time, would any time have been lost on account of lumber not being there? A. I don't see where they could have been any loss. They would give us the lumber as we asked for it. There was lumber there when we stopped. Q. Was there any time during the time of the loading of that vessel that there was no lumber alongside of the vessel to be loaded on the boat? A. No, sir; when we started there was about five cars there, and when we knocked off we left one there on the main line. They left them on the main line, and we got them as we asked for them. Q. When did you knock off for Christmas? A. On Wednesday evening before Christmas. Q. Was there lumber alongside of the vessel the time you knocked off? A. Yes, sir. Q. When you went back to work again, was lumber promptly furnished by the L. N. Dantzler Lumber Company? A. Yes, sir. Cross-examination: Q. You say you knocked off Wednesday evening? A. Yes, sir; for Christmas. Q. Were there any car loads of lumber placed to the vessel on Wednesday evening before Christmas? A. There was a car lying there on the side track. When we wanted them they would put them on the main line for us as we asked for them. I told the switchman that we were going to knock off, and that he need not put the car in there; we would not be able to take it off that day. Q. Then there

was no cars delivered to the vessel except as you directed? A. No, sir; except as we asked for them. Q. Were you there on Christmas Day, the 25th? A. No, sir; I was home. Q. There on the 26th? A. No, sir; Saturday I was not there. Q. And there was no cars placed to that vessel except as you directed? A. As we asked for them; the cars we left were for their vessel. Q. How many cars were left there? A. One there, and some more in the yards—so the switch-engine man told me. Q. The statement that you make that lumber was there all the time is made on information you received from the railroad people? A. I saw these cars. * * * Q. When was it put there? A. It was there the day we began to load the vessel. They would put the cars in on the siding, and switch them in on the main line as we asked for them. Q. That car was there on the evening of the 23d—that was Wednesday before Christmas—and had been there before the vessel had started loading? A. Yes, sir; about that long; four or five cars—I don't know how many—lying there; and, as we would ask for them, they would put them on the main line for us. Q. How many car loads of lumber did you discharge a day, and take aboard of that vessel? A. About two. Sometimes three. Two is about the best that I can tell about. Q. How many car loads did you put aboard the vessel on the 23d, Wednesday? A. I think about two we put on there, if I am not mistaken. I think we put two, or one and part of another one. Q. Why didn't you take the other car that was there? A. It was about four o'clock, or a little after, and the men were ready to go home, and just as we knocked off for Christmas. Q. You say you were subcontractor? A. The contract was made something like them— Mr. Ladnier met me up here one day and asked me, did I want to load a schooner or barkentine, and I told him, 'Yes; I would load it.' He said he didn't care to do it himself; something like that; he was 'ground out'—and asked me, did I want to take the job. I said, 'Yes.' He said, 'I will tell the captain,' and I said, 'All right;' and, as he started off, I said, 'Hold on. Let me find out what I am going to get out of the captain.' He said, '70 cents; will try to get that; if not, I will try to get it for 65 cents. I want to help the fellow out.' I said, 'All right,' and he told me about the cargo; and he went on and told the captain, and told me to have a gang there, and told me when to have the gang there, and he told me he would tell the captain when he was ready to start. Q. Then the contract was made between the captain and Mr. Ladnier as to the loading of the vessel? Your contract was made with Mr. Ladnier to take the vessel? You didn't make any contract with the captain? A. No, sir; I had oral contract with him; didn't have any writing."

The mate of the *Hornet* (the most intelligent witness for the libellant) testifies, in a general way, that from the 23d of December to the 1st of January there were men on the ship ready to work at loading, and that no cargo was loaded because none was delivered. Whether the men about, staying on the ship, who were ready to work at loading, belonged to the crew, or were a part of the stevedore's gang, the mate does not say. This witness furnishes a statement of the receipt and unloading of cars delivered to the ship, and this agrees in the main with Catchot's statement; and on cross-examination he admits that lumber was furnished on the 26th that the stevedore refused to load.

The only other witness for the libellant was one of the crew of the *Hornet*, a foreigner not well acquainted with the English language, who admitted himself drunk on the examination, and who only swore generally about men being around ready for work.

The agreed statement made by Mr. Catchot, who is admitted to be a reliable witness, and who was in charge of the railroad, handling all the lumber, shows that four cars were placed to the vessel on December 21st, three on December 22d, and one on De-

ember 26th, and that this latter was not unloaded until January 1st, and that during Christmas week there were on hand in the railroad yards three other cars, not placed at the vessel until January 1st. There is no evidence to show that between December 23d and December 31st the charterers were called on to deliver any cargo, or that they were not ready to deliver cargo according to contract, and the preponderance of the evidence is that during that period the ship was not ready to receive cargo through want of stevedores and laborers. And certain it is that the ship stevedore testifies, without contradiction, that he notified the switchman of the railroad on December 23d he need not put a car in, as "we would not take it off that day."

On the whole case, we are of opinion that, under the evidence, the blame for losing the days from December 23d to January 1st, as loading days under the charter party, lies with the stevedore and his gang, who did not work during the holiday period; and for the shortcomings of the stevedore the owners, and not the charterers, are responsible.

The decree of the District Court is reversed, and the cause is remanded, with instructions to dismiss the libel.

WESTERN ELECTRIC CO. v. HANSELMANN.

(Circuit Court of Appeals, Second Circuit. March 8, 1905.)

No. 131.

1. MASTER AND SERVANT—INJURY OF SERVANT—UNSAFE PLACE TO WORK.

Where plaintiff, an employé, was sent to work where he was obliged to stand partly inside the doorway of elevator shafts, and was struck and injured by one of the cars, which were continued in use by other servants, who had been directed by the master to give plaintiff warning of the approach of the cars, which in this instance was not done, the facts justified a finding by the jury that the master did not perform its duty in respect to furnishing plaintiff with a safe place to work, in that it did not either stop the cars, or provide some one who should devote his attention to keeping watch, so as to give plaintiff due warning.

2. SAME—DANGER FROM SEPARATE WORK OF FELLOW SERVANTS—DUTY OF MASTER TO GIVE WARNING.

Where a servant is set to work in a place safe in itself, but in which he is exposed to danger from the doing of work by other servants not connected with his own, the master is bound to employ the necessary means to give him timely warning of such danger, and cannot delegate such duty to any other person, so as to relieve himself from liability for the negligent failure to give such warning.

In Error to the Circuit Court of the United States for the Eastern District of New York.

This cause is brought here by writ of error of defendant below from a judgment entered by the United States Circuit Court for the Eastern District of New York in favor of plaintiff for \$7,131.88 damages for personal injuries.

John Notman, for plaintiff in error.

Louis Hicks, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The material testimony on behalf of the plaintiff was in effect as follows:

The defendant sent the plaintiff to repair the door switches of certain elevators in the front of a building where there were, altogether, eight or nine elevators. In order to work on the switches, it was necessary that he should reach in from the outside of the shaft, and stand with one foot inside the shaft, on the cross-girder between two elevators, one local and one express, using his left hand to hold him in this position, and, while facing the wall, use his right hand to work. When the elevator cars came up and down, he swung himself back out of the shaft with his left hand, and allowed them to pass. On the day before the accident the elevator boys had said they would rattle the lever of the elevator to let plaintiff know when they were coming, and they had done so and plaintiff was satisfied with said warning, and had gotten out of the way. While he was working on the day of the accident, defendant's foreman asked him how he was getting along, and he said, "All right," but that one of the elevator boys had hit his arm with the car the day before. The foreman told the boys to be careful, and asked plaintiff whether they let him know when they were coming, and he replied: "Yes; they rattle the lever, and give me time to get out of the shaft." Thereafter they continued to rattle the lever until the car came up on the trip when plaintiff was struck, when no warning was given. The plaintiff did not watch for the approach of the cars, as he could not do so and attend to his work. The elevator cars were frequently passing up and down, and the plaintiff was changing from one floor to another, wherever work was to be done.

The elevatorman who ran the car which struck the plaintiff testified as follows:

"That car goes very fast. I was going at the usual rate of speed when I struck Hanselmann. * * * There was nobody in the elevator with me to assist me in looking out for Hanselmann. I didn't have to have any one. * * * I couldn't see through the bottom of the elevator. * * * It was by looking through the side that I could see Hanselmann above."

The foreman testified:

"I did nothing to secure Hanselmann against the running of the elevator, because I didn't think it necessary, * * * because what I told him to do didn't require him to get out into the shaft."

It did not appear whether or not one of these elevators could have been conveniently stopped during the time while plaintiff was at work in the shaft.

In these circumstances, it is unnecessary to discuss the assignments of error by reason of the refusal of the court to direct a verdict for the defendant on the ground that defendant had provided a competent man to give a warning of the approach of the car, which was satisfactory to the plaintiff, and that said competent man was a fellow servant of plaintiff. The jury may well have found upon the evidence that the defendant had assumed the responsibility of using due precautions to give timely warning of the

approach of the car, and that, after the knowledge of the danger had been brought home to defendant's foreman who directed the performance of the work, and he had undertaken to instruct the elevatormen as to their duty, the warning thereafter given was by the direction of defendant. They would have been justified in finding that defendant did not discharge its duty to use reasonable precautions to provide plaintiff with a safe place to work, because of the admitted failure of defendant to temporarily stop the running of said car or to do anything, except as aforesaid; because of its failure to provide any one to give warning on the floor where plaintiff was working, or in the cars, where the elevatormen must necessarily have been so engrossed in answering calls, stopping to let passengers off, opening and closing the doors, and operating the car, that they could not reasonably have been expected to be attentive to the plaintiff and his situation of danger, and that the accident was the direct result of such neglect. *McLaine v. Head*, 71 N. H. 294, 300, 52 Atl. 545, 58 L. R. A. 462, 93 Am. St. Rep. 522; *Louisville R. R. v. Hanning*, 131 Ind. 528, 31 N. E. 187, 31 Am. St. Rep. 443; *The Pioneer* (D. C.) 78 Fed. 600, 609.

But independently of these considerations, the case presented is one where a servant is directed to work in a place safe in itself, but where, by reason of other and independent work pertaining to the business of a common master, the servant is exposed to perils arising from the doing of such distinct and independent work. The authorities are irreconcilably in conflict as to the liability of an employer when by his direction or by an arrangement between employes engaged in a common employment, one of the employes undertakes to warn another of the perils arising in the course of said employment, due to the performance of the common work. In the case at bar, however, the facts call for the application either of the well-settled rule that a master is liable when he either fails to provide for giving warning of danger or intrusts the duty of giving such warning to an employe so engrossed with other duties that he could not properly and efficiently give the necessary warning, or of the other equally well settled rule, established by repeated decisions in other jurisdictions and in this circuit, that when the perils to be apprehended arise either from outside and independent conditions, or from the doing of other extraneous work by defendant's servants, distinct and separate from the work in which the particular servant is engaged, the master is bound to employ the necessary means to give timely warning of such danger, and that he cannot delegate his duty to any other person, so as to relieve him from liability for the negligent failure to give such warning. *Toledo Brewing & Malting Co. v. Bosch*, 101 Fed. 530, 41 C. C. A. 482; *Orman v. Salvo*, 117 Fed. 233, 54 C. C. A. 265; *Gustav Pantzar v. The Tilly Foster Iron Mining Co.*, 99 N. Y. 368, 2 N. E. 24; *Catherine McGovern v. Central Vermont Railroad Co.*, 123 N. Y. 280, 25 N. E. 373; *Belleville Stone Co. v. Mooney*, 61 N. J. Law, 253, 39 Atl. 764, 39 L. R. A. 834; *Smith v. Baker* [1891] App. Cas. 325.

In this circuit this rule has been repeatedly considered and ap-

plied. Thus in *Kennedy v. Grace & Hyde Co.* (C. C.) 92 Fed. 116, affirmed 99 Fed. 679, 40 C. C. A. 69, plaintiff was at work for defendant on timbers raised above the street. A wagon struck one of the guys, and thereby plaintiff was thrown from the timber and seriously injured. The court below distinguished between the cases where the progress of the work itself affected the question of safety or caused the peril, and those where the accident occurred by reason of a failure to give warning of a danger with which the work in which the plaintiff was engaged had nothing to do. This court, in reviewing the decision below, affirmed the distinction, and held further as follows:

"The subject which is contained in the defendant's assignment of error that the plaintiff assumed the risk of his position and of the conditions as they existed was fully considered in *Railway Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188, and it is sufficient to say that the plaintiff did not assume the risk of the employer's neglect to furnish a reasonably safe system of protection against the danger from injury by passing vehicles."

So, in *Baird v. Reilly*, 92 Fed. 884, 35 C. C. A. 78, where plaintiff was injured by the caving in of a trench, with the cutting of which he had had nothing to do, but in which he had been directed to lay pipes, and it appeared that a competent foreman had been placed in charge of the work, provided with all necessary materials for the protection of the side walls, but had not used them at this point because he thought they were not necessary, this court said:

"An employer is not relieved from responsibility to an employé, who has been injured in consequence of his failure to make the working place reasonably safe, by proof that he employed a competent superintendent or foreman, supplied him with the necessary appliances, and gave him all needful instructions for the purpose. He cannot escape responsibility by delegating his duty in this behalf to another, because it is his implied contract with the employé that he will see to it that the working place is reasonably safe, in view of the character of the work to be performed, and this obligation is not satisfied by devolving it upon a subordinate."

In the *Magdaline* (D. C.) 91 Fed. 798, Judge Thomas said as follows:

"A master may not place his servant at a work made dangerous by the nature of the work of other servants, or persons performing work under contract, without due effort to furnish adequate protection, and, when injury arises, escape upon the plea that, but for the negligence of a co-servant or third person employed on the premises, the injury would not have happened."

To the same effect is the decision in the Ninth Circuit in *The Pioneer*, supra, where a shipwright was engaged in making repairs in the hold of a vessel, and when he came on deck was injured by being struck by a barrel which was being swung into the hold. A general warning of this danger had been given, but it was doubtful whether plaintiff had heard it, and the mate, who supervised the loading, was so occupied with his duties that he could not give timely warning. Judge Morrow held as follows:

"In the view taken by the court, no question of the negligence of a fellow servant can arise in this case. The injury to respondent, under all the facts of the case, arose by virtue of the breach on the part of his employers, the petitioners, of a personal duty which they impliedly owed him, to see to it that the places on the vessel in which he was compelled in the course of his employ-

ment, and by reason of the nature of his duties, to proceed to and from, should be reasonably safe and free from danger; and, having failed to fully and properly discharge this personal duty, it is such negligence as entitles the respondent to recover for the damages he proximately sustained thereby."

It is unnecessary to discuss the other points made by defendant. If the conversation with the foreman was not binding on defendant, then the evidence shows an utter failure of defendant to take any measures for warning plaintiff of the perils to which he was exposed in the place where he was directed to work, and defendant is liable, under all the authorities.

The judgment is affirmed.

TOWN OF FLETCHER v. HICKMAN.*

(Circuit Court of Appeals, Eighth Circuit. March 29, 1905.)

No. 2,019.

1. MUNICIPAL CORPORATIONS—BOARD OF TRUSTEES—MEETINGS—ORDINANCES—VALIDITY—PRESUMPTIONS.

An adjourned regular meeting of a town board, at which a quorum was present, was adjourned to June 5, 1891, when, no quorum being present, the meeting was adjourned to June 8th, at which there was a quorum, and an ordinance authorizing a bond issue for waterworks was duly passed. At this meeting the mayor and four of the six trustees assembled at a time when a legal session was possible and transacted other business of importance, disclosed by the minutes of the meeting in the town records. *Held*, that it would be presumed, if necessary, in favor of bona fide holders of bonds issued under such ordinance, who had no knowledge of their invalidity, excepting as shown by the town records, that the meeting at which the ordinance was passed was a special one, of which the two absent trustees were duly advised, as well as of the matters to be then considered, and that the ordinance was therefore not invalid because the regular meeting died on June 5th because of the absence of a quorum.

2. SAME—PUBLICATION—PRIMA FACIE EVIDENCE—BURDEN OF PROOF.

Under a Colorado statute requiring that all town ordinances, after their passage, shall be recorded in a book styled "Book of Ordinances," which shall be considered in all the courts of the state as prima facie evidence that the ordinances appearing therein have been published as provided by law, where an ordinance authorizing the issuance of waterworks bonds was duly recorded in the book of ordinances, the burden was on the town, in an action on coupons detached from the bonds issued under such ordinance, claiming that the ordinance was void for want of publication, to prove such fact by affirmative evidence.

3. SAME—EVIDENCE.

A Colorado statute provided that, to be effective, the ordinances of a town must be published in some newspaper published within its corporate limits, or, if none, in one of general circulation therein, or otherwise by posting copies in three public places designated by the board of trustees, and that the record of an ordinance in the "Book of Ordinances" shall be prima facie evidence of publication as provided by law. *Held*, that where an ordinance authorizing the issuance of waterworks bonds was duly recorded in the "Book of Ordinances," and there was no newspaper published or in circulation in the town, the prima facie due publication of the ordinance was not overcome by proof that no places for posting were

*Rehearing denied May 17, 1905.

designated by the board of trustees prior to the date of the bonds, not shown to have been the date of their actual issue.

4. SAME—BONDS—ISSUANCE—CONSPIRACY—EVIDENCE.

Where, in an action on coupons cut from water bonds issued by a town, it was admitted that plaintiff was a bona fide purchaser of the coupons in the open market, without any knowledge of their invalidity, except such as appeared on the records of the town, and there was no evidence in such records of a conspiracy, or any fraudulent act, in connection with the execution or delivery of the bonds, with their attached coupons, parol evidence was inadmissible to show a fraudulent conspiracy between the mayor and certain trustees of the town, and that the bonds were issued in pursuance thereof.

[Ed. Note.—Bona fide purchasers of municipal bonds, see note to *Pickens Tp. v. Post*, 41 C. C. A. 6.]

In Error to the Circuit Court of the United States for the District of Colorado.

This writ of error challenges a judgment recovered by Hickman upon coupons detached from bonds issued by the town of Fletcher, Colo., in the acquisition of a system of waterworks. The defenses urged were the invalidity of the ordinance authorizing the issue of the bonds and a fraudulent conspiracy between the mayor and a majority of the trustees, resulting in the incorporation of the town, their own election as officers, and in the issue of the bonds in the purchase of a property which was alleged to be comparatively worthless.

Guy Le Roy Stevick (O. N. Hilton, on the brief), for plaintiff in error.

Thomas K. Skinker, for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and LOCHREN, District Judge.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is contended by counsel for plaintiff in error that the ordinance was invalid for the reason that it was not passed at a legal meeting of the board of trustees of the town, and also because it was not published as required by the Colorado statute. The records of the board of trustees showed that at an adjourned regular meeting of that body, held on June 3, 1891, at which was present a legal quorum, a further adjournment to June 5th was ordered, and on the latter day, no quorum being present, the meeting was adjourned to June 8th, at which time there was a quorum, and the ordinance was passed by the requisite number of votes. The particular contention is that, because of the absence of a quorum on June 5th, the meeting died as matter of law, there could have been no legal adjournment thereof, and therefore the meeting at which the ordinance was adopted was wholly unauthorized. But we cannot assent to this conclusion. The mayor and four of the six trustees were present and acted in the passage of the ordinance. They assembled at a time when a legal session was possible and transacted other business of importance. The minutes of the meeting were duly entered and still remain upon the public records of the town. It is not essential that every step leading up to the assemblage of a city council

or connected with proceedings which are within the general powers conferred upon it be shown with that degree of strictness which is required in tracing title to realty back to its fountain head. There is a presumption, which is in accord with a wise public policy, in favor of the regular and rightful performance of official duty by public officers. "*Omnia præsumentur rite et solemniter esse acta donec probetur in contrarium.*" And when, as in this case, many years after the passage of an ordinance out of which substantial rights have grown, it is assailed upon such a ground as that here presented, it may be assumed, if necessary, that the meeting was a special one, and that the two absent trustees were duly advised thereof and of the matters to be then considered and passed upon.

In *Knox County v. Bank*, 147 U. S. 91, 97, 13 Sup. Ct. 267, 269, 270, 37 L. Ed. 93, it was said:

"The election was held, the votes cast at that election were canvassed by the proper officers, and an order made by the county court for a subscription in accordance with the terms of the order for the election. From these facts it may be presumed that proper notices of the election were given; for it is a rule of very general application that, where an act is done which can be done legally only after the performance of some prior act, proof of the later carries with it a presumption of the due performance of the prior act."

An instructive case is *Rutherford v. Hamilton*, 97 Mo. 543, 11 S. W. 249. It involved the validity of a special tax bill. The contract for the work required the approval of the city council. That body met in regular session July 8, 1881, and adjourned to meet "in a week from" that night. The next record of a meeting was of July 16, 1881, when the mayor and eight of the ten councilmen were present and transacted business, among which was the approval of the contract in question. The court said:

"Nothing is stated regarding the cause of their assembling. It may have been upon special call of the mayor, or in supposed compliance with the adjournment of eight days before. It appears that regular municipal business was transacted and a record thereof was preserved in the usual way by the proper officer. In the absence, therefore, of any evidence to the contrary, it will be presumed that these public officers rightly acted in the premises and that the meeting was properly convened."

In *Duluth v. Krupp*, 46 Minn. 435, 49 N. W. 235, it was held that the same presumptions obtain that a city ordinance was legally passed as in the case of an act of the Legislature.

In *Freeholders v. State*, 24 N. J. Law (4 Zab.) 718, it was held that, if any proceeding of a municipal corporation be had at an adjourned meeting, it will be presumed, until the contrary is shown, that the meeting was rightly adjourned, and that it is not necessary that the facts showing the proper convening should appear upon the face of the proceedings.

See, also, *Scott v. Paulen*, 15 Kan. 162, 167; *Downing v. Miltonvale*, 36 Kan. 740, 14 Pac. 281; *O'Mally v. McGinn*, 53 Wis. 353, 10 N. W. 515; *Town of Eldora v. Burlingame*, 62 Iowa, 32, 17 N. W. 148; *Atchison Board of Education v. DeKay*, 148 U. S. 591, 601, 13 Sup. Ct. 706, 37 L. Ed. 573.

A statute of Colorado provided that, to be effective, the ordinances of a town must be published in some newspaper published within

its corporate limits, or, if there be none, in one of general circulation therein, or, if there be neither, the publication shall be made by posting copies of the ordinance in three public places in the town, to be designated by the board of trustees. The evidence showed that since its incorporation there was no newspaper in which publication could legally be made. There were then introduced in evidence copies of the town records covering the period from the incorporation of the town until and including July 1, 1891, which was the date of the bonds from which the coupons in suit were detached, and they showed no action of the board of trustees designating the places and no posting of the ordinance. There was no evidence, however, that the ordinance had not been posted at places designated after the date of the bonds. It is claimed in this connection that a designation of the public places by the board of trustees was essential; that, in the absence thereof, there could have been no lawful posting; and that, as the records introduced in evidence covered the period down to the date of the bonds, no inference or presumption could be indulged in that there was a designation of places and a posting after that time. The statute referred to also required that all ordinances, after their passage, be recorded in a book styled "Book of Ordinances," which should be considered in all the courts of the state as *prima facie* evidence that the ordinances appearing therein had been published as provided by law. The ordinance in controversy was duly recorded in the book of ordinances, and it therefore devolved upon the town to overcome that proof of the publication by affirmative evidence.

It is to be observed that the contention of the plaintiff in error is predicated upon the assumption that the date of the bonds was the time of their issue, and that a designation of the places for posting and a posting of the ordinance after the bonds were issued could serve no lawful purpose. But there is no presumption that the date of the bonds is the date of their actual emission or issue. It is the common practice to fix an arbitrary date for municipal bonds, and their issue on the day of their date is of exceptional occurrence. It is common knowledge that the 1st day of July is one of the conventional days for the dating of bonds, and, moreover, it appears from the very ordinance before us that that date was arbitrarily selected in advance, without regard to the exact time of the consummation of the transaction by the delivery of the bonds.

In *Village of Kent v. Dana*, 100 Fed. 56, 40 C. C. A. 281, it was held that the fact that municipal bonds bore a date prior to the time the ordinance authorizing their issue went into effect was insufficient to defeat a recovery on the bonds by a bona fide holder, where there was no proof of the date of their actual issue, and their premature issue would have been contrary to the recitals on the face of the bonds.

In *Perkins County v. Graff*, 114 Fed. 441, 52 C. C. A. 243, this court had occasion to consider an objection quite similar to the one now being discussed. In that case a statute of Nebraska under which certain bonds were issued required the publication of a notice for two successive weeks prior to the issuing of the bonds. The

recitals in the bonds showed that but ten days intervened between the order of the county commissioners for the publication and the date of the bonds, and it was therefore contended that the bonds were invalid upon their face. It was held, however, that the date of the bonds did not evidence the date of their issue.

We have here *prima facie* evidence of the due publication of the ordinance in controversy, arising from the fact of its record in the book of ordinances; and such proof is certainly not overcome by an inadmissible assumption that the bonds were issued on the day of their date, and that there was no designation of places or posting thereafter.

The objections to the validity of the ordinance being untenable, and the ordinance being valid, the mayor, treasurer, and recorder of the town, being therein so directed, had full authority to sign the bonds as the proper representatives of the board of trustees. Under the statute the mayor was a member of the board and the chief executive officer of the town, and the recorder, being the clerk, was the custodian of its records and its corporate seal.

Parol testimony was offered to sustain the defense of fraudulent conspiracy between the mayor and certain trustees, but it was excluded by the Circuit Court. This ruling was correct. There was an agreement between the parties that the defendant in error was a bona fide purchaser of the coupons in the open market, "without any knowledge of their invalidity save and except such as appears upon the records of the town of Fletcher." There was no evidence in the town records of such conspiracy, or of any fraudulent or unlawful act in connection with the execution or delivery of the bonds with their attached coupons. The law of the state authorized the issue of bonds for the purchase of waterworks, the ordinance required by the statute was duly adopted and published, the purchase of the waterworks was made, and the negotiable bonds of the town were issued. So far as the records showed, all of the conditions surrounding the due exercise of the statutory power conferred upon the board of trustees had been performed. Under the stipulation of the parties the defendant in error was cognizant of these things, but ignorant of all else affecting the validity of the bonds or the coupons, which he purchased in good faith. Under such circumstances it was not his duty to go behind the records of the municipality, and inquire into the conduct and motives of public officials, who, being invested with authority to act, had apparently conducted themselves within its limitations.

In reaching these conclusions we have passed by the comprehensive recitals in the bonds of full compliance with all precedent and concurrent conditions imposed by law, and therefore we need not consider who had authority to make them, whether the board of trustees, or the mayor, treasurer, and recorder, whom they directed to act.

The judgment of the Circuit Court is affirmed.

ROGERS v. CINCINNATI, N. O. & T. P. RY. CO.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1905.)

No. 1,382.

1. RAILROADS—OPERATION OF TRAINS—STATUTES—CONSTRUCTION.

An object does not appear on the "road" within Shannon's Code Tenn. §§ 1574, 1575, requiring railroads to maintain a lookout on the locomotive, and when any person or other obstruction appears on the road to sound the alarm whistle, etc., until the object is near enough to be struck by a passing train.

2. SAME—CONTRIBUTORY NEGLIGENCE—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

Shannon's Code Tenn. §§ 1574, 1575, requiring that a lookout shall be maintained on railroad locomotives, and, when any person or other obstruction appears on the road, that the alarm whistle shall be sounded, etc., and that a failure to observe such precautions shall make the company liable for damages, having been construed by the Tennessee Supreme Court as giving damages notwithstanding contributory negligence, such construction will be followed in the federal court.

3. SAME—APPLICATION.

Such sections do not apply in favor of the foreman of a railroad construction gang, killed as the result of being struck by a locomotive which he had seen approaching, while he was standing near the track clearing it for the train to pass.

In Error to the Circuit Court of the United States for Eastern District of Tennessee.

This is an action for the alleged negligent killing of the husband of the plaintiff in error by collision with an engine hauling a train of cars upon the line of railway owned and operated by the defendant company. At the conclusion of all of the evidence the trial judge instructed a verdict for the railroad company. It was conceded below, and conceded here, that the plaintiff could not recover unless the Tennessee statute concerning the precautions to be observed by railroads in the operation of trains applied to workmen engaged in work upon the railway track. The deceased, John R. Rogers, was at the time of his injury a foreman in the employment of a construction company engaged in making certain additional sidings, under contract with the railroad company, at the time and place of the accident. Rogers had charge of a gang of some 15 men, and was at the time engaged in grading to put in a new switch. To do this, dirt was being moved in wheelbarrows from one side of the main track to the other, and planks were laid down across the rails to facilitate this movement. The place of work was about $6\frac{1}{2}$ rails north of a switch which led into a siding. A long freight train pulled out from this siding onto the main track, going north, which was the direction in which Rogers was at work. The railroad was provided with the electric block and signal system, and, when this train came out on the track, its approach was indicated by the ringing of the signal bell. The track was also straight, and there was no obstacle to prevent the seeing of the train or the ringing of the electric signal. The deceased both heard the bell and saw the train, and gave directions to his men to clear the track. The bulk of the men were working near, but on the east or right-hand side of the track. Rogers and one man, George Bouyer, were on the west or left-hand side, and Bouyer was the only one of the gang in position to see Rogers when he was struck. Rogers and this witness were engaged in clearing the track of dirt which had fallen upon the rails, and in the removal of the plank used to wheel the barrows across the rails. The witness had one end, that farthest from the track, and Rogers stopped to assist him by carrying the other. The evidence is not as clear as it might be as to whether Rogers was far enough from the rail at the time he undertook to thus assist Bouyer to be clear of danger of a passing train, or whether in stooping, his back being

toward the train, he placed himself unconsciously within striking distance. Bouyer, who does not seem to have always had Rogers in view, says that, when he last saw him before he was struck, he was close enough to be hit by a passing train. On the other hand, the trainmen, who seem to have been diligently upon the lookout, say that he was clearly beyond reach of the train, but stepped back as he rose with the plank, so as to throw his back near enough to be struck by the end of the pilot beam on front of the engine as it passed. Either this blow, or the concussion of his fall upon some hard substance, caused the explosion of a pistol in a side coat pocket, the ball passing through his body and killing him at once.

Rogers & Rogers, for plaintiff in error.

Edward Colston and Head & Anderson, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

It is too plain for controversy, unless the Tennessee statute applies, that, aside from all other questions, the contributory negligence of the deceased would bar any action based upon the principles of the common law. In view of this plain conclusion, the attorney for the plaintiff in error has staked his case upon the Tennessee statute, and has insisted that there was evidence from which the jury might reasonably find that the deceased was within striking distance of the approaching train from the time it came onto the main track, some six or seven rails distant from Rogers, and that the engineer or fireman should have seen his danger and sounded the alarm whistle and exerted every effort to stop the train before striking him, in obedience to the vigorous terms of the statute. The Tennessee statute requires that a lookout shall be maintained upon the locomotive, and when any person or other obstruction "appears upon the road the alarm whistle shall be sounded, the brakes put down and every possible means employed to stop the train and prevent the accident." It also provides that failure to observe these precautions shall make the company liable for all damages resulting from any accident or collision that may occur. Shannon's Code Tenn. §§ 1574, 1575. An object does not appear upon the "road," within the meaning of this statute, until it is near enough to be struck or injured by a passing train. *L. N. & G. S. Rd. Co. v. Reidmond*, 11 Lea, 205.

This statute has been construed by the Tennessee Supreme Court as giving damages notwithstanding the contributory negligence of the plaintiff, and that such contributory negligence goes only in mitigation of damages. *Ry. Co. v. Foster*, 88 Tenn. 672, 676, 13 S. W. 694, 14 S. W. 428. This construction of the statute will be followed by this court. *W. & A. Rd. Co. v. Robertson*, 61 Fed. 592, 9 C. C. A. 646; *Byrne v. Rd. Co.*, 61 F. 605, 9 C. C. A. 666, 24 L. R. A. 693; *C. N. O. & T. P. Ry. Co. v. Davis*, 127 Fed. 933, 62 C. C. A. 565.

Assuming that there was evidence to take the case to the jury if the statute is applicable, the question is as to the correctness of the trial judge in holding that the statute had no proper application to workmen whose duties required them to be on or about the track. The Tennessee court has never regarded this statute as always and every-

where applicable. In *Railroad Co. v. Rush*, 15 Lea, 145, 150, it was said:

"But in view of the stringent terms of the act and the manifest object of the Legislature, the court has not extended its provisions to every case which might be embraced in its general language. We have held that the provisions apply only to the injury of persons or property by actual collision on the roadway proper, and not to the injury of passengers caused by obstruction in the roadbed. *Rd. Co. v. McKenna*, 7 Lea, 313; *Railway Co. v. Reidmond*, 11 Lea, 205; *Holder v. Rd. Co.*, 11 Lea, 176. They have also been held not to apply to the servants and employes of the railroad company about its depots and yards. *Rd. Co. v. Robertson*, 9 Heisk. 276; *Haley v. Rd. Co.*, 7 Baxt. 239. Nor to a stranger when the company is making up and switching trains within its yards. *Cox v. Rd. Co.*, 2 Leg. Rep. 168."

To the cases cited in *Railroad v. Rush*, we add *Railroad v. Scales*, 2 Lea, 688, and *Railroad v. Swaney*, 5 Lea, 119, 121, where it was held that, if compliance with the statute after the object appears upon the track is impossible, the statute is not applicable. So, if reversing would seriously endanger the safety of a train, that method of stopping is excused. *Rd. v. Troxlee*, 1 Lea, 520. So it has been held as not applicable to the rear section of a freight train broken in two by accident and following by gravity. *Patton v. Ry. Co.*, 89 Tenn. 372, 15 S. W. 919, 12 L. R. A. 184. The general doctrine by which the court would regard the general interest and spirit of the statute rather than its literalism was again announced in *Railroad v. Pugh*, 95 Tenn. 419, 32 S. W. 311, and *Rd. Co. v. Rush*, 15 Lea, 150, and *Cox v. Rd.*, 2 Leg. Rep. 150, approved. In *Southern Ry. Co. v. Simpson* (C. C. A.) 131 Fed. 705, we had occasion to interpret this statute, and, following the spirit of the Tennessee cases cited, held that there might be circumstances under which the statute would not be violated by operating a train in the daytime on the main road, with the engine moving backwards, where it was shown that the view of the lookout was not obstructed, and the person coming on the track at a crossing was seen as soon as he appeared, and that every precaution was observed which was possible. It has been argued that the statute has never been held applicable except as to servants, and to movement of trains about the yards or in switching. But this is an erroneous view of the Tennessee cases. Thus the statute was held not applicable to movement of engines or trains within the yards of the company, although the person invoking its provision was not an employe. *Cox v. Railroad*, cited above. In *Railroad v. Hicks*, 89 Tenn. 301, 17 S. W. 1036, the terms of the statute were not applied to an employe traveling by velocipede on the main track in discharge of his duty as an inspector. The court said:

"He was rightfully on the track at the time, passing from station to station, on a railway velocipede, in the same direction that the train was moving. He was prepared to give the right of way to all trains on short notice, and it was his duty, to himself and to the company, to do so whenever he discovered the necessity for it. Therefore the employes operating the train, on seeing him in the distance, were authorized to assume that he would surrender the track in time to save himself, and to act on this assumption so long as not refuted by the actual fact of his remaining in the way until the train came in such proximity to him as to make danger of accident probable."

That the court regarded the statute inapplicable to hands at work on the track is clear, whether in a railway yard or not, for the court said:

"The logic of the rule applied by the trial judge would require a train to be stopped as soon as in sight of section hands at work on the track, when, in fact and in reason, such hands are expected to continue at work until the train comes reasonably near, and then get out of the way without causing the train to stop at all."

The reasoning of the Tennessee Court in *L. & N. Rd. v. Robertson*, 9 Heisk. 276, 280, which led it to hold the statute nonapplicable to employes about the yards of the company, is as applicable to persons whose duty requires them to engage in work upon the tracks of a company, whether in the yards or on the main road, and whether such persons be the immediate employes of the company, or the servants of a contractor engaged in work for the company upon its track. Speaking for the court, Judge McFarland said:

"This statute in terms makes no exceptions, but it seems to us unreasonable and utterly impracticable to apply it strictly to the running of engines and cars about the depots or yards of railroads, and in relation to the hands or employes of the road, who are moving across the track in discharge of their several duties. To require that whenever any one of these employes shall be upon the track, when the engine is running at the rate of three or four miles an hour, that the whistle shall be sounded, the brakes put down, and every effort used to stop, seems to us not only to be utterly unnecessary, but also that it would render it almost impracticable to make the necessary movements of the engines and cars about the yard. This record discloses that engines passed over these tracks a great number of times daily, and this we all know from common observation. The duties of the employes require them to cross or walk upon the track often, and sometimes close to a moving engine. They become familiar with this, and possibly to some extent indifferent to their danger. They seem conscious of their ability to cross the track close to a moving engine without danger. They are familiar with the running of the trains, and with the rules and regulations. In this case it appears that the deceased had been for some time in the employ of the company, and engaged in the very duty he was that day discharging. It was the daily custom for the engine and tender to back out in the same manner it did that day. The ringing of the bell was the signal used in the yard that the engine was in motion. All this was well known to the deceased. Upon this state of facts, we think it was error to make the liability of the company dependent upon their proving that they had strictly complied with these provisions of the statute above quoted. We think the statute was not intended to apply to a case of this sort; but as between its own employes, and about the depot, where trains are being made up and engines and cars switched from one track to another—in regard to the hands engaged in these several duties—we think different rules may be adopted. We do not mean to lessen in any degree the rigor of the statute as applied to the general public, or in any case where it was intended to apply; nor do we intend to intimate that in a case like the present the company may not be held liable for injuries resulting from the misconduct or negligence of its agents. But we think that that liability is not to be determined by the statute referred to, but by the general common-law principle applicable in such cases."

In the subsequent case of *Cox v. Railroad*, cited above, the court extended this reasoning to the case of a stranger.

The fact that the railroad company was having construction and repair work done under a contract by which it agreed to pay by the square yard for dirt removed from one side to the other of its track for the purpose of making a fill does not change the principle applicable if

the same work had been done by its own section hands. The work Rogers undertook to do was upon and alongside the railway track, and his duty required him to go on and about the track, upon which trains were being constantly operated. To hold that, every time a railway train came in sight of such a gang of workmen, the whistle must be sounded and every effort made to stop the train, in face of the fact that it was the duty of these men to keep the track clear for passing trains, would be to extend a most severe statute to a case where the reason of the thing would not apply. We see no error in the action of the trial judge in holding the situation to be one to which the statute had no application.

Judgment affirmed.

PACIFIC PACKING & NAVIGATION CO. v. FIELDING.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1905.)

No. 1,050.

1. TRIAL—INSTRUCTIONS AS TO BURDEN OF PROOF—AFFIRMATIVE DEFENSE.

In an action by a member of the crew of a vessel against the owners to recover damages for his unlawful imprisonment by the master, where the answer alleged as a special defense that plaintiff had become mentally deranged, rendering his confinement necessary and proper, it was not error to instruct the jury that the burden of proving such defense rested on defendant; nor was such instruction inconsistent with the general charge that plaintiff had the burden of proving that his restraint was unlawful, malicious, and without probable cause.

2. SHIPPING—LIABILITY OF OWNER FOR TORTS OF MASTER—EXEMPLARY DAMAGES.

A corporation owner of a vessel cannot be subjected to punitive damages because of the unlawful, oppressive, and malicious action of the master in imprisoning a member of the crew while at sea, which action was not authorized nor ratified by the corporation.

In Error to the District Court of the United States for the Northern Division of the District of Washington.

Gorham, Brown & Gorham, for plaintiff in error.

McCafferty & Kane and O. Jacobs, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This action was brought by the defendant in error to recover damages against the plaintiff in error, a corporation and owner of the steamship Valencia, on which the defendant in error was employed as purser, and of which ship one James McRae Lane was master, on a voyage from Nome, Alaska, to Seattle, Wash., in the fall of 1901. The complaint contained two counts, one of which was held insufficient by the court below, and is not now for consideration. The other charged that while the ship was at sea the defendant in error was imprisoned by the captain of the ship, who in so doing acted maliciously and without reasonable or probable cause, to the plaintiff's damage. The answer of the plaintiff in error, defendant to the action, put in issue the averments of malice and want of reasonable or probable cause on the part of the master, and, among other things, alleged as a separate and affirmative defense that on the

18th day of October, 1901, the ship left Nome with cargo and passengers for Seattle, and that on or about the 21st day of October thereafter, while the ship was upon her voyage, and upon the high seas between Dutch Harbor, Alaska, and Seattle, the plaintiff—

"Became and was ill, and incapacitated by such illness from attending to his duties as such purser, and at the same time became and was deranged and affected in his mind, and his brain was disordered to such an extent that, if said plaintiff had been permitted to be at large and have the liberty of said vessel during the remainder of the said voyage, there was great danger and probability that he, said plaintiff, by reason of said illness and his said deranged and disordered condition of mind, would inflict great harm and injury upon himself and take his own life; that the said Lane, master of the said vessel as aforesaid, to prevent the infliction upon himself by plaintiff of such injuries, and the taking of his life by himself while so ill and in such deranged and disordered condition of mind and brain, and for no other reason, confined said plaintiff to his room on said vessel and caused the same to be guarded; and that the said illness of said plaintiff, and his said deranged and disordered condition of mind, continued until the arrival of said vessel at Seattle, on or about the 30th day of October, 1902, whereupon plaintiff was released from his said restraint and left said vessel."

There are but two questions presented on the present appeal that we deem it necessary to consider, one of which grows out of the fact that the court below instructed the jury that the burden of proving, by a fair preponderance of evidence, the justification for the imprisonment of the plaintiff, so affirmatively pleaded, rested upon the defendant, and that, unless such particular justification was so proved, the jury should find that specific defense "against the defendant; in other words, find it not proven." The court had already instructed the jury that the burden was on the plaintiff to show by a preponderance of the evidence:

"First, that he was restrained of his liberty by the defendant, or by its officers or agents acting by its authority; second, that such restraint was unlawful; third, that it was imposed upon him maliciously; and fourth, that it was without probable cause"—

and that, if the plaintiff failed to so prove any one of those facts, he could not recover, and the verdict should be for the defendant.

It is insisted on the part of the plaintiff in error that these instructions were inconsistent and misleading. It is conceded that the court below properly instructed the jury that the master of a vessel at sea has the power to imprison a member of the crew in the exercise of the authority he necessarily has, in order to provide for the safety of the vessel and the protection of those on board, but that such authority cannot be abused by exercising it with malice, or without reasonable or probable cause, without rendering both the master and the owner of the vessel liable in damages for such abuse. We are of the opinion that the inconsistency contended for on the part of the plaintiff in error does not exist, and that the instructions given by the court below in respect to the burden of proof were not misleading, and were correct.

But the court below instructed the jury that, if they should find in favor of the plaintiff, they had—

"The right, if the facts seemed to them to justify it, to award as damages something in addition to actual compensation, as smart money—something to

compensate him for the humiliation and annoyance of being imprisoned, and as a penalty upon the wrongdoer for having inflicted a personal indignity of that kind."

As the alleged wrongful act, for which the plaintiff was awarded \$5,000 damages by the jury, consisted in the master's confining him in his stateroom on board the ship, this instruction, if erroneous, may have caused very substantial injury to the plaintiff in error. Whether or not it was erroneous presents a very important question. There is much conflict in the decisions of the courts of the various states in respect to the liability of a corporation in punitive damages for the wanton or oppressive conduct of its officers or agents, done without its consent or ratification.

In the present case the bill of exceptions states, among other things, that no evidence was given tending to show that the defendant corporation ever authorized the master to commit any of the acts complained of, or ever in any manner ratified them. In *Lake Shore, etc., Railway Company v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97, the Supreme Court had before it a very aggravated case of the illegal, wanton, and oppressive arrest of a passenger by the conductor of a railway train. In that case, as in this, the wrongful acts were in no way authorized or ratified by the defendant corporation. The Supreme Court there referred to the conflict of authority in the various states upon the question, and held that, inasmuch as it is one of general jurisprudence, the federal courts, in the absence of an express statute regulating the subject, must exercise their own judgment, uncontrolled by the decisions of the courts of the several states, and, after giving the case very careful consideration, came to the conclusion that, for such wrongful acts of a conductor of one of its trains, not authorized or ratified, a railroad company is not liable to exemplary or punitive damages. In the course of its opinion the court said:

"Exemplary or punitive damages being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though, of course, liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent. This is clearly shown by the judgment of this court in the case of *The Amiable Nancy*, 3 Wheat. 546, 4 L. Ed. 456."

That was a libel in admiralty by the owner, master, supercargo, and crew of a neutral vessel against the owners of an American privateer, for illegally and wantonly seizing and plundering the neutral vessel and maltreating her officers and crew; and the court, in disposing of that case, speaking through Mr. Justice Story, said:

"Upon the facts disclosed in the evidence, this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse. Under such circumstances, the honor of the country and the duty of the court equally require that a just compensation should be made to the unoffending neutrals for all the injuries and losses actually sustained by them. And if this were a suit against the original wrongdoers, it might be proper to go yet farther, and visit upon them, in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered that this is a suit against the owners of the privateer, upon whom the law

has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can scarcely ever be able to secure to themselves an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of the opinion that they are bound to repair all the real injuries and personal wrongs sustained by the libelants, but they are not bound to the extent of vindictive damages."

The Supreme Court, in the case of *Lake Shore, etc., Railway Company v. Prentice*, supra, also quoted with approval the language of Judge Martin, in *Keene v. Lizardi*, 8 La. 26, 33:

"It is true, juries sometimes very properly give what is called 'smart money.' They are often warranted in giving vindictive damages as a punishment inflicted for outrageous conduct. But this is only justifiable in an action against the wrongdoer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of his factor or agent"—

adding, also, a large number of other decisions to the same effect.

The case of *Denver & Rio Grande Railway Company v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. Ed. 1146, was also referred to by the court in *Lake Shore, etc., Railway Company v. Prentice*, supra, where a railroad corporation was held liable in punitive damages for the acts of its agents and employes upon a record which showed that the company, by an armed force of several hundred men, acting as its agents and employes, and organized and commanded by its vice president and assistant general manager, attacked with deadly weapons the agents and employes of another company in possession of a railroad, and forcibly drove them out, and in so doing fired upon and injured one of them, who was held not limited to compensatory damages, but might recover punitive damages also, "not," as said by the court in *Lake Shore, etc., Railway Company v. Prentice*, "because any evil intent on the part of the agents of the defendant corporation could of itself make the corporation responsible for exemplary or punitive damages, but upon the single ground that the evidence clearly showed that the corporation, by its governing officers, participated in and directed all that was planned and done"; the court adding, in *Lake Shore, etc., Railway Company v. Prentice*:

"The president and general manager, or, in his absence, the vice president in his place, actually wielding the whole executive power of the corporation, may well be treated as so far representing the corporation and identified with it that any wanton, malicious, or oppressive intent of his, in doing wrongful acts in behalf of the corporation to the injury of others, may be treated as the intent of the corporation itself."

It is contended that this principle is applicable to the master of a ship at sea, who is for the time being in the sole and absolute command of the ship and of everybody in it; but we do not feel justified in so extending it, especially in view of the decision of the Supreme Court in the case of *The Amiable Nancy*, 3 Wheat. 546, 4 L. Ed. 456, the doctrine of which case was expressly approved in *Lake Shore, etc., Railway Company v. Prentice*, supra.

We are of the opinion that, upon the facts here appearing, the plaintiff in error is not liable in punitive damages for the acts of the master complained of, for which reason the judgment must be, and hereby is, reversed, and the cause remanded for a new trial.

MILLER et al. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1905.)

No. 1,109.

INDICTMENT—DESCRIPTION OF OFFENSE—PROCURING PRESENTATION OF FALSE PENSION AFFIDAVIT.

An indictment under Rev. St. § 4746, as amended by Act July 7, 1898, c. 578, 30 Stat. 718 [U. S. Comp. St. 1901, p. 3279], which charges that defendants "did knowingly and willfully procure the presentation to the Commissioner of Pensions of a false and fraudulent paper writing," etc., is insufficient where it does not state the manner of presentation, or the name of the person procured to present it, or that his name is unknown.

In Error to the District Court of the United States for the Northern District of Illinois.

The plaintiffs in error were on April 14, 1904, convicted of violating section 4746 of the Revised Statutes, as amended by the act of July 7, 1898, c. 578, 30 Stat. 718 [U. S. Comp. St. 1901, p. 3279]. The section reads as follows: "That every person who knowingly or wilfully makes or aids or assists in making, or in any wise procures the making or presentation of any false or fraudulent affidavit, declaration, certificate, voucher, or paper or writing purporting to be such, concerning any claim for pension or payment thereof or pertaining to any matter within the jurisdiction of the Commissioner of Pensions * * * shall be punished," etc. The charge in each of the four counts of the indictment is that "defendants did knowingly and willfully procure the presentation to the Commissioner of Pensions of a certain false and fraudulent paper writing," etc. The indictment fails to name any person through whom the presentation was made, or to account for the omission of the name, and fails to state in what manner the defendant procured the presentation. Demurrers to the indictment for insufficiency were overruled, and after trial and conviction a motion in arrest of judgment was overruled, to which several rulings proper exceptions were reserved. After judgment and sentence upon the verdict, the cause is brought here for review.

Thomas E. Milchrist, for plaintiff in error.

S. H. Bethea, U. S. Dist. Atty.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge. Where the offense is purely statutory, it is usually sufficient that the indictment charges acts coming within the statutory description and in the substantial words of the statute, without further expansion. *United States v. Simmons*, 96 U. S. 360, 24 L. Ed. 819; *United States v. Britton*, 107 U. S. 655, 2 Sup. Ct. 512, 27 L. Ed. 520; *Pounds v. United States*, 171 U. S. 35, 18 Sup. Ct. 729, 43 L. Ed. 62. But this rule is subject to the qualification that the crime must be charged with precision and certainty, and every ingredient of which it is composed must be clearly and accurately set forth, and that even in the case of misdemeanors the indictment must be free from ambiguity, and leave no doubt in the mind of the accused or of the court of the exact offense intended to be charged. *United States v. Carll*, 105 U. S. 611, 26 L. Ed. 1135; *United States v. Hess*, 124 U. S. 433, 8 Sup. Ct. 571, 31 L. Ed. 516; *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419; *Blitz v. United States*, 153 U. S. 308, 315, 14 Sup. Ct. 924, 38 L. Ed. 725; *Evans v. United*

States, 153 U. S. 584, 587, 14 Sup. Ct. 934, 38 L. Ed. 830; *Ledbetter v. United States*, 170 U. S. 606, 609, 18 Sup. Ct. 774, 42 L. Ed. 1162. Within this rule and its qualifications, we are of opinion that the indictment here, couched in the language of the statute is insufficient. It is charged that the defendants did knowingly and willfully procure the presentation to the Commissioner of Pensions of a certain false and fraudulent affidavit, etc., but wholly omits to name the person procured, or to state that his name was unknown to the grand jury, or in any way to account for the failure to name him or to state how the presentation was procured. It is to be observed that the statutory offense consists in in any wise procuring to be presented to the officer named a false affidavit—which means that the accused procured the false affidavit to be presented. It is not charged that the defendant personally made the presentation. It may be doubtful whether personal presentation of a false affidavit to the commissioner falls within the statute. The language is peculiar. "Every person who knowingly or wilfully makes, or aids or assists in making, or in any wise procures the making or presentation of any false or fraudulent affidavit," etc. The making of a false affidavit is one offense; the aiding or assisting in the making of a false affidavit by another is a second offense; the procuring of the making of a false affidavit by another is a third offense; the procuring of the presentation of a false affidavit is still another offense. The words "in any wise procures the making or presentation" follow the description of the offense of making a false affidavit, and the offense of making or assisting another in the making of a false affidavit. Thus the word "presentation" is linked with and governed by the verb "procures." Is the offense thereby limited to a presentation procured by the accused to be made by another, and does the statute cover the case of a personal presentation? Should the statute be construed as though it read "presents or procures the presentation of"? See *People v. Roderigas*, 49 Cal. 11; *Reg. v. Mines*, 25 Ont. 577. If the statute should be so read, the greater necessity would arise to notify the accused by the indictment of the particular mode of presentation relied upon. The indictment should charge whether the false affidavit was presented by himself or procured by him to be presented by another named. The indictment fails to declare the agency through which the presentation of the false affidavit was procured by the accused. How, then, can it be said that the offense is so stated that the accused can be fully apprised of the charge which he is to meet? He is not informed by the indictment of the manner of presentation, or the name of the person claimed by the prosecution to have been his agent in the presentation of the false affidavit, and would be obliged to go to trial without opportunity of meeting the testimony of any one of several persons whom the prosecution might then produce as the agent of the accused in such presentation. This is not that certainty in the charge of an offense which the law requires.

The case of *United States v. Simmons*, *supra*, is one quite similar to the case in hand. That was an indictment under section 3266,

Rev. St. [U. S. Comp. St. 1901, p. 2119], prohibiting distilling on certain premises, which provides that no person shall use a still, boiler, or other vessel for the purpose of distilling, under certain circumstances stated, and that "every person who does any of the acts prohibited by this section, or aids or assists therein, or causes or procures the same to be done, shall be fined," etc. It was there, as here, insisted that it was sufficient to charge the offense in the language of the statute. The court, recognizing the general rule, stated that "there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense and plead judgment as a bar to any subsequent prosecution for the same offense," and added: "Tested by these rules, the second count is insufficient. Since the defendant was not charged with using the still, boiler, and other vessels himself, but only with causing and procuring some one else to use them, the name of that person should have been given. It was neither impracticable nor unreasonably difficult to have done so. If the name of such person was unknown to the grand jurors, that fact should have been stated in the indictment." We think this ruling controlling here, and effectual to condemn this indictment.

The judgment is reversed, and the cause remanded, with direction to the court below to set aside the conviction, to sustain the demurrer to the indictment, and to discharge the prisoners.

UNITED STATES v. GEORGE RIGGS & CO.

(Circuit Court of Appeals, Second Circuit. March 3, 1905.)

No. 134.

CUSTOMS DUTIES—CLASSIFICATION—FIGURED COTTONS.

The additional duties imposed by Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 313, 30 Stat. 178 [U. S. Comp. St. 1901, p. 1659], on cotton cloth in which other than ordinary warp and filling threads have been introduced in the process of weaving to form a figure, are to be applied in addition only to the specific rates provided in the other paragraphs of said schedule on cotton cloth, and not in addition to the ad valorem rates provided in said paragraphs.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Appeal from the decision of the Circuit Court of the United States for the Southern District of New York reversing a decision of the Board of United States General Appraisers (G. A. 5,374, T. D. 24,562), which overruled the protest of the importers and sustained the action of the collector in assessing duty upon the merchandise in question, which consisted of figured cotton cloth, pursuant to the provisions of paragraphs 306, 307 and 313 of the tariff act of 1897. Act July 24, 1897, c. 11, § 1, Schedule I, 30 Stat. 176, 178 [U. S. Comp. St. 1901, pp. 1657, 1659].

The importers protested against the action of the collector, insisting that the "goods dutiable under paragraph 313 should pay only the specific rates therein provided, according to their value per square yard, in addition to the specific rates provided in paragraphs 304-309 for cotton cloth of the same

description or condition, weight and count of threads to the square inch. The ad valorem provisos of paragraphs 305-309 cannot be applied to any goods assessed under paragraph 313, which has an ad valorem classification of its own. The addition of the specific rates imposed by paragraph 313 to the ad valorem rates of 30, 35 or 40 per cent. provided in paragraphs 305-309 is therefore unauthorized and illegal."

Paragraph 313 is as follows: "Cotton cloth in which other than the ordinary warp and filling threads have been introduced in the process of weaving to form a figure, whether known as lappets or otherwise, and whether unbleached, bleached, dyed, colored, stained, painted, or printed, shall pay, in addition to the duty herein provided for other cotton cloth of the same description, or condition, weight, and count of threads to the square inch, one cent per square yard if valued at not more than seven cents per square yard, and two cents per square yard if valued at more than seven cents per square yard."

Paragraphs 306 and 307 provide for a specific duty upon the cotton cloth therein described, but at the end of each paragraph there is a proviso levying an ad valorem duty on such cloth if it exceeds a certain designated value per square yard.

Three of the items in controversy contain between 100 and 150 threads to the square inch, counting the warp and filling, and fall, therefore, under paragraph 306. The fourth item contains from 150 to 200 threads to the square inch, and falls under paragraph 307.

The opinion of the board clearly states the facts as to the action of the collector and the contention of the importers, as follows:

"All the goods were assessed under the provisos to paragraphs 306 and 307 at 35 per centum ad valorem—the first and third items because they are colored and valued at over 12½ cents per square yard, the second because it was bleached and valued at over 11 cents per square yard, and the last one because it was bleached and valued at over 12 cents per square yard. There was also added a specific duty of 2 cents per square yard, as provided in paragraph 313. It is claimed by the importers that the provisos to paragraphs 306 and 307 are not to be considered in ascertaining the rate to which the additional duty is to be added, and, while it is conceded that the additional duty of 2 cents per square yard should be assessed, it is claimed that it should be added to the duty to be ascertained by classifying the goods under the body of the paragraph, the first three under paragraph 306 and the last under paragraph 307. It is further contended that the additional duty provided for by paragraph 313 cannot be added to the duty provided for in the provisos to said paragraphs 306 and 307, because it is a specific duty, and the duty there provided for is an ad valorem duty."

The decision of the Circuit Court will be found reported in 131 Fed. 568.

D. Frank Lloyd, Asst. U. S. Atty.

W. Wickham Smith, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, Circuit Judge. Paragraph 313 appears for the first time in Act July 24, 1897, c. 11, § 1, Schedule I, 30 Stat. 178 [U. S. Comp. St. 1901, p. 1659], and we are inclined to think that it was the purpose of Congress, after cotton cloths had been properly classified under paragraphs 306 and 307 (30 Stat. 176 [U. S. Comp. St. 1901, p. 1657]), to lay an additional duty per square yard upon such cloth as was figured, in other words to place an extra duty upon the figure, so that figured cotton cloth should pay a higher duty than the same cloth plain. But the legislative intent must be derived from the language employed and unless it can be clearly ascertained from paragraph 313 that the collector was justified in assessing the merchandise under the provisos of the preceding paragraphs, the importers should succeed upon the principle that their money should

not be taken from them upon a doubtful construction of the law. It is the duty of Congress to make its meaning clear and if it fails to do so the citizen should not suffer.

When figured cotton cloth is imported it is the duty of the collector to turn to the paragraph of the law which specifically described such cloth and proceed as there directed. This is paragraph 313. It provides that figured cotton cloths shall pay, in addition to the duty provided elsewhere in the act "for cotton cloth of the same description, or condition, weight, and count of threads to the square inch, one cent per square yard," etc. With these instructions before him the collector proceeds to ascertain, first, the description or condition of the goods—whether bleached or unbleached, etc.; second, the weight; and, third, the count of threads. Having found these facts he turns to the appropriate preceding paragraph to ascertain what duty is imposed on such cloth and finds that it is a specific duty of so much per square yard. His course is now clear. Having obtained all the information from the preceding section which the law requires he returns to paragraph 313 and finds that he is now required for the first time to ascertain the value of the goods for the purpose of levying duty under that paragraph,—namely whether valued at more or less than seven cents per square yard.

Assume that the imported merchandise is figured cotton cloth, bleached, containing 125 threads to the square inch and weighing five square yards to the pound, if the collector has no other data regarding it he will inevitably levy a specific duty of three cents per square yard under paragraph 306. He cannot levy an ad valorem duty under the proviso until he knows what the value is, and he cannot know that unless the law permits him to know it. In short, paragraph 313 has given him all the criteria which he is to use in ascertaining the duty under paragraph 306, and they do not include the value of the goods. If this omission be a mistake Congress can cure it, the courts cannot.

It is said that the words of paragraph 313 "other cotton cloth goods of the same description" are broad enough to include value. We think this contention would be entitled to weight if the sentence had stopped with the words quoted, but it is manifest that Congress was not stating a broad, general comparison, but was giving in minute detail the precise points of similarity which were to be taken into consideration. The omission of value from these is significant and cannot be ignored. If Congress had intended the construction urged by the appellant it would have required only the addition of the word "value" after the word "weight" and we are unable to say that the omission may not have arisen from a desire to avoid the imposition of two duties upon the same article based upon the ad valorem standard.

Having found that paragraph 313 does not permit the value of the goods to be considered in fixing the original duty we are not concerned with the effect which this interpretation may have upon other merchandise not involved in the present controversy. As before stated such considerations are not for the courts. The ques-

tion is difficult and perplexing, but for the reasons above stated we are of the opinion that the contention of the appellees is well founded.

Decision affirmed.

FREEDLEY v. WILSON.

(Circuit Court of Appeals, Second Circuit. February 27, 1905.)

No. 137.

CONTRACTS—CONSTRUCTION—BREACH—OPTION TO RENEW.

Plaintiff contracted with defendant to quarry, between January 1, 1901, and January 1, 1902, 50,000 cubic feet of marble from defendant's quarry, at not less than 2,000 cubic feet in the month of April and 6,000 in each of the succeeding months. The contract also provided that, if plaintiff stripped more than 50,000 cubic feet, he should have the option of quarrying all the marble so stripped at the same price, and, if defendant operated the quarry during the succeeding year, plaintiff should have the option of a contract for quarrying all marble taken out at the price provided for. At the close of the season plaintiff had only quarried 43,707 feet, but there was at that time 26,640 cubic feet which plaintiff had stripped, but not quarried. *Held* that, plaintiff having failed to quarry the amount required by the contract through no fault of defendant, he could not recover damages for defendant's refusal to permit him to quarry the marble so stripped.

In Error to the Circuit Court of the United States for the District of Vermont.

This cause comes here on writ of error by defendant from a judgment (125 Fed. 962, 129 Fed. 835) in favor of plaintiff for \$4,472.83, for damages for breach of contract.

F. M. Butler, for plaintiff in error.

O. M. Barber, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. The plaintiff was an experienced quarryman; the defendant, the owner of a marble quarry at East Dorset, Vt. In December, 1900, they entered into a contract, by which defendant, "party of the first part," agreed to employ plaintiff, "party of the second part," to quarry marble, under certain conditions, from defendant's quarry, and to pay plaintiff "forty-five cents per cubic foot for all marble so quarried and delivered." The portions of said contract material to the questions herein are as follows:

"Second. The party of the second part agrees to quarry from the tunnel of said quarry, between the 1st day of January, 1901, and the 1st day of January, 1902, an amount of marble not less than fifty thousand (50,000) cubic feet and to deliver the same at the wheelhouse derrick of said quarry.

"Third. The party of the second part agrees to deliver the aforesaid marble as follows: Not less than two thousand (2,000) cubic feet in the month of April, and not less than six thousand (6,000) cubic feet per month in each of the succeeding eight months. * * *

"Seventh. The party of the second part agrees that, if at the end of each month he has not delivered the amount of stone stipulated in this contract,

he will pay to the party of the first part, in satisfaction of all damages, ten cents per cubic foot for any deficiency; and it is further agreed that any stone which may be delivered by the party of the second part in excess of the amount stipulated in this contract shall apply on the following month or months during the term of this contract. * * *

"Eleventh. The party of the first part agrees to transport free of charge and promptly upon the railroad from the mill to the quarry any supplies or machinery required by the party of the second part; it being understood that the party of the second part assumes all responsibility for damage during said transportation, except when caused by gross negligence. It is further understood that not more than three tons shall be taken in one load. * * *

"Seventeenth. It is understood that, in case the party of the second part strips more than the fifty thousand feet required in this contract, he will have the option of quarrying all the marble so stripped at the same price as is provided in this agreement; and it is further understood that, if the party of the first part operates the tunnel during the year succeeding the termination of this contract, the party of the second part will have the option of a contract for quarrying all marble to be taken out at the same price provided in this agreement."

Other portions of said contract provided that defendant should furnish a certain water supply and a derrick. The jury having rendered a verdict for plaintiff for damages for defendant's failure to furnish the water and derrick, the court, on motion to set aside the verdict, found that these items of damage were not sufficiently supported by the evidence, and the claims therefor were remitted and are not involved herein. The jury rendered a special verdict in favor of plaintiff for damages, as follows:

For not supplying water.....	\$ 885 00
For not furnishing derrick.....	600 00
For not transporting coal.....	301 00
For refusing option on stripped block.....	8,351 66

\$10,137 66

The verdict for damages for defendant's failure to transport coal was justified by the evidence, and is not involved in the issues raised herein. The exceptions raise the question of the propriety of the action of the trial judge in awarding to plaintiff one-half of his damages by reason of defendant's denial of the option provided for in the seventeenth section of the contract.

It appeared on the trial that plaintiff failed to deliver the stipulated quantity at the end of each month, and that defendant had made deductions for such failure in accordance with the provisions of the seventh section. At the close of the season plaintiff had only furnished 43,707 feet of the 50,000 which he had agreed to deliver. There was on hand in the quarry at the close of the season some 26,640 feet of marble, which plaintiff had stripped or uncovered, under section 17 of the contract, in excess of the amount agreed to be delivered, and defendant claimed that he had the option of quarrying this marble at any time after the close of the season. Counsel for defendant requested the court to charge the jury that the contract gave plaintiff no option to quarry marble stripped under it after the expiration of the year. The court did not so charge, and the defendant duly excepted. The jury returned a verdict for plaintiff for \$8,351.66 damages for defendant's refusal to allow plaintiff to exercise his option on said stripped blocks.

On motion to set aside said verdict, the court found that part of plaintiff's failure was due to defendant's breach of contract to supply coal. But the court found, and it is not disputed, that only 1,000 feet of the deficiency of 6,293 feet was due to said breach, and that in no event could the plaintiff have supplied the remaining deficiency within the season limit, which, it was agreed, so far as concerned the contract for the delivery of the 50,000 feet, terminated on December 31, 1901. The court, therefore, found that plaintiff made a substantial default in the fulfillment of the contract, and, therefore, was not entitled to the option provided for in section 17. The court held as follows:

"The uncovering was done with the concurrence of the defendant, and as it is necessary to the beneficial use of the quarry by the defendant in taking out the good marble, and the plaintiff cannot get any benefit from it otherwise, he seems to be entitled to recover that he has in that way benefited the plaintiff by increasing the value of the quarry. This, without question, upon the evidence, is about one-half of the damages found for denying the option. The other one-half, and the damages for not transporting the coal, seem well enough founded to stand. If the plaintiff remits the rest, the motion should accordingly be overruled; if not, the verdict should be set aside."

The plaintiff remitted as provided by the court, and judgment was entered for the damages for not transporting coal and for one-half of the damages found by the jury for denial of option.

This allowance of one-half damages depends, necessarily, upon the conclusion that plaintiff was entitled to exercise his option after December 31, 1901, although without the fault of the defendant he had substantially failed to the extent of 5,293 feet to fulfill his contract to quarry and deliver not less than 50,000 feet of marble between January 1, 1901, and January 1, 1902. In this conclusion we think the learned judge was in error. The true construction of the contract seems to be that the plaintiff had the right to demand pay for all marble stripped by him, which he should quarry before January 1, 1902, provided he fulfilled in all respects the provisions of the contract binding upon him. That it was the understanding and agreement of the parties that this option did not extend beyond January 1, 1902, appears from the provision limiting plaintiff's right to quarry to said date, by the admitted custom and usages as to seasons in said quarries, by the manifest inconvenience to defendant of having plaintiff engaged in quarrying and removing such marble at plaintiff's pleasure during some other season, and by the provision in section 17 leaving the option of the disposition of the quarry to the defendant for the following year, which is as follows:

"That, if the party of the first part operates the tunnel during the year succeeding the termination of this contract, the party of the second part will have the option of a contract for quarrying all marble to be taken out at the same price provided in this agreement."

It follows that, as the court has rightly found that the failure to quarry the 50,000 feet was not through the fault of defendant, and as fulfillment of this agreement was a condition precedent to the right to exercise said option, and as said option, if exercised, must

be exercised within the year fixed by the contract, no damages should have been allowed for the refusal of the option after the expiration of the season.

The judgment is reversed.

NEWPORT NEWS & OLD POINT RY. & ELECTRIC CO. v. YOUNT.

(Circuit Court of Appeals, Fourth Circuit. February 21, 1905.)

No. 563.

1. **ERROR—REVIEW OF INSTRUCTIONS—SUFFICIENCY OF BILL OF EXCEPTIONS.**

Assignments of error based on the giving and refusal of instructions cannot be considered by the Circuit Court of Appeals, unless the bills of exceptions contain the evidence pertinent to the issues to which the instructions relate, as required by the rules of the court.

2. **SAME—MATTERS REVIEWABLE—ORDER DENYING NEW TRIAL.**

The refusal of the court to set aside a verdict and grant a new trial is not reviewable in the federal courts.

In Error to the Circuit Court of the United States for the Eastern District of Virginia.

R. T. Thorp (S. Gordon Cumming, on the brief), for plaintiff in error.

Robert H. Talley (Miller & Coleman, on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and BOYD, District Judge.

PRITCHARD, Circuit Judge. Defendant in error, on September 16, 1903, was a passenger on one of the open cars of the Newport News & Old Point Railway Company, which was propelled by electricity. While he was standing on what is commonly known as the "running board" of the car, he was struck by a pole which had been erected by the Hampton Telephone Company, alongside the road or right of way of the Newport News & Old Point Railway & Electric Company, by reason of which defendant in error instituted an action in the Circuit Court of the United States for the Eastern District of Virginia, alleging he was injured by the negligence of the plaintiff in error. A verdict and judgment was rendered for the defendant in error in the court below, from which judgment the plaintiff in error sued out this writ of error.

The assignments of error in the record relate to the refusal of the court to give 11 instructions requested by the plaintiff in error and to certain portions of the charge of the court to the jury. The bill of exceptions certifies the charge of the court to the jury, and also the instructions which were requested by the plaintiff in error and refused by the court. It does not contain nor certify any part of the evidence taken at the trial. The record discloses the fact that the bills of exceptions in this case were not prepared in accordance with the rules of this court. It has been uniformly held that bills of exceptions in

cases like the one now under consideration should not only contain the instructions which were refused and that portion of the charge to which exception is taken, but the evidence relating to the question sought to be raised in each bill of exceptions should be incorporated as a part thereof. Unless this requirement should be strictly complied with, it would be impossible for us to intelligently consider objections which might be raised to the charge of the court below or to its refusal to give instructions submitted by plaintiff in error.

In the case of *Reed v. Gardner*, 17 Wall. 411, 21 L. Ed. 665, Justice Hunt, in delivering the opinion of the court, said:

"It has been frequently held by this court that, in passing upon the questions presented in a bill of exceptions, it will not look beyond the bill itself. The pleadings and the statements of the bill, the verdict, and the judgment, are the only matters that are properly before the court. Depositions, exhibits, or certificates, not contained in the bill, cannot be considered by the court.
* * *

The rule is admirably stated by Judge Goff, in an opinion of this court in the case of *S. W. Va. Imp. Co. v. Frari*, 58 Fed. 172, 7 C. C. A. 149, in which, among other things, it is said:

"No part of the evidence considered by the jury was certified in either one of the bills of exceptions, and therefore we cannot pass on the questions of law raised by the instructions given and refused, as there is nothing before us showing that they have any relation to the issue that was submitted to the jury. In the preparation of the bills of exceptions and the assignments of error there was an utter disregard of the rules of this court, and of the practice in cases of this character as established by the decisions of the Supreme Court of the United States. The rules and practice so instituted have been frequently announced, and the reason for the enforcement of the same so often given, that we do not deem it necessary to again set forth the one or explain the other." *Insurance Co. v. Raddin*, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644; *Mining Syndicate Co. v. Frazier*, 130 U. S. 611, 9 Sup. Ct. 665, 32 L. Ed. 1031; *Block v. Darling*, 140 U. S. 234, 11 Sup. Ct. 832, 35 L. Ed. 476.

It is contended by the plaintiff in error that the evidence bearing on the different questions raised by the several bills of exceptions appears elsewhere in the transcript of the record. To print the evidence relating to the points sought to be raised by the bills of exceptions is not a substantial compliance with the rules of the court, which require that such evidence be incorporated as a part of each bill of exceptions. An assignment of error based on the refusal of the court to set aside a verdict of the jury and grant a new trial is not reviewable. *S. W. Va. Imp. Co. v. Frari*, 58 Fed. 172, 7 C. C. A. 149; *Insurance Co. v. Barton*, 13 Wall. 603, 20 L. Ed. 708; *Kerr v. Clappitt*, 95 U. S. 188, 24 L. Ed. 493; *Fishburn v. Railway Co.*, 137 U. S. 60, 11 Sup. Ct. 8, 34 L. Ed. 585; *Ayers v. Watson*, 137 U. S. 584, 11 Sup. Ct. 201, 34 L. Ed. 803; *Railway Company v. Heck*, 102 U. S. 120, 26 L. Ed. 58.

For the reasons stated, the judgment of the Circuit Court is affirmed.

SUN PRINTING & PUBLISHING ASS'N V. EDWARDS.

(Circuit Court of Appeals, Second Circuit. February 28, 1905.)

1. MASTER AND SERVANT—WRONGFUL DISCHARGE—EFFICIENCY.

Where, in an action for alleged wrongful discharge, it appeared that plaintiff was employed in defendant's office as superintendent of printing, with control of all of defendant's printing and mechanical departments, during a strike, and that during the 10 days of his employment the delay in getting out defendant's morning and evening papers was materially cut down, with a reduced force, and that plaintiff worked nearly 16 hours a day, and the only reason given for his discharge was that the matter had gotten beyond defendant's manager, and that the men would not work with plaintiff, the question of his efficiency was properly submitted in an instruction that if he fulfilled his duties efficiently, and was improperly discharged, he was entitled to recover, otherwise not.

2. SAME—EVIDENCE.

Where, in an action for a servant's wrongful discharge, defendant's witnesses claimed that plaintiff had done nothing in the line of his employment, a pay roll made up by plaintiff during such employment was admissible in rebuttal.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here by defendant's writ of error from a judgment entered against it in the court below upon the verdict of a jury in an action brought to recover damages for breach of contract. The facts in the case are sufficiently stated in the opinion of this court on a former hearing. 113 Fed. 445, 51 C. C. A. 279.

Franklin Bartlett, for plaintiff in error.

Thomas F. Bayard, for defendant in error.

Before TOWNSEND, Circuit Judge, and HOLT, District Judge.

TOWNSEND, Circuit Judge. The single question argued on the exceptions is as to the propriety of the action of the court below in refusing to direct a verdict in favor of the defendant. The motion for such direction was made under a claim that the uncontradicted evidence showed that plaintiff was discharged because he was incompetent, inefficient, and negligent. The plaintiff was engaged, during a strike in defendant's office, as superintendent of printing—to have entire control of all defendant's printing and mechanical departments. During the period of his employment, which lasted 10 days, the delay in getting out the morning and evening papers at the regular time was cut down, with a reduced force, from an hour and a half or two hours to a period of from fifteen to twenty-five minutes. There was evidence from which the jury were justified in finding that plaintiff was discharging the duties of superintendent at the Sun establishment from half past 6 or 7 o'clock in the morning, with an interval for dinner, only, until 10 or 11 o'clock at night; that the success in getting the paper out was due to his efforts; and that he was fully qualified for the duties of the position, and discharged those duties efficiently and successfully. It appeared that he was summarily discharged, without previous complaint or warning, and no explanation of his dismissal was given;

that the only reason assigned by defendant's manager, except that the matter had gotten beyond him, was that he was very sorry he had to take this course, but that the men would not work with plaintiff. In these circumstances, the questions of plaintiff's competency and efficiency were questions to be submitted to the jury, and they were properly submitted by the judge in the charge, a portion of which is as follows:

"The question is whether the plaintiff fulfilled his duties efficiently, and, if he did not, he is not entitled to recover at all. If he did, then he was improperly discharged, and he is entitled to recover the damages which have accrued."

A further exception discussed in the brief, but not pressed on the argument, relates to the admission in rebuttal of the pay roll made up by plaintiff during the time of his employment. Counsel for defendant stated that he did not object to the testimony of the witness that he had made out the pay roll, but merely objected to the admission of the pay roll itself, on the ground that it might convey an erroneous idea to the jury. It was admitted merely to show that it was a pay roll, and that plaintiff himself made it. This evidence was proper on rebuttal as tending to disprove the testimony of defendant's witnesses that plaintiff had done nothing in the line of his employment.

The judgment is affirmed, with costs.

CAVIN v. SOUTHERN PAC. CO.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1905.)

No. 1,113.

CARRIERS—ACTION BY RAILWAY MAIL CLERK FOR PERSONAL INJURY—INSTRUCTIONS.

In an action by a railway mail clerk against a railroad company to recover for injuries received through the alleged negligence of defendant in operating its road, where the court correctly instructed the jury that defendant owed to plaintiff the same degree of care as to a passenger for hire, which was the highest degree of care, skill, and foresight consistent with the carrying on of its business, further instructions that the care required was such only as "a prudent and careful person would generally exercise to prevent injury in the management of business attended by danger," and such "as skillful men engaged in that kind of business might fairly be expected to use under like circumstances," were inconsistent with the first, and erroneous, as not requiring the high degree of care exacted by the law from carriers of passengers.

In Error to the Circuit Court of the United States for the Northern District of California.

J. T. Houx and Houx & Barrett, for plaintiff in error.

P. F. Dunne, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The plaintiff in error was plaintiff in the court below in an action for damages for injuries received by him

when the train on which he was employed as a mail clerk was derailed at a washout on the defendant company's track near Mills City, in the state of Nevada, about 5:25 a. m. of the 17th day of February, 1901. The complaint counted on the alleged negligence of the company in the construction of the track at the place of the derailment, and in the care and inspection thereof. The answer of the company put in issue the charge of negligence on its part, and averred that the alleged injuries were caused without fault on its part. The court below correctly instructed the jury that:

"The defendant owed the same degree of care to the plaintiff, as a mail clerk riding in the mail car in charge of the United States mail, as it did to passengers for hire upon said train; and that care is prescribed by law to be the highest degree of care, skill, and foresight consistent with the carrying on of its business."

It is manifest that if, as we think, and as the court below first told the jury, the law exacted of the defendant company the highest degree of care, skill, and foresight consistent with the carrying on of its business, the court was in error in subsequently instructing the jury as it did, in effect, that the degree of care required of the carrier was such only as "a prudent and careful person would generally exercise to prevent injury in the management of a business attended by danger," or that degree of care and prudence "which a very cautious and prudent person would have used under the known or apparent circumstances of the case," or such "as skillful men engaged in that kind of business might fairly be expected to use under like circumstances." These latter instructions were not only inconsistent with that first given, but do not measure up to the standard of care exacted by the law of carriers of passengers. See *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. Ed. 115; *Railroad Company v. Pollard*, 22 Wall. 341, 22 L. Ed. 341; *Gleeson v. Virginia Midland Railroad Co.*, 140 U. S. 435, 443, 11 Sup. Ct. 859, 35 L. Ed. 458.

The judgment is reversed, and the cause remanded to the court below for a new trial.

CARDWELL v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1905.)

No. 1,092.

PUBLIC LANDS—UNLAWFUL INCLOSURE—SUIT FOR ABATEMENT OF FENCES.

Act Feb. 25, 1885, c. 149, 23 Stat. 321 [U. S. Comp. St. 1901, p. 1524], making it unlawful to inclose public lands without claim of right thereto under the land laws, applies to the inclosure and appropriation to private use of such lands by fences built on other lands, and the government may maintain a suit thereunder to abate such fences.

Appeal from the District Court of the United States for the District of Montana.

Massena Bullard, for appellant.

Carl Rasch, U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. On the 25th day of February, 1885, Congress passed an act entitled "An act to prevent unlawful occupancy of the public lands." Chapter 149, 23 Stat. 321 [U. S. Comp. St. 1901, p. 1524]. By its bill in the present case the government charged the appellant (defendant below) with the commission of certain acts forbidden by that statute, specifically describing the public lands which it alleged the defendant had unlawfully inclosed and over which it alleged he exercised exclusive and unlawful control. Issue having been taken by the defendant, proof was taken, and upon the evidence the court below found in favor of the government and against the defendant, and entered a decree accordingly.

The construction and proper application of the statute of 1885 was before the Supreme Court in the case of *Camfield v. United States*, 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260, and was by that tribunal carefully considered; the court saying, among other things:

"It needs no argument to show that the building of fences upon public lands with intent to inclose them for private use would be a mere trespass, and that such fences might be abated by the officers of the government or by the ordinary processes of courts of justice. To this extent no legislation was necessary to vindicate the rights of the government as a landed proprietor. But the evil of permitting persons who owned or controlled the alternate sections to inclose the entire tract, and thus to exclude or frighten off intending settlers, finally became so great that Congress passed the act of February 25, 1885, forbidding all inclosures of public lands, and authorizing the abatement of the fences. If the act be construed as applying only to fences actually erected upon public lands, it was manifestly unnecessary, since the government as an ordinary proprietor would have the right to prosecute for such a trespass. It is only by treating it as prohibiting all 'inclosures' of public lands, by whatever means, that the act becomes of any avail."

The doctrine of that case, applied to the evidence in the present one, satisfies us of its sufficiency to justify the conclusions reached by the court below.

The judgment is affirmed.

UNITED STATES v. AMERICAN EXPRESS CO.

(Circuit Court of Appeals, Second Circuit. March 13, 1905.)

CUSTOMS DUTIES—CLASSIFICATION—SOAP PENCILS.

So-called soap pencils, for cleaning spectacle and eyeglass lenses, in which soap is the material of chief value, are dutiable as nonenumerated manufactured articles under section 6 of the tariff act of July 24, 1897, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], and not as pencils under paragraph 456 (chapter 11, § 1, Schedule N, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1678]).

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, which affirmed the decision of the Board of General Appraisers (G. A. 5,528; T. D. 24,881), see 131 Fed. 656.

Charles Duane Baker, Asst. U. S. Atty.

Howard T. Walden, for appellee.

Before LACOMBE and COXE, Circuit Judges.

PER CURIAM. We deem it unnecessary to add anything to the opinions of the board and of the Circuit Court upon the questions therein discussed.

The argument is now advanced, apparently for the first time, that the merchandise in question should have been assessed for duty under paragraph 456 of the act of July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1678], which relates to "pencils of paper or wood, filled with lead or other material, and pencils of lead," etc. In our judgment, this contention is not well founded. Though called "soap pencils," the imported articles are intended for cleaning spectacle and eyeglass lenses, and do not belong to the class of writing or marking pencils manifestly referred to in paragraph 456.

The decision is affirmed.

KEYSTONE LANTERN CO. et al. v. SPEAR.

(Circuit Court of Appeals, Third Circuit. March 24, 1905.)

No. 57.

PATENTS—ANTICIPATION—LANTERNS.

The Spear patent, No. 413,464, for a lantern, claim 1, is void for anticipation, being so broad in its terms as to cover previous devices. Claim 2 held not infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 131 Fed. 879.

F. G. Dussoulas and Charles B. Collier, for appellants.

Francis T. Chambers, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and McPHERSON, District Judge.

J. B. McPHERSON, District Judge. The patent in controversy, No. 413,464, is for improvements in lanterns, and was granted to the appellee on October 22, 1889. The following paragraphs from the specification will explain its scope and purpose:

"My invention relates chiefly to lanterns, but is applicable to analogous illuminating apparatus wherein a guard-frame is employed in sustaining the different parts.

"The object of my present invention is to provide a simple, cheap, durable, and easily applicable means of uniting the oil-pot and chimney or globe with the guard-frame, the union being such as to increase the strength or rigidity of the structure at or in the region of the union, so that it will effectually withstand any damaging force or strain to which it is likely to be subjected. To accomplish all of this, and to secure other advantages in the matters of construction and operation, my improvements involve certain new and useful arrangements or combinations of parts and peculiarities of construction, as will be herein first fully described, and then pointed out in the claims.

* * *

"A, A¹, are the upright guards, and B, B¹, B², B³, are the horizontal ring-guards of the lantern-frame. These parts are notched together and interlocked or interwoven, as set forth in a separate application for patent of even date of filing herein, serial No. 280,632, by me made, and are preferably all made of flat metal considerably wider than it is thick. It is to this form of frame that

my present improvements are especially applicable; but obviously other forms might be substituted if a horizontal body-hoop frame-ring be employed and rigidly secured to the upright guards by notching them together. The body-hoop is applied to the body-hoop frame-ring, B, and receives the oil-pot. The hoop may be short as at C in Fig. 1, extending a little above and a little below the bottom of the body-hoop frame-ring, or it may extend considerably below that ring, as at C, Fig. 2, constituting also the base or foot of the lantern.

"The hoop, C, is formed to enter the body-hoop frame-ring, B, and it is secured in and on said ring, preferably, by being buckled under and over the inner margin thereof, as shown in the sectional part at a, a, and afterward 'dipped' or 'tinned,' if required. By thus uniting the body-hoop with the body-hoop frame ring (which may be easily and quickly accomplished by use of ordinary beading or reeding tools), the said hoop is not only securely held in place against any possibility of disarrangement, but the form of joint adds to the strength and stiffness of the structure in the region of the frame always most liable to damage; and it further dispenses with the use of solder, enabling me to complete the union easier, quicker and with much less expense than in other methods; but other methods may be adopted."

The present dispute concerns the first and second claims, which are as follows:

"(1) In a lantern, the combination, with the horizontal frame-ring, B^a, secured to the upright guards, substantially as explained, of a body-hoop secured upon said frame-ring, substantially as and for the purposes set forth.

"(2) In a lantern, the combination, with the flat metal horizontal frame-ring notched upon and secured to the upright guards, of the body-hoop bent or buckled upon said flat metal ring, substantially as shown and described."

The first claim covers the combination of the frame-ring secured to the upright guards, with a body-hoop secured upon the ring, no matter by what means the union of the ring, the guards, and the hoop is effected; and, if this claim is valid, the appellants' lantern is a clear infringement. The second claim is much narrower and is confined to a particular kind of frame-ring, a particular method of securing the ring to the guards, and a particular method of securing the hoop to the ring. This claim, therefore, may be good, even if the first claim is invalid because it is too broad; and this, we may say at once concerning the first claim, is the conclusion to which we have felt obliged to come. Without going into a detailed examination of the prior state of the art, it is enough to say that a body-hoop is an essential part of such lanterns as are now under consideration. It is a vertically set, hollow cylinder of metal, usually of tin, and supports the oil-pot, the chimney or globe, and the other appliances connected with the light. In the earlier stages of the art, the upright guards were united directly to the hoop, no frame-ring being employed. As a further step in the development of the structure, the frame-ring was introduced, and to one of its edges the guards were fastened, while the body-hoop was secured to the other. This made a stronger lantern, and was a distinct advance. These steps had already been taken, however, before the patent in suit was granted. To refer to no other lantern, "Porter No. 2," which antedates the appellee's device, shows a frame composed of vertical guards and four horizontal rings, one of them being a frame-ring (called a "flange" by the appellee, in the effort to distinguish the two lanterns), to which the guards are

secured on the outer rim, the body-hoop being secured on the inner. It is true that the method by which the guards and the rings are fastened together differs from notching, and that the frame-ring is not buckled to the hoop, but in considering the first claim these differences are not material. It is also true that the frame-ring is secured to the top of the hoop, and not at a point intermediate of the top and the bottom; but this again is not important in view of the broad language of the claim. It is important, however, to observe that the precise combination described by the appellee is presented by this old lantern—a horizontal frame-ring, secured to the upright guards, with a body-hoop secured upon the ring. If Porter No. 2 were a new construction, we think it would be impossible to deny that the first claim of the patent was infringed thereby; and upon familiar principles therefore it must be held that the claim has been anticipated by the same device.

This being so, the validity of the second claim need not be decided. Assuming it to be good for the particular construction therein described, we are of opinion that the appellants do not infringe. It is true that they use a flat metal horizontal frame-ring notched upon and secured to upright guards, but the body-hoop is not bent or buckled on the ring, but is held in place by a device so different as not to be the equivalent of buckling. It is thus described in the brief of appellants' counsel:

"In appellants' lantern the body-hoop frame-ring is provided with a number of lugs at spaced distances around the periphery, and such lugs are, in turn, provided with open slots. The lower ends of the upright guards are provided with projecting 'tongues,' and are slotted near their inner margins above such tongues. On assembling the parts, the tongues on the lower ends of the guards enter the slots formed on the lugs of the ring and passing through openings formed in the body-hoop, are then bent upwardly—or clinched—against the inner face of the body-hoop, an upturned collar formed on the inner margin of the ring serving as an abutment."

The frame-ring rests in a groove in the hoop, but it is not buckled, or even tightly secured by the groove; for when the tongues are removed the ring can be readily rotated in the groove, which is evidently intended only to prevent the ring from moving upward or downward, and not to hold it rigidly in place. As one element of the appellee's combination has thus been replaced by a device that is materially different, the appellants' lantern does not infringe: Walker, Pat. (4th Ed.) § 349, and cases cited.

The decree must be reversed, with costs, and the case remanded, with instructions to dismiss the bill.

KAHN et al. v. STARRELS.

(Circuit Court of Appeals, Third Circuit. March 27, 1905.)

PATENTS—SUIT FOR INFRINGEMENT—COSTS.

The provisions of Rev. St. §§ 973, 4922 [U. S. Comp. St. 1901, pp. 703, 3396], that when judgment or decree is rendered for the plaintiff or complainant in any suit at law or in equity for infringement of part of a patent, etc., no costs shall be recovered unless the proper disclaimer was

entered in the Patent Office before the suit was brought, applies only to costs in the trial court, and not to costs on appeal, the allowance or refusal of which is to be determined by the appellate court in view of the special circumstances of the case. Where the court below denied all relief and dismissed the bill, which action was reversed on appeal as to certain claims of the patent, complainant will be awarded costs in the appellate court.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Sur Motion of Appellee as to Costs.

For opinion below, see 131 Fed. 464.

Jos. C. Fraley, for appellants.

L. L. Smith, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

PER CURIAM. The court below dismissed the bill, and the complainants appealed to this court. We have held that two of the claims of the patent in suit are valid, and were infringed by the defendant (appellee), and accordingly we have reversed the decree below, and will remand the case to the court below, with directions to enter a decree in favor of the complainants in accordance with our opinion. It now appears that the appellants have filed a disclaimer as to the third claim of the patent, which we held to be invalid, and the present motion is based upon the contention of the appellee that under the statutory provision contained in sections 973, 4917, and 4922 of the Revised Statutes [U. S. Comp. St. 1901, pp. 703, 3393, 3396] no costs, either in the court below or in this court, are recoverable by the appellants, because the disclaimer was not entered in the Patent Office before the suit was brought. Undoubtedly the statutory provision applies to costs in the court below, but no case has been brought to our attention in which it was directly held that the statutory provision applies to costs on appeal. The provision that "when judgment or decree is rendered for the plaintiff or complainant in any suit at law or in equity for the infringement of a part of a patent," etc., no costs shall be recovered unless the proper disclaimer has been entered before the suit was brought, applies, we think, only to the costs in the original suit in which the judgment or decree is rendered, and does not apply to appeal costs. The allowance or refusal of appeal costs is to be determined by the appellate court in view of the special circumstances. In the present case the court below denied all relief to the complainants, and dismissed their bill. Our decree rectifies the error of the court in dismissing the bill, and remands the cause, with instructions to enter a decree in favor of the complainants, which should have been rendered. We think, then, that the appellants are rightfully entitled to costs in this court upon the appeal, but not to costs below, and it is so ordered.

WESTON ELECTRICAL INSTRUMENT CO. v. EMPIRE ELECTRICAL
INSTRUMENT CO. et al.

(Circuit Court of Appeals, Second Circuit. March 8, 1905.)

1. PATENTS—RENEWAL APPLICATION IN CASE OF FAILURE TO PAY FEES—TIME FOR FILING.

Under Rev. St. § 4897 [U. S. Comp. St. 1901, p. 3386], the Commissioner of Patents is without authority of law to issue a patent on an application filed more than two years after the allowance of a patent for the same invention on a prior application by the same party, which has been forfeited for nonpayment of fees.

2. SAME—SUIT FOR INFRINGEMENT—DEFENSES.

In a suit for infringement of a patent the want of legal authority in the Commissioner of Patents to issue the same may be pleaded as a defense.

3. SAME—VALIDITY—ELECTRICAL CONDUCTOR.

The Weston reissue patent, No. 10,945 (original No. 381,305), for an electrical conductor, is void because the original was granted on an application filed more than two years after the allowance of a patent on a prior application, which was not issued because of the nonpayment of fees.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 131 Fed. 90.

Richard Eyre and W. H. Kenyon, for appellant.

Philip Mauro, for appellees.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. We concur in so much of the opinion of the court below as holds that:

"If more than one application could be made, the final application must be made within two years after the allowance of the original application, the term 'the original application,' as used in this section, meaning the first application."

There is no ambiguity in the language of the statute as to the limitation of time within which the later application must be made. The provisions for withholding the patent upon the nonpayment of the final fee within six months, and for relief from the effect of such provision, are imperative. The construction contended for by the appellant would permit an indefinite prolongation of a monopoly by means of unlimited forfeitures and renewals, and would nullify the policy of the law, which requires diligence in the prosecution of applications for and issuance of patents. The patent in suit, therefore, was granted by the Commissioner of Patents under a mistake as to the law, but without authority of law, because upon an invalid application. This defense may be raised in an action for infringement. "Where it is evident that the commissioner, under a misconception of the law, has exceeded his authority in granting or reissuing a patent, there is no sound principle to prevent a party sued for its infringement from availing himself of the illegality, independently of any statutory permission so to do." *Mahn v. Harwood*, 112 U. S. 354, 358, 6 Sup. Ct. 451, 28 L. Ed. 665; *Planing-Machine Company v. Keith*, 101 U. S. 479, 25 L. Ed. 939.

The decree is affirmed, with costs.

NEW YORK PHONOGRAPH CO. v. EDISON et al.

(Circuit Court, S. D. New York, January 5, 1905. On Rehearing, April 20, 1905.)

1. PATENTS—LICENSES TO SELL AND USE—TRANSFER OF PATENT—DEFECT.

Where a corporation owning patents, subject to licenses granted to sell and use, became insolvent, and its assets were purchased at a receiver's sale by E., who had full knowledge of the rights of the licensee, and he thereafter organized another corporation, to which he conveyed the assets of the former company so purchased, excepting the rights of the insolvent under the licenses, which he transferred to a trusted employé, the succeeding corporation, taking with full knowledge of the licenses, was bound thereby.

2. SAME—INVASION OF LICENSE—EQUITABLE RELIEF.

Where complainant acquired the exclusive right to use, exhibit, and sell phonographs and graphophones, under a license from a corporation owning patents thereon, and such rights were wrongfully invaded by a subsequent corporation, which succeeded to the rights of the licensor with knowledge of the licensee, complainant was entitled to recover against the latter in equity for breach of covenant.

3. SAME—LACHES.

Where complainant, a licensee of the exclusive right to use and sell patented phonographs and graphophones in a certain district, brought suit against defendant, a corporation which succeeded to the rights of the licensor, for breach of covenant in the license within five years after defendant's incorporation, and within less than three years after the termination of fruitless negotiations to settle, and there was no evidence that complainant had acquiesced in defendant's intrusion into such field, complainant was not barred by laches.

4. SAME—BREACH OF COVENANT—FORFEITURE.

A breach of covenant contained in an exclusive license to use and sell patented phonographs and graphophones in a specified territory did not work a forfeiture of the license per se, no condition to that effect being inserted in the license.

5. SAME—ABANDONMENT—INSOLVENCY.

Where an exclusive license, within specified territory, to use and sell patented phonographs and graphophones, authorized the licensor, on written notice, to immediately terminate all the rights granted, on the licensee's failure to perform certain conditions, and in the event of the licensee becoming bankrupt or insolvent, the licensee's insolvency did not operate as an abandonment of its contract rights, in the absence of notice, it being willing and capable of fulfilling its contract obligations notwithstanding such insolvency.

6. SAME—EXTENSION.

Certain licenses for the exclusive use and sale of patented phonographs and graphophones in a limited territory provided that the licenses should be extended on performance of a covenant that the licensee, at or before the expiration of the original term, would increase its capital stock to a specified amount and deposit the same with a trust company for delivery to the licensor or a trustee, and on notice of such deposit the licensor would forthwith deposit with the trust company, for delivery, extension licenses specified. Extension licenses were duly executed and delivered to the trust company thereunder, and stock deposits made and accepted by the trust company, but after the delivery of the stock and extension licenses to the latter it was directed not to deliver the stock certificates pending settlement of certain claims of the licensee against the stock. *Held*, that the extension licenses were effective on the deposit of the stock with the trust company, the subsequent notice not to deliver the stock being ineffective.

On Rehearing.

7. PATENTS—LICENSES—EXTENSION OF TERM.

An extension of the term of a patent does not inure to the transferee of a license, in the absence of language expressing such intention.

8. SAME—LICENSES—SUBSEQUENT EXTENSION.

Where an assignment of certain patents contained agreements whereby all inventions or improvements on the patented article made by the patentee within 15 years should be assigned, and improvements were made and patented in several years subsequent to the execution of a license to use and sell, providing for a second extension for such further time as the "assignee was authorized to extend such license," subject to the covenants and agreements of the original contract, the licensee was not entitled to a second extension in perpetuity, but only until the expiration of the last improvement patents.

9. SAME—OPTION TO RENEW—CONSTRUCTION.

Where an exclusive license to use and sell patented phonographs and graphophones provided for a second extension for such further time, "at the option" of the licensee, as the licensor may be authorized to extend the license, and it appeared that the agreement was regarded by both parties to contemplate continuous business relations between them, the option was, in effect, but a reservation of the right to the licensee to discontinue existing relations, and its exercise was not, therefore, a condition precedent to the licensee's right to a renewal.

10. SAME—NOTICE—WAIVER.

A license to use patented phonographs and graphophones provided for a renewal until March 26, 1903, and for a second renewal after such date for "such further time, at the option" of the licensee, as the licensor was authorized to extend the license. Prior to the date specified the licensor had invaded the licensee's territory and refused to recognize the latter's exclusive rights granted, and had obstructed the licensee's efforts to obtain supplies, and a suit had been brought by the licensee to compel recognition of its rights. *Held*, that such acts on the part of the licensor constituted a waiver of the obligation of the licensee, if any, to give notice of its election to exercise its option to take a renewal of the license.

Elisha K. Camp (Louis Hicks and John C. Tomlinson, of counsel), for complainant.

Robinson, Biddle & Ward (C. L. Buckingham, C. M. Hough, Frank L. Dyer, and William Pelzer, of counsel), for defendants.

HAZEL, District Judge. This action is brought to restrain the defendants, Thomas A. Edison, the Edison Phonograph Company, the Edison Phonograph Works, and the National Phonograph Company from selling, leasing, or disposing of phonographs and supplies therefor within the state of New York, and for damages and an accounting. The basis for the action is the alleged infringement of a license or contract made between complainant's predecessors and the North American Phonograph Company (hereafter referred to as the American Company), which the bill charges granted the sole and exclusive rights to use, exhibit, and let phonographs, and to sell and dispose of appliances therefor, in the state of New York. The legal rights of licensees under substantially similar contracts have been several times before the courts of the United States on demurrer and motions for preliminary injunctions. *New England Phono. Co. v. Edison et al.* (C. C.) 110 Fed. 26; *New York Phono. Co. v. National Phono. Co.* (C. C.) 112 Fed. 822; *New York Phono.*

Co. v. National Phono. Co. (C. C.) 119 Fed. 544; Whitson v. Columbia Phono. Co., 18 App. D. C. 565; Rahley v. Columbia Phono. Co., 122 Fed. 623, 58 C. C. A. 639; New York Phono. Co. v. Jones (C. C.) 123 Fed. 197; before Judge Brown in New England Phono. Co. v. Dawson Co. (C. C.) 124 Fed. 1022; and before Judge Carpenter in American Graphophone Co. v. New England Phono. Co. et al. (unreported). The bill charges Mr. Edison and defendant companies with entering upon a plan or scheme to avoid the contracts for licenses, and to hinder and obstruct the complainant in the exercise of its sole and exclusive territorial rights. Service of a subpoena ad respondendum was had upon the National Phonograph Company only.

The salient facts, chronologically stated, are these: Prior to 1888, Jesse H. Lippincott acquired a license of certain patents of Alexander G. Bell, Chichester A. Bell, and Sumner Tainter for the invention known as the "graphophone," for the purpose of exploiting, selling, and manufacturing the same in the United States and elsewhere. At this time Thomas A. Edison had also invented a machine for recording and reproducing sounds and articulate speech, called the "phonograph." On October 28, 1887, the patents obtained by Mr. Edison on his invention were assigned to the Edison Phonograph Company, a corporation owned and controlled by him; the right to manufacture, however, being reserved to him. This right was on May 12, 1888, assigned to the Edison Phonograph Works, a corporation also owned and controlled by Mr. Edison. To unite and consolidate the competing interests in the talking machines, the North American Phonograph Company was organized by said Lippincott, it having been previously agreed in writing between Lippincott and Edison that, upon the formation of such company, the latter would sell to it the entire stock of the Edison Phonograph Works for the sum of \$500,000. By conveyance and assignment from Edison, the Edison Phonograph Works, the Edison Phonograph Company, and Lippincott, dated October 12, 1888, the North American Phonograph Company became the owner in perpetuity of the sole and exclusive title and interest in and to the certain patents of the defendant Edison relating to the phonograph, for the express purpose of enabling it to sell to subcompanies and agencies certain exclusive territorial rights throughout the United States and Canada. The company was incorporated on October 12, 1888, under the laws of New Jersey, with an authorized capital of \$6,600,000, and Mr. Edison became a stockholder and director therein immediately upon organization. Not only were patents covering the phonograph transferred, but it was agreed that future improvement patents and inventions made within 15 years thereafter were to be assigned to the American Company. The Metropolitan Phonograph Company (hereafter referred to as the Metropolitan Company) was incorporated on October 6, 1888, under the laws of New York. In consideration of the cash payment of \$100,000, the American Company granted on October 12, 1888, to the Metropolitan Company, for a period of five years, the sole and exclusive rights to the use of the phonograph and graphophone, and for the use of appliances therefor, and the right to use, exhibit, and

sublet such instruments, and to sell the necessary appliances therefor, within certain specified counties of the state of New York. Such agreement, however, was extended, as will subsequently appear. On February 6, 1889, a similar contract of license for a period of five years, covering territory in the state of New York not licensed to the Metropolitan Company, and comprising the city of New York and certain other specified counties, was granted to one John P. Haines, acting for the New York Phonograph Company, a corporation to be organized thereafter in pursuance of such agreement. The actual cash price paid in consideration of the territorial license to the last-mentioned company was \$125,000. Both written agreements contained provisions and restrictions relating to retail prices to be paid by local companies or agencies, manner of buying or leasing instruments and supplies, option for extension of license, and general details regulating the conduct of the business. The New York Phonograph Company (referred to as the New York Company) was, in pursuance of such agreement, incorporated on February 8, 1889, under the laws of the state of New York. In September, 1890, the Metropolitan Company and the New York Company were consolidated into a single corporation, the complainant. The proofs show that the licensees conducted the business for which they were incorporated, in the state of New York, during three years without interference or molestation, but with rather indifferent financial success. Contrary to the expectation of the promoters, the business was not prosperous, and all the witnesses are agreed that the enterprise was unsuccessful because of defects and imperfections in the phonograph, and inability to procure machines with which to do business. Between July 1, 1892, and July 1, 1893, the New York Company, though engaged in business, owned scarcely any assets. For reasons hereafter stated, the business appears to have been conducted at a great disadvantage, and resulted in financial loss. The evidence shows that the defendant Mr. Edison became a controlling stockholder in the American Company in 1889, and in 1893 its president. On July 1, 1893, according to written agreement entered into between the American Company and the New York Company, the latter waived its exclusive rights under the licenses until July 1, 1895, since which time the complainant concededly has not actively engaged in business. By the terms of this suspension agreement, so-called, and upon payment of specified royalties, the American Company was authorized to come into complainant's territory and to exclusively transact the phonograph business. On May 1, 1894, after the suspension agreement went into effect, the American Company became insolvent, and a receiver was appointed. Its assets consisted principally of phonograph patents, shares of stock in the Edison Works, and the good will of the business. All the property of the insolvent corporation, together with contracts for licenses, were sold to Mr. Edison by the receiver at public sale, pursuant to the order of the court. Mr. Edison transferred a portion of his purchase, consisting of patents, shares of stock, and good will, to the defendant National Phonograph Company, which was organized by him, while the interests in the many territorial licenses which had been granted by the American Com-

pany, including those in controversy, were transferred to a trusted employé named Ott. On February 10, 1896, a few days after the receiver's sale, a communication was addressed by complainant to Mr. Edison, requesting that no instruments or supplies be sold or delivered in New York except through the medium of the New York Company. A few days later another letter was mailed and received by Mr. Edison, requesting an interview in behalf of complainant's committee. Both communications were ignored.

It is practically conceded that, immediately upon the acquisition by the National Company of the assets of the American Company in the manner indicated, it began the sale of phonographs and supplies in the restricted territory. This fact is also shown by the letters in evidence under date of March 10, 1896, passing between said company and the firm of Walcutt, Miller & Co., of New York. In May, 1896, the defendant National Company opened a store for the sale of phonographs and supplies in the city of New York. Prior thereto, on January 31, 1898, a committee of the complainant company was appointed, pursuant to resolution adopted by its directors, to confer with the defendant Edison regarding his apparent hostile attitude, and his evident disregard for complainant's rights under the contract. Thereafter the committee, Mr. Edison, and Mr. Gilmore, president of the National Company, met to discuss the unsettled question. Complainant's claim to an exclusive license was asserted with renewed insistence. Mr. Edison replied that he would sell phonographs to the New York Company on the same basis as to other agents, and not otherwise. He also stated, in substance, that complainant had better establish its rights by litigation. Further negotiations towards a settlement of existing differences were, at Mr. Edison's request, continued with his counsel, but with no success. The witnesses for complainant, and Mr. Dyer, witness for defendant and counsel for Mr. Edison, are not agreed as to the exact purport of the negotiations. Mr. Haines, witness for complainant, declares the interviews to have been unsatisfactory and evasive. His criticism of the conversations is corroborated by other members of the committee. Upon this point Mr. Dyer testified that the object of the interviews with complainant's committee, and other negotiations had about the same time with its counsel, was not to arrange for the return of the New York Company to the phonograph business, but, on the contrary, that complainant desired a settlement which contemplated a purchase of its license by defendants. At this time the phonograph and graphophone business was increasing, and gave hopeful promise of financial success. The machines had been improved by the adoption and use in 1897 of a so-called "spring-power attachment" invented by the United States Company. The general public became interested in the amusement feature of the instrument, and the asserted territorial rights of the complainant increased in value. Much testimony is found in the record regarding the substitution by the National Company of the spring-motor attachment to the phonograph in place of an electric battery. The suggestion that Mr. Edison, prior to the suspension agreement, designedly withheld his approval of the substitution of the later device, is not sustained by the proofs. Complainant's theory is that the early imperfections of the talking machine could have been

obviated by using the spring power and another form of molded record, but the evidence establishes that Mr. Edison doubted the efficiency of the suggested improvement. The failure of the American Company or Mr. Edison to supply this improvement (which was not of his invention) in the earlier period of the exploitation of the phonograph certainly does not establish the claim that any improvements were withheld by him. Nothing further occurred until the bringing of this suit in January, 1901. Neither the American Company nor its successor, the defendant National Company, gave the 30-day notice required by subdivision 10 of the contract, which, in effect, declares that if the licensee neglects or fails to take measures to supply a demand in any portion of the licensed territory for phonographs or phonograph-graphophones, or appliances therefor, then the licensor may supply the demand through its agents, but only to the extent of complainant's default. In explanation of the failure of the National Company and Mr. Edison to give the specified notice, it is argued that it was well known that when the National Company came into the field the complainant had abandoned its license and was practically unable to carry out the provisions of the contract, not only on account of its evident reluctance to re-enter the field of operation, but because of its insolvency. The testimony, however, is to a different effect. The witnesses, Fahnestock and Lewis, testified that, had the New York Company received the notice mentioned, it would gladly have met the demand for machines, as it was desirous of increasing its business. During the entire period of time mentioned, several offices were and still are maintained by complainant in the city of New York and at Tarrytown, N. Y., annual elections of officers have been regularly held, and the board of directors have met for the transaction of business frequently since 1895. Other evidence is found in the record which will be mentioned herein when pertinent.

Complainant insists that, when the defendant Edison bought the assets of the North American Company, he did so with full knowledge of the facts, and, moreover, when the National Company, which had been organized by him, acquired the assets of the American Company, it also had full knowledge of the pre-existing contractual relations, i. e., that the complainant was the exclusive licensee for the entire state of New York for a period of time stated in the contract. Hence, according to the decisions, the stipulations and conditions between the American Company and the complainant were binding upon it.

In *New England Phono. Co. v. Edison et al.*, supra, Judge Gray, on the assumption that the bill correctly set out the contract, decided:

"That the said contract contained an implied negative covenant not to sell or deal in the articles or matters in regard to which the said exclusive right was granted, and that the defendant Thomas A. Edison owned and controlled the defendant companies, and that he and they succeeded to the rights and responsibilities of the North American Phonograph Company in regard to the contract in question."

When the bill in suit was considered on demurrer by Judge Wheeler, who had before him the licenses, he, assuming the truth of the allegations of the bill, stated in effect that one who knowingly, in pursuance of a scheme, independently sells and uses phonographs and supplies in

violation of a complainant's contract rights, such salable articles coming from the same source, unjustifiably invades the legal rights of the complainant. The principle appears to be well settled that where there is an exclusive right, and such right is wrongfully invaded or violated by one having knowledge of the contractual relations, a court of equity may be invoked to redress the breach of covenant. *Appollinaris Co. v. Scherer* (C. C.) 27 Fed. 18; *Standard Fashion Co. v. Siegel-Cooper Co.*, 30 App. Div. 564, 52 N. Y. Supp. 433. In the *Whitson Case*, *supra*, the Circuit Court of Appeals for the District of Columbia, having a similar license before it, said:

"Any person, natural or artificial, into whose hands, after the execution of the contract between the North American Company and the Columbia Company, the control of the Edison patents came, with knowledge or notice, actual or constructive, of the existence of such contract and of the rights of the Columbia, must be assumed to have taken subject to such rights, and to be disqualified from infringing in any manner the exclusive license given to the Columbia Company. If this were not so, it is very plain that rights granted under a patent might be destroyed with impunity, against the will of the owner of the rights, by the mere transfer of the patent."

As already indicated, the doctrine is well established that a license follows the assets of the licensor into the possession of him who buys with his eyes open to the pre-existing contractual relations and existing equities. The assets of complainant's licensor in no sense innocently came to Mr. Edison or his assignee, nor were they freed from the obligations created by the contracts of license. The transfer to Ott of the interest of the American Company in the licenses cannot be considered in any other light than an ill-advised attempt to evade contractual liability. Whether it was the intention of the transferror to dissolve the American Company and make room for a successor is not thought to be material. The assets were bid in and purchased "as a going concern," and the receiver turned the remaining business over to the purchasing company. Being in possession, therefore, of all the facts, and having succeeded to the rights of the American Company, the National Company has nevertheless unwarrantably invaded the licensed territory of the complainant. That the contractual rights of the New York Company have been obstructed and interfered with in the manner indicated cannot be seriously controverted.

The defenses principally relied on challenge complainant's right to enforce its exclusive license on account of its unexplained laches, and deny that an extension of license was acquired under the provisions of the contract.

The question of laches will be first considered. The principal circumstances of each case must govern the application of the rule. It is true that, immediately after the receiver's sale of the assets of the North American Company, it became apparent that Mr. Edison did not regard that complainant's license survived the dissolution of the American Company. His declarations to complainant's committee, as already observed, were in effect an unalterable repudiation of the asserted claims to a subsisting license. There was no room for misunderstanding. Under the circumstances of this case, what was complainant's remedy, and when should it have been brought to the attention of a proper tribunal? The circumstances undoubtedly demanded

that the limit of time be measured in which to seek relief. Upon this point defendants vigorously contend that complainant was cognizant of the invasion of its territory by the National Company from the beginning, and that, assuming the paramount rights of the complainant, Mr. Edison's refusal to recognize such rights should have admonished the complainant to seasonably question the interference by immediately commencing suit to establish its rights. These propositions are untenable. According to one of complainant's witnesses, no action was earlier instituted on account of lack of funds. The facts and circumstances are not convincing that the complainant has slumbered on its rights. The maxim that "the laws serve the vigilant, and not those who sleep," has application only where the party is silent, and permits an interference with his alleged rights, without adequately and seasonably protecting them. This litigation was instituted within five years after the incorporation of the defendant National Company, and within less than three years from the termination of fruitless negotiations to settle existing differences. It already appears that the actual invasion by the defendant National Company of complainant's territory by opening therein a place of business was in May, 1898. Nothing is shown from which it may be justly concluded that the National Company or its codefendants believed that complainant acquiesced in such intrusion, or that there was an abandonment of, or an intent to abandon, its asserted rights in the license. The contrary appears.

The doctrine of laches, as expounded in the following cases, is thought to apply: *Bradford v. Belknap Motor Co.* (C. C.) 105 Fed. 63; *Ide v. Carpet Co.*, 115 Fed. 137, 53 C. C. A. 341; *Richardson v. Osborne & Co.*, 93 Fed. 828, 36 C. C. A. 610; *Saxlehner v. Eisner & Mendelson Co.*, 173 U. S. 704, 19 Sup. Ct. 886.

Defendants contend that complainant, on account of its insolvency both before and after the expiration of the suspension agreement, was practically unable to resume the phonograph business, and hence there was an abandonment of its contract rights. The provisions of the agreement, fairly interpreted, undoubtedly require the complainant company to operate the business and to fulfill its contractual obligations. This it was willing to do, as appears by the oral evidence, and by the first letter addressed to Mr. Edison following the receiver's sale. It has been held that a breach of covenant does not work a forfeiture of the license per se, unless a condition to that effect be inserted in the agreement. *White et al. v. Lee* (C. C.) 3 Fed. 222; *Consolidated Middlings Purifier Co. v. Wolf et al.* (C. C.) 28 Fed. 814. Subdivision 14 of the contract in terms authorized the licensor, upon written notice, to immediately terminate all the rights granted upon failure to perform certain conditions, and in the event of the licensee becoming bankrupt or insolvent, as therein provided. No such notice, however, is relied upon to terminate the license, and admittedly none has been given either by the American Company or its successors, the defendants. Assuming, therefore, the insolvency of complainant, in the circumstances of this case, it is doubtful whether the defendants can be heard to assert complainant's insolvency. There is no doubt that complainant could have procured any necessary finances to actively establish the business if the defendants had acquiesced in its exclusive

license and furnished phonographs and supplies under such license, after acquiring the assets and good will of the American Company.

The next defense is that the license contracts in question were not in effect extended beyond a period of five years, for which they were originally granted. Assuming a grant of exclusive territorial rights, the defendants contend that the option of a second term was not exercised. The preliminary provisions of both the Metropolitan and the New York agreements, under which the licenses were to be extended until 1903, are substantially identical. The original licenses are to continue for five years, and such further time as the parties may afterwards determine. The original Metropolitan agreement provided that the period limited may further be extended upon the performance of a covenant stating, in substance, that the company would, at or before the expiration of the original term, increase its capital stock in the amount of \$250,000, and deposit the same with the Central Trust Company for delivery to the American Company or to Lippincott, trustee, or his successor, and, upon notice to the American Company of the deposit of such stock with the trust company, the American Company shall forthwith deposit with said trust company the extension license until March 26, 1903, for delivery to the Metropolitan Company. Such deliveries by the trust company were to be made at the expiration of the original term of the licenses. In pursuance of said agreement, and on June 23, 1890, the extension license referred to in the original contract was executed and deposited with the Central Trust Company, the \$250,000 of stock having been likewise deposited. The original license to the New York Company also contained a provision regarding a similar deposit of stock and of an extended license with the trust company. Such deposits of stock and extension licenses were made pursuant to said original agreements. The Central Trust Company accepted the deposits mentioned, and acknowledged receipt thereof. The extension licenses contained the following provisions, being clauses 2 and 3 in the Metropolitan agreement and 3 and 4 in the New York agreement:

"Second (Third). It is further agreed that on the 6th day of February, 1894, said Central Trust Company of New York shall, without further direction from the parties hereto, or either of them, and without or further consideration, deliver and transfer to said Jesse H. Lippincott, trustee, or his successor, said Two thousand five hundred shares of stock, and shall, at the same time, deliver to the party of the first part and to the party of the second part hereto each one copy of this agreement or extended license, which is executed and deposited, in duplicate, this day with said Central Trust Company of New York, and the party of the second part shall be immediately entitled to the possession of said extended license upon the delivery to said Jesse H. Lippincott, trustee, or his successor, of said shares of stock.

"Third (Fourth). It is further agreed, that upon delivery, as aforesaid, to said Jesse H. Lippincott, trustee, or his successor, by said Central Trust Company of New York of said shares of the capital stock of the party of the second part, and upon the faithful performance by the party of the second part of all the covenants and agreements made incumbent upon it by said agreement of February 6th, 1889, then that this agreement shall become and shall confer upon and shall fully and entirely vest in the party of the second part an extension of the rights granted to and conferred upon the party of the second part by said agreement of February 6th, 1889, and the subsequent assignment to it for a further period and until the 26th day of March, 1903,

and for such further time at the option of the party of the second part as the party of the first part may be authorized to extend such license; subject, however, to the covenants and agreements of said agreement of February 6th, 1889, as fully and entirely as if said agreement had been in the first instance made to cover the period of the extension granted hereby, as well as the period originally thereby fixed and limited."

On October 3, 1894, subsequent to the delivery to the trust company of the stock certificates and said extension licenses, the complainant, by its executive committee, notified the trust company not to deliver the stock certificates deposited, as agreed under both contracts, "pending the settlement of certain claims of this company against said stock." A similar notice in writing was given to the stock transfer agents not to make the transfer of such capital stock standing in the name of said Central Trust Company, trustee, until further notification. Later, on June 20, 1902, after the commencement of this suit, the above notices were in effect canceled and revoked, and, after some correspondence between the trust company and complainant, the extension licenses were delivered to complainant. Another notice, however, was given to the depositary to withhold the certificates of stock on account of a claim against the receiver of the American Company. The shares of stock were never demanded by Mr. Lippincott or any other person or corporation. Defendant now contends that the context of the provisions relating to the extension plainly shows a license for two terms, namely, one for five years and the other for ten; that the amount of money paid, viz., \$100,000 by the Metropolitan Company and \$125,000 by the New York Company, was for the first term, while, for the second, the consideration was the number of shares of capital stock deposited with the trust company, and hence, when the depositary was notified not to deliver the capital stock, there was, in legal effect, a rescission of the contract. This interesting problem is difficult of solution.

In pursuance of the intention of the parties, plainly apparent from the context of the contracts, it is thought that the agreements for extensions of license were completed contracts, and not dependent upon a future occurrence or contingency. The Central Trust Company, without further direction from either of the parties, was authorized and empowered to deliver the possession of the stock and the agreements, as therein expressly provided. It received the stock without any accompanying reservations or limitations, and therefore it was not an escrow dependent upon the performance of future conditions. The subsequent notice to the depositary not to make delivery of the stock could not affect the contract rights, as the delivery of the stock was not essential to its effectiveness. The ownership of the shares of stock had passed from complainant to another. There was a constructive delivery, and, accordingly, the title actually vested in Lippincott, as trustee, or his successors. On deposit of the shares of stock, the complainant was unquestionably, at the termination of the original license, entitled to the possession of the documents extending the same. The proviso that the rights shall not be conferred or become vested unless the covenants are faithfully performed is not thought to have been a restriction upon the depositary in the

delivery of the stock, as provided. As already intimated, the intention of the parties must be learned from the entire contract. Careful consideration of the clauses covering the point in question warrants the conclusion that the deposits of the stock and the extension licenses were considered as a part of the original license. The contract is not separable or divisible in the sense that the money paid was in consideration of the first item, and the delivery of the capital stock for the second. Moreover, the transaction could not be recalled without the consent of the interested parties, and the delivery of the shares of stock in the manner indicated in the agreement was not revocable by the complainant.

But it is suggested that the embargo on the stock prevented the depositary from making the disposition intended by the solemn act of the parties, and that consequently the owner was deprived of the use of his property, and hindered in its control. This proposition ignores the rule that any direction to a depositary, by a party to a completed contract, in contradiction of or inconsistent with the agreement under which the deposit was made, is inoperative. *Stanton v. Miller*, 58 N. Y. 192. So that, irrespective of whether the Central Trust Company could lawfully deliver the stock to the American Company or its receiver, or whether such depositary was restricted in its delivery to the actual person or persons mentioned in the contracts, the notice of cancellation was entirely independent of the contract, and could not legally affect the disposition or delivery of the stock, as previously agreed between the parties. As stated in complainant's brief:

"The assertion by the New York Phonograph Company of the existence of a valid claim against said stock in its favor, arising, for all that appears, independent of the contract under which the certificates were deposited, and subsequent to the time when it became absolutely entitled to the physical possession of the agreements 'extending licenses,' and its consideration of which rights, if any, were acquired by the National Phonograph Company and Ott to the said stock, have really no bearing upon the contract rights of the complainant."

I agree that the "stop notice" was entirely outside of the provisions of the contract, and, therefore, could not have served the purpose intended. The reasons for deferring the delivery of the stock until after the expiration of the original term is not material. Furthermore, the proofs show that all the parties have heretofore treated the contract as an extension of the original term. Indeed, the exclusive rights of the complainant was recognized in an action brought against the receiver to recover royalties upon instruments sold during his receivership, and such royalties were paid pursuant to the order of the court for sales of phonographs after the expiration of the original term of the license. Had there been no extension of the license under contract of February 6, 1889, the same would have expired on February 6, 1894, prior to the appointment of the receiver. The language of the agreement is as follows:

"The rights granted by the original contract shall remain in force and this agreement shall continue until the 6th day of February, 1894, and for such further period as hereinafter provided, unless sooner terminated as hereinafter provided."

This brings me to a consideration of the next point, namely, whether the licenses herein were extended beyond the second term. As has been observed, the original New York Company license was until February 6, 1894 (the Metropolitan Company license expiring earlier), and later, as has been stated, both licenses were extended until March 26, 1903. The original and extension licenses, after setting forth the conditions of the second term, contained this provision:

"Such further time, at the option of the party of the second part, as the party of the first part may be authorized to extend said license."

Complainant insists that the limited period specified, namely, March 26, 1903, applied only to the graphophone; that, with regard to the phonograph, the time to which the licenses were capable of being enjoyed was entirely controlled by the rights of the American Company in perpetuity, and, as that company was succeeded by the National Company, the latter must be held bound to strictly carry out the obligations of the former. There is no evidence that the complainant ever exercised the option clause of the contract, and therefore it is difficult to conceive upon what equitable ground the complainant is entitled to any rights beyond the second term. The language of the option is vague and indefinite, and does not specify on what terms, if any, it becomes effectual, or whether any consideration should be paid therefor. Manifestly, if the complainant had been enabled to perform its part of the contract, another agreement to extend the term beyond the period expressly limited would have been necessary.

This disposes of the primary and controlling questions, and it is deemed unnecessary to pass upon others presented.

The licenses having expired since the commencement of this suit, no injunction will be granted. Decree for an accounting, with costs, allowed against the National Phonograph Company.

On Rehearing.

This is an application by complainant for a rehearing of this cause and for leave to introduce additional proofs. A decision in complainant's favor, rendered January 5, 1905, allowed an accounting, and held that no injunction should issue, as the licenses in question had expired and complainant had failed to exercise its option to extend the same. The petition for rehearing recites that, because of the opinion of the court, full and complete reargument, and the production of further available proofs upon the question whether the licenses were extended beyond March 26, 1903, becomes essential, lest injustice be done, if the cause be decided on the present record. Defendants contend that under well-established rules of procedure the hearing sought should not be allowed, on the ground that the evidence now offered is not newly discovered, and complainant has not been misled or surprised. This contention, persuasive of its correctness in a majority of cases, need not be discussed, as a careful review of the original decision and re-reading parts of the evidence satisfies me that the former ruling was er-

roneous, in that complainant was not afforded all the relief to which it is entitled.

The contention that the complainant's rights under the licenses remained in force subsequent to March 26, 1903, was fully argued at the hearing, and sufficient evidence is found in the record in support thereof, although it was not given the importance which I now believe it merits. The opinion, after stating:

"As has been observed, the original New York Company license was until February 6, 1894 (the Metropolitan Company license expiring earlier), and later, as has been stated, both licenses were extended until March 26, 1903. The original and extension licenses, after setting forth the conditions of the second term, contained this provision: 'Such further time, at the option of the party of the second part, as the party of the first part may be authorized to extend said license' "

—points out that there is no evidence that complainant ever exercised such option clause, and, accordingly, it was difficult to conceive upon what equitable grounds it was entitled to assert any rights beyond the second term. The excerpt from the licenses is misleading, and does not correctly disclose the period of time for which they were equitably extended. The paragraph containing the term of extension in the agreement of June 23, 1890, between the American Company and the Metropolitan Company, reads as follows:

"Third. It is further agreed that upon delivery, as aforesaid, to said Jesse H. Lippincott, trustee, or his successor, by said Central Trust Company of New York, of said shares of the capital stock of the party of the second part, and upon the faithful performance by the party of the second part of all the covenants and agreements made incumbent upon it by said agreement of October 12th, 1888, then that this agreement shall become, and shall confer upon and shall fully and entirely vest in the party of the second part, an extension of the rights granted to and conferred upon the party of the second part by said agreement of October 12th, 1888, for a further period and until the 26th day of March, 1903, *and for such further time as the party of the first part may be authorized to extend such license*; subject, however, to the covenants and agreements of said agreement of October 12th, 1888, as fully and entirely as if said agreement had been in the first instance made to cover the period of the extension granted hereby, as well as the period originally thereby fixed and limited." (Italics mine.)

It will be noted that the words "at the option of the party of the second part," upon which stress was placed in the original opinion, are omitted, although such words of apparent limitation are contained in the original and extension licenses to the New York Company and in the original (not extension) license to the Metropolitan Company.

The question for further consideration is whether the franchise rights granted to the Metropolitan Company were extended for the full period of time for which the licensor had authority to extend the same, or, as the court assumed, whether such rights were wholly dependent upon the formal exercise of the option and the necessity of another agreement to extend the term. Complainant lays stress upon the perpetuity clause of the contract between Mr. Edison, the Edison Companies, Lippincott, and the American Company, by which it was agreed that the phonographs and supplies

for use in the United States and Canada should be exclusively manufactured by the Edison Phonograph Works in perpetuity. Complainant insists that the licenses were in effect extended beyond the date mentioned in the contract, and for such period as the American Company by its agreement with the Edison Works was authorized to extend the same. The argument proceeds upon the theory that, as the American Company acquired legal title to the Edison phonograph patents, the license granted by that company to the Metropolitan Company continued during the life of the patents, and, the manufacturing contract between the American Company and the Edison Works being in perpetuity, the license privileges conveyed to complainant's predecessors were likewise perpetual or of indefinite duration. This inference, however, is not warranted by the law or facts.

The parties to the various contracts undoubtedly intended to effect a mutually beneficial plan of co-operation in promoting and exploiting the phonograph, and to maintain, preserve, and perpetuate the relations established by the contracts. Hence such rights, franchises, and privileges as the American Company had authority to convey were conferred upon complainant's predecessors. The agreements by which the patents were transferred to the American Company, and the established rights of the parties, considered in connection with the testimony of Mr. Edison, unquestionably warrant a determination that the parties actually intended their relation to be continuous and lasting. Such contracts not only in terms assigned to the American Company the then existing phonograph patents and those applied for prior to August 1, 1888, but also any invention or improvement upon the phonograph made within 15 years.

What precise meaning may be given to the words "in perpetuity" (contained in the contract between the American Company and Edison Phonograph Works) is not necessary to a decision here. The duration of the manufacturing contract, as to whether it was continuous, perpetual, or limited, does not affect the authority to extend the licenses in question, which the American Company had under the agreement by which the patents were sold to it and the exclusive rights granted as hereinabove mentioned. That the franchises, rights, and privileges secured were transmissible to complainant's predecessors upon the terms and conditions specified in the contract must, therefore, be conceded. It is well settled that a patent does not carry with it any rights beyond the term of the patent, or, in the words of Robinson on Patents, § 815:

"A patentee is not permitted to issue a license beyond his own right."

It may be noted for illustration that an extension of the term of the patent, which, in certain cases, was permitted under the prior act, does not inure to the transferee of a license, in the absence of language expressive of such intention. *Hodge et al. v. Hudson River R. Co.*, 6 Blatchf. 85, Fed. Cas. No. 6,559; *Wilson v. Rousseau et al.*, 45 U. S. 646, 11 L. Ed. 1141; *Mitchell v. Hawley*, 6 Fish. 331, Fed. Cas. No. 6,250; *Id.*, 16 Wall. 544, 21 L. Ed. 322.

Furthermore, it is held that, during the period wherein an exclusive right has been granted, the patentee or licensor cannot invade the territorial license without infringing the grant, and that, in the absence of express provision covering the duration for which a license is granted, the legal presumption is that the parties meant to continue their relations during the term remaining at the time the license or privilege is conveyed. This would seem to preclude the possibility of the license to complainant's predecessors containing a perpetual covenant or valid provision continuing the term beyond the life of the patents. However, a more serious problem is found in the suggestion that the extension clauses contained in the licenses to the Metropolitan and New York Companies were self-executing, and continued beyond March 26, 1903, without the exercise of formal choice or the making of another agreement. As we have seen, the license to the Metropolitan Company does not expressly require giving notice of any desired extension, and contains no option clause. The phraseology of the paragraph containing the right of enlarging the terms of the licenses, though somewhat confusing and indefinite as to duration, must be read in connection with the prior contracts between Mr. Edison and the companies alleged to be under his control and the American Company. The rule is that the circumstances surrounding the transaction, the subject-matter of the arrangements, and the prior acts of the parties must govern the effect given to uncertain or equivocal phraseology in the contract. *Del., L. & W. R. R. Co. v. Bowns et al.*, 58 N. Y. 573.

The words "for such further time as the party of the first part may be authorized to extend such license," inserted in the license, when considered in relation to the covenants contained in the agreements whereby all inventions or improvements in the phonograph made by Mr. Edison within 15 years were to be assigned to the American Company, would seem to clarify the evident uncertainty of the extension clause. Manifestly, at the time of executing the licenses, the parties were unable to specify and determine the period of their continuance, as that apparently was dependent upon future improvements in the phonograph and the status of the parties at the expiration of the original term. Such an interpretation of the intention of the parties induces the holding that, inasmuch as improvements were made subsequent to the contract of August 1, 1888, to wit, in the years 1888, 1889, 1890, 1891, 1892, and 1893, and patented by Mr. Edison, the license privileges or franchises granted by the American Company to the Metropolitan Company continued, without the necessity of further terms or conditions expressive of such intention. Such being the fact, the American Company had authority and power to convey the privileges mentioned in the agreement until the expiration of the life of the phonograph and improvement patents.

The New York Company license:

Except as hereinbefore pointed out, the provisions under which the duration of both licenses was extended are the same. The legal

effect of the option in the New York Company license, in my opinion, was to enable that company, if it so desired, to abrogate the existing relations. This conclusion is not reached without hesitation, but further consideration of the evidence warrants holding that the option was in effect a reservation of a right to the licensee to discontinue the existing relations on March 26, 1903, if it no longer wished to co-operate in the enterprise. The extension of the license, obtained by the deposits of stock and of the extension license in the manner hereinbefore indicated, was for five years, and for such further time, at the option of the New York Company, as the licensor was authorized to extend the same. This evidently was a positive grant, and its terms, doubtless, were perfectly understood by the parties. As indicated, there is abundant evidence in the record from which the intention of the parties to extend the license to March 26, 1903, may be ascertained. Defendants' contention that it was necessary, as a condition precedent, that complainant should formally notify the American Company, or its successors, on March 26, 1903, whether it elected to continue under the license granted to the New York Company, or preferred to exercise its option, is thought not to be maintainable. Not only was this action instituted prior to March 26, 1903, to compel a recognition of complainant's rights under the licenses, but complainant in many ways, as shown by the proofs, evidenced its intention to continue in the phonograph business and to exercise the right of carrying on the same under the license agreement. Its franchise rights, however, as has been stated, were persistently ignored and disputed by Mr. Edison and the defendants. That complainant endeavored to obtain phonograph records and supplies from other dealers when defendants refused to supply the same (as permitted by the terms of the license) is also shown. Attention is directed to the evidence showing that complainant's efforts to obtain phonograph supplies were obstructed by a suit instituted by defendant National Company against Leeds, Catlin & Co., to enjoin them from supplying phonograph records or appliances to complainant. As already observed, the defendants, in my judgment, by their acts must be deemed to have regarded the extension clause as self-executing and operative beyond the period therein specified. Moreover, the invasion of complainant's territory by the National Company, the refusal on the part of the defendants to recognize their exclusive rights granted, together with the institution of this action, would seem to have excused the New York Company from formally exercising any option. Such an act, in the circumstances presented, became nugatory and an idle ceremony. The principle is applicable that he who obstructs another in the performance of an act which otherwise would be obligatory may not avail himself of the nonperformance which he himself has occasioned. *Dolan v. Rodgers*, 149 N. Y. 489, 44 N. E. 167; *Shaw v. Insurance Co.*, 69 N. Y. 286.

My conclusion is that a rehearing of this cause is not necessary. A re-examination of the record warrants the correction of the pre-

vious opinion; and hence complainant is entitled to an injunction and accounting as prayed for in the complaint. Such injunction, however, may be stayed until determination by the Circuit Court of Appeals of the questions presented, provided, of course, an appeal is taken and seasonably prosecuted. A decree in conformity with the foregoing opinion may be entered.

PRINDLE v. BROWN et al.

(Circuit Court, D. Massachusetts. March 29, 1905.)

No. 2,024.

1. PATENTS—BILL TO OBTAIN PATENT—ALLEGATION OF INVENTION.

A bill filed under Rev. St. § 4915 [U. S. Comp. St. 1901, p. 3392], by an unsuccessful applicant for a patent, to obtain an adjudication of his right to such patent, which alleges his application on a certain date, and, in general terms, that he made the invention prior to such date, but which also shows that an application for a patent for the same invention had been previously made by another, without explanation of the apparent contradiction, is demurrable, since the date of the application must be taken by the court as the date of complainant's invention.

2. SAME—RIGHT TO MAINTAIN SUIT—FAILURE TO APPEAL FROM COMMISSIONER.

An applicant for a patent, who failed to appeal from the adverse decision of the Commissioner to the Court of Appeals for the District of Columbia, as provided by Act Feb. 9, 1893, c. 74, 27 Stat. 434 [U. S. Comp. St. 1901, p. 3391], cannot maintain a suit to obtain a patent under Rev. St. § 4915 [U. S. Comp. St. 1901, p. 3392].

In Equity. On demurrers to bill and cross-bill.

Philip Mauro, Charles J. Williamson, Edwin J. Prindle, and Chas. E. Haywood, for Prindle.

Emery, Booth & Powell, for Trufant.

William Quinby, for Brown and Miller.

LOWELL, District Judge. This was a bill in equity brought under Rev. St. § 4915 [U. S. Comp. St. 1901, p. 3392]. It set out that before June 6, 1900, Prindle was the original and first inventor of a certain improvement in lasts, more fully described in an application filed by him June 6, 1900; that Trufant disclosed the invention to Miller; that Miller disclosed it to Brown, and that on May 28, 1900, Brown, wrongfully alleging himself to be the inventor, filed an application covering Prindle's invention as described in Prindle's application; that on September 27, 1899, Trufant filed an application for the invention, which application became abandoned for want of prosecution; that neither Trufant's knowledge, nor his application, nor his disclosure to Brown prior to Prindle's application, nor Brown's application prior to Prindle's, entitles Trufant, Brown, or Miller to a patent as against Prindle, and that none of these things impair Prindle's right to a patent; that after Trufant's application was abandoned the Commissioner of Patents declared an interference between the claims of Prindle and Brown; that on August 1, 1901, Trufant filed a second application; that an interference was redeclared between Prindle, Brown, and Trufant; that the issues were found in favor of Prindle; that, on appeal to

the board of examiners in chief, priority was awarded to Brown; that the Commissioner affirmed the decision of the examiners in chief; and that the Court of Appeals for the District of Columbia affirmed the decision of the Commissioner. Prindle thereupon prayed for a decree adjudging him entitled to the patent. To this bill Miller and Brown demurred generally, and more specifically because the bill did not allege that Prindle had any conception or knowledge of the invention before Brown's application was filed.

The allegation in the bill of the date of Prindle's invention must be taken to state its reduction to practice by an application to the Patent Office as of June 6, 1900, and there is no allegation of invention by Prindle at an earlier date. But on May 28th, a week before Prindle's invention as set out in the bill, the bill alleges an application filed for the same invention by Brown. That Brown may not have been himself the true and original inventor is immaterial. The bill shows that some person other than Prindle reduced Prindle's invention to practice before Prindle, though it does not show whether that person was Brown, Trufant, Miller, or some one else. Suppose the bill had alleged categorically invention by a stranger prior to the invention of Prindle. In the absence of possible explanatory allegations, no patent could issue to Prindle, though the bill somewhere alleged that he was the first inventor. *Christie v. Seybold*, 55 Fed. 69, 78, 5 C. C. A. 33.

Counsel for Prindle contended that an allegation of prior application by the defendant does not necessarily contradict an allegation of first invention by the plaintiff, but a bill which alleges invention by the complainant on a given date, and an earlier application for the same invention, without explanation of the apparent contradiction, is demurrable. Without explanatory allegations, the court is not required to determine if, by some extraordinary combination of circumstances, possibly imaginable, the allegations which apparently deny the complainant's right can be reconciled with it. The demurrer is sustained, and the bill dismissed, with costs.

Trufant, a defendant in the bill originally filed, filed a cross-bill against Prindle, Brown, and Miller, praying that the patent might be issued to him. Brown and Miller have demurred upon the ground that Trufant failed to prosecute an appeal from the Commissioner of Patents to the Court of Appeals in the District of Columbia, and therefore cannot avail himself of the remedy given by Rev. St. § 4915 [3 U. S. Comp. St. 1901, p. 3392], as affected by the act of February 9, 1893, c. 74, 27 Stat. 434 [3 U. S. Comp. St. 1901, p. 3391]. Trufant's counsel contended that proceedings might be begun in this court after the decision of the Commissioner of Patents, without going first to the Court of Appeals for the District of Columbia. The contrary was decided in *Smith v. Muller* (C. C.) 75 Fed. 612, and *McKnight v. Metal Volatilization Co.* (C. C.) 128 Fed. 51. I prefer to follow these decisions. The demurrer to the cross-bill is therefore sustained, and that bill also is dismissed, with costs.

UNITED STATES v. GREEN (five cases).

(District Court, N. D. New York. March 13, 1905.)

Nos. 23,927, 23,940, 23,928, 23,961, 23,960.

1. CRIMINAL LAW—REMOVAL OF DEFENDANT TO ANOTHER DISTRICT FOR TRIAL—SUFFICIENCY OF COMPLAINT.

In proceedings under Rev. St. § 1014 [U. S. Comp. St. 1901, p. 716], for the removal of a defendant from a district where found to another district for trial on an indictment, a complaint which has the indictment attached as a part thereof is as broad as the indictment, and is sufficient if the indictment charges an offense, and it is immaterial what the offense may be designated in the complaint.

2. SAME—DESIGNATION OF OFFENSE—BRIBERY OF UNITED STATES OFFICER.

The offense denounced by Rev. St. § 5451 [U. S. Comp. St. 1901, p. 3680], is properly described in a complaint as bribery of an officer of the United States, being so designated in the marginal note to the section, which was a part of the Revised Statutes when the same were enacted.

3. SAME—WARRANT—DESCRIPTION OF OFFENSE.

A warrant issued by a commissioner for the arrest of a person for removal to another federal district for trial is sufficient, if it sets forth the offense charged in the complaint in general terms, and need not recite all the acts alleged to have been done by defendant to constitute the offense.

4. SAME—PROBABLE CAUSE—EVIDENCE.

In a proceeding for the removal of a defendant to another federal district for trial on an indictment charging him with a violation of Rev. St. § 5451 [U. S. Comp. St. 1901, p. 3680], by bribing an officer of the postal department to use his official position to promote the sale to the government of articles in which defendant was interested as agent, evidence that defendant and such officer were personally acquainted, that the sales were made by defendant, who in soliciting the same talked with such officer and his superiors, who in fact made the purchases, and that after receiving his commissions on the sales he paid a similar amount to such officer, without any explanation of the reason for such payments, or evidence showing that they had any connection with the sales, is not sufficient, aside from the indictment itself, to show the commission of the crime charged, or to establish probable cause to believe the defendant guilty.

5. SAME.

Probable cause to believe a defendant has committed a crime, such as will warrant his removal to another district to be tried therefor, is not established by evidence which is as consistent with his innocence as with his guilt, although it may afford ground for a suspicion or conjecture that the offense was committed.

6. SAME—INDICTMENT AS EVIDENCE—PRIMA FACIE CASE.

Under the law, as determined by the Supreme Court, that an indictment is prima facie evidence of probable cause in a proceeding for the removal of a defendant to another federal district for trial thereon, the effect of the indictment, if introduced in evidence in such proceeding, is not weakened by the fact that the government introduces additional evidence, which is in itself insufficient to establish probable cause, provided such evidence does not contradict the facts alleged in the indictment.

7. SAME—SUFFICIENCY OF INDICTMENT—BRIBERY OF UNITED STATES OFFICER.

An indictment under Rev. St. § 5451 [U. S. Comp. St. 1901, p. 3680], making it an offense to tender "any contract, undertaking, obligation,

gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, to any officer of the United States," with intent to influence his decision or action on any matter pending or which may be brought before him in his official capacity, which charges the defendant with bribing an officer, etc., by tendering to him "a certain obligation for the payment of money, to wit, the personal check of him, the said [defendant], drawn upon the Knickerbocker Trust Company of New York City, N. Y., in favor of the said [officer], for the sum of three hundred and twenty-five dollars, with intent," etc., but which does not set out the check, nor give its date or contents, nor allege that the trust company named was in existence or engaged in the banking business, is insufficient to charge the offense stated, because it does not show the check to have been an obligation for the payment of money, nor so identify it as to protect the defendant in case of a subsequent indictment for the same offense; and such indictment is insufficient to sustain proceedings for the removal of defendant from another district for trial thereon.

8. INDICTMENT—CONSTRUCTION—COMMON-LAW WORDS OR PHRASES.

Where common-law words or phrases are used in an indictment or information, they must be given their common-law meaning.

9. BRIBERY OF UNITED STATES OFFICERS—CONSTRUCTION OF STATUTE—"OBLIGATION FOR PAYMENT OF MONEY."

A bank check is not an "obligation for the payment of money," within the legal meaning of such term as used in Rev. St. § 5451 [U. S. Comp. St. 1901, p. 3680], providing for the punishment of bribery of United States officers.

10. SAME—ELEMENTS OF OFFENSE—TENDER OF VOID INSTRUMENT.

The tendering by a person of his personal check, drawn on a bank and payable to an officer of the United States, to such officer, with intent thereby to affect his official action, does not constitute the crime of bribery, under Rev. St. § 5451 [U. S. Comp. St. 1901, p. 3680], since a check made and delivered for such illegal purpose is void, and not within any of the classes of instruments enumerated in the statute.

11. INDICTMENT—AVERMENT OF INTENT.

Where intent is of the essence of an offense as defined in the statute, it must be averred in an indictment for such offense.

12. CONSPIRACY TO DEFRAUD UNITED STATES—SUFFICIENCY OF INDICTMENT.

An indictment under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], for conspiracy to defraud the United States, which avers that defendant and an officer of the United States "unlawfully did conspire, combine, confederate, and agree together * * * knowingly to defraud the said United States in the manner following, that is to say," followed by an averment that defendant promised and agreed with said officer to pay him a commission on the price of each and every one of certain articles which should be purchased by the United States by procurement of such officer, fairly imports an assent or agreement on the part of the officer, and is sufficient in such respect to charge conspiracy, although the officer's assent is not directly averred.

13. SAME.

Indictments for conspiracy to defraud the United States, under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], considered, and *held* sufficient for the purposes of a proceeding for the removal of the defendant from another district for trial and to establish probable cause in such proceeding.

14. SAME.

An indictment charging a defendant with a conspiracy to "commit an offense against the United States" must state an agreement to do acts which, if done, would constitute a specific offense; and where an intent is an essential part of such offense, as defined by the statute, such intent must be averred.

15. CRIMINAL LAW—REMOVAL OF DEFENDANT TO ANOTHER DISTRICT—VALIDITY OF INDICTMENT.

Where it is sought to remove a defendant from one federal district to another for trial on an indictment, the question of the validity of such indictment in matters of substance may properly be raised and determined in the district of the arrest in habeas corpus proceedings.

On Habeas Corpus, Certiorari, and Petition for Warrants of Removal for Trial.

The defendant, George E. Green, of Binghamton, N. Y., in the Northern District of New York, having been indicted by five several indictments presented by the grand jury of the Supreme Court of the District of Columbia, holding a criminal term, and not being within such District of Columbia, was arrested at Binghamton, N. Y., in the Northern District of New York, by the United States marshal of said district, on warrants issued by Charles S. Hall, Esq., a United States commissioner in and for said district, issued pursuant to the provisions of section 1014 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 716]. That section reads as follows:

"Sec. 1014. For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

It will be noted that this section, enacted by Congress September 24, 1789 (1 Stat. 91, c. 20), and amended August 22, 1842 (5 Stat. 516, c. 188 [U. S. Comp. St. 1901, p. 716]), provides that an offender against the criminal laws of the United States, whether indicted or not, is to be arrested, or imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of that offense, "agreeably" (that is, in accordance with) "to the usual mode of process against offenders in such state." This means, and the decisions are uniform, that the offender against the laws of the United States is to be arrested, imprisoned or bailed, and held for trial in the same manner and under the same procedure adopted and fixed by the laws of the state in which found for the arrest, bailing, examination, etc., of offenders against the laws of such state. In short, Congress has adopted, for these purposes, the laws of each state as to offenders found within its borders. The decisions of the state courts in interpreting such statutes will, of course, apply and usually govern.

The defendant, Green, having been taken before Commissioner Hall, demanded an examination, and, being represented by counsel, such examination was held on each indictment, or, more properly speaking, on each complaint; each complaint being founded on a separate indictment. The result of these examinations was that on the 18th day of December, 1893, defendant, Green, was held on each charge or indictment, and required to give bail in the sum of \$4,000 in each case for his appearance, etc., before the Supreme Court of the District of Columbia, then and there to stand trial and answer what might be required of him, and in default of such bail to stand committed to the custody of the marshal of the District pending an application to the district judge of said District for a warrant of removal, in each case, pursuant to section 1014 of the Revised Statutes [U. S. Comp. St. 1901, p. 716] above quoted. On the same day the defendant, George E. Green, in the custody of

the marshal, was taken before the District Judge of the Northern District of New York, and the United States Attorney for said district applied then and there, pursuant to the section of the Revised Statutes above quoted, for warrants for the removal of said Green to the District of Columbia, where the trial of said Green under said indictments must be had.

The defendant, Green, by his counsel, opposed the granting of such warrants, and applied on petitions and papers in due form and alleging many substantial errors and defects in the proceedings, as well as the invalidity of each of the indictments and the absolute insufficiency of the evidence, including the indictments, to show the commission of a crime by the defendant, or probable cause to believe him guilty of the commission of any crime, for writs of habeas corpus to bring Green before the court for the purpose of inquiring into the legality of his arrest and detention by said marshal. He also applied for writs of certiorari to bring up the records in each case. These applications were not opposed, and such writs were duly issued, and the applications for warrants of removal were held pending the determination of the court on such writs of habeas corpus. The defendant was admitted to bail in the sum of \$20,000, pursuant to section 1015 of the Revised Statutes [U. S. Comp. St. 1901, p. 718], requiring absolutely that bail shall be taken upon all arrests in criminal cases where the offense is not punishable by death.

The hearings on the returns to the writs were not completed until late in July, 1904, and the cases were finally submitted in September of that year.

Geo. B. Curtiss, U. S. Dist. Atty., and M. D. Purdy, Asst. U. S. Atty. Gen.

John B. Stanchfield, Frederick Collin, and Theodore R. Tuthill, for defendant.

RAY, District Judge (after stating the facts). The questions arising on the voluminous indictments and records in these cases are important, not only to the government, but to the defendant, and have received consideration such as their importance would seem to demand. The defendant, Green, is held under five indictments, as follows:

No. 23,927, dated July 17, 1903, charging that in the District of Columbia, about December 11, 1901, said Green bribed one George W. Beavers, an officer of the United States government, in violation of section 5451 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3680], in connection with "Bundy Time Recorders," an instrument for recording the time of government employes, and alleged to have been sold to the government through the joint action of Green and Beavers.

No. 23,940, dated October 1, 1903, charging that in the District of Columbia, on or about the 1st day of November, 1901, George W. Beavers, an officer of the United States government, and George E. Green, the defendant, unlawfully conspired, combined, confederated, and agreed together, and with divers other persons to the grand jury unknown, knowingly to defraud the United States in the manner set forth in such indictment, in violation of section 5440 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3676]. The indictment charges that this conspiracy to defraud the government related to the Bundy time recorder.

No. 23,928, dated September 17, 1903, charging that in the District of Columbia, on or about the 1st day of November, 1901, the

said Beavers and Green conspired to commit an offense against the United States of America, in violation of section 5440 of the Revised Statutes of the United States, and in connection with the Bundy time recorder.

Reference is made to one count only in each of these indictments, as reference to the others is unnecessary.

No. 23,961, dated October 5, 1903, charging that in the District of Columbia, on or about the 6th day of October, 1900, the defendant, George E. Green, and George W. Beavers and Willard D. Doremus, unlawfully conspired, combined, confederated, and agreed together and with divers other persons knowingly to defraud the United States in the manner set forth in the said indictment, and which conspiracy related to the purchase of what is known as the "Doremus Stamp Canceling Machine" for the government by said Beavers, through said Green and Doremus.

No. 23,960, dated October 5, 1903, charging that in the District of Columbia, on or about the 6th day of October, 1900, the defendant, George E. Green, and George W. Beavers, an officer of the United States government, and one Willard D. Doremus, entered into an unlawful and corrupt agreement whereby said Green and Doremus undertook and promised, on behalf of the corporation represented by them, to pay to said Beavers, for his own personal use and benefit from time to time, and while said Beavers continued to be an officer of the United States government, \$25 for each canceling machine sold the government, and that thereafter the said Green and Doremus did make payments to the said Beavers in pursuance of said agreement.

It will be noted that indictment No. 23,927 charges Green with the bribery of Beavers in connection with the Bundy time recorder, in violation of section 5451 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3680]; that indictment No. 23,940 charges said Green with conspiracy to defraud the United States in connection with said Bundy time recorders, in violation of section 5440 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3676]; while indictment No. 23,928 charges said Green with conspiracy to commit an offense against the United States in connection with said Bundy time recorders, in violation of section 5440 of the Revised Statutes of the United States.

Section 5451 of the Revised Statutes [U. S. Comp. St. 1901, p. 3680] reads as follows:

"Sec. 5451. Every person who promises, offers, or gives, or causes or procures to be promised, offered, or given, any money or other thing of value, or makes or tenders any contract, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the government thereof, or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence

him to commit or aid in committing, or to collude in or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be punished as prescribed in the preceding section."

Section 5440 of the Revised Statutes, as amended by Act May 17, 1879, c. 8, 21 Stat. 4 [U. S. Comp. St. 1901, p. 3676], reads as follows:

"Sec. 5440. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment, in the discretion of the court."

We will first consider the charges in relation to the Bundy time recorder, and that relating to bribery comes first in order. The defendant, Green, insists that the information or complaint made and filed with Commissioner Hall did not confer upon such commissioner jurisdiction of the subject-matter; that is, of the alleged transaction in the city of Washington in which it is claimed Green agreed to bribe and did bribe Beavers in one of the modes or manners pointed out in section 5451 of the Revised Statutes [U. S. Comp. St. 1901, p. 3680] above quoted. That information or complaint consists of the affidavit of one Walter S. Mayer, a post office inspector of the Post Office Department of the United States, and among other things he says, upon information and belief, that at the city of Washington, in the District of Columbia, United States of America, and on or about the 11th day of December, 1901, and at other times thereafter and before the finding of said indictment, the said George E. Green committed the crime of bribing one George W. Beavers, an officer of the United States, in violation of section 5451 of the Revised Statutes of the United States of America [U. S. Comp. St. 1901, p. 3680]. The affiant then gives the sources of his information and the grounds of his belief, among which sources of information and grounds of belief is an indictment, the one in question, a copy of which indictment, duly authenticated, was attached to such affidavit of said Mayer and made a part of the complaint. A bench warrant, issued out of the Supreme Court of the District of Columbia, directing the arrest of the defendant, Green, upon the charge embraced within the said indictment, was also attached to the affidavit. The complaint also sets forth that Green could not be found within the District of Columbia, but was then within the Northern District of New York.

As the indictment itself was attached to and made a part of this affidavit of Mayer, it is to be read into the affidavit and as a part of it. The Supreme Court of the United States has decided that, in these proceedings for the removal of a defendant from the district where found to another where indicted for trial under an indictment, the indictment itself is evidence against the defendant of probable cause, and may be put in evidence, and that, when standing alone, it is *prima facie* evidence of all the acts charged to have been committed by the defendant and of all matters properly stated therein.

If this indictment, duly authenticated and attached to the complaint, was evidence against Green on his examination, which followed his arrest, it is difficult to understand why it was not also evidence for the purposes of the information, and competent as a part thereof to charge the defendant with the commission of the offense, or one of the offenses, described in section 5451 of the Revised Statutes. I am of the opinion, and hold, that the complaint or information was as broad as the indictment itself, and that such information or complaint was sufficient to justify the arrest and holding of Green, if it charges the commission of a crime under the provisions of section 5451 of the Revised Statutes. The force of the affidavit of Mayer as a legal information is not at all broken by describing the offense of Green as that of bribing one George W. Beavers, an officer of the United States, in violation of section 5451 of the Revised Statutes, even if it be true, as claimed by the counsel for the defendant, that there is no such offense known to the law as "bribery of an officer of the United States." If the complainant gave the offense that name, but still charged the defendant with the commission of all the acts necessary to constitute the crime described in section 5451, it is all-sufficient. But I am of the opinion that the crime of "bribery of any United States officer"—that is, bribery of an officer of the United States—is an offense known to the law, and is the offense described in section 5451 of the Revised Statutes. The marginal note of such section reads: "Bribery of Any United States Officers." These marginal notes formed a part of the Revised Statutes when adopted by Congress, and are to be taken and read as a part thereof. See Act June 27, 1866, c. 140, 14 Stat. 74 [U. S. Comp. St. 1901, p. 3755], and Act June 20, 1874, c. 333, 18 Stat. 113 [U. S. Comp. St. 1901, p. 3757].

This complaint, to which was attached, as forming a part thereof, the indictment last above referred to, No. 23,927, and sworn to before Commissioner Hall, was filed with him, and such commissioner thereupon issued his warrant, in which it is recited that complaint is made—

"Charging that George E. Green, late of Binghamton, Broome county, in the state of New York, did on or about the 11th day of December, 1901, at the city of Washington in the District of Columbia, United States of America, in violation of section 5451 of the Revised Statutes of the United States, unlawfully commit the crime of bribing one George W. Beavers, an officer of the United States of America; and it appearing from the said complaint of Walter S. Mayer that an indictment was on the 17th day of September, 1903, duly found by the grand jury of the Supreme Court of the said District of Columbia against the said George E. Green for said offense, and that a bench warrant has been duly issued out of said court on said indictment for the arrest of said defendant, and it appearing further by said complaint that the said George E. Green is within this district, to wit, the Northern District of New York, now, therefore," etc.

I am of the opinion that this warrant was sufficient. It cannot be that in these proceedings it is necessary to set out in the complaint and again in the warrant all of the acts of the defendant alleged to constitute an offense under section 5451 [U. S. Comp. St. 1901, p. 3680]. I find no case so holding.

Again, the record shows that, on being arrested and taken before the commissioner, the defendant entered a plea of not guilty of the charge stated in the indictment, and demanded an examination as to whether there was probable cause to believe him guilty of the offense charged. Such examination was allowed by the commissioner. The government then gave evidence of identity. Further hearing was then adjourned to September 22, 1903, at which time the defendant's counsel moved that the complaint be dismissed and the defendant discharged, "on the ground that the indictment under section 5451 of the Revised Statutes of the United States, charging bribery, does not recite and allege facts sufficient to constitute a crime." This motion was denied. It will be seen that the sufficiency of the complaint was not in question in any other respect than that the indictment, made a part of the complaint, did not recite and allege facts sufficient to constitute a crime. At no subsequent stage of the proceedings before the commissioner was the sufficiency of the complaint or information questioned. I am of the opinion, and hold, that the only question raised and to be considered as to the sufficiency of the complaint is, does the indictment recite and allege facts sufficient to constitute a crime under section 5451 of the Revised Statutes of the United States?

The defendant insists that the evidence given by the government before the commissioner on his examination was insufficient to show the commission of a crime or to establish probable cause to believe that the defendant, George E. Green, was guilty of the alleged offense. I have read and re-read the evidence given before the commissioner on this charge, leaving out of consideration the indictment itself, and not reading it as a part of the evidence to establish the commission of an offense and to establish probable cause against the defendant, Green. Standing alone and unsupported by the indictment, the evidence given is insufficient to show the commission of the crime by Green or establish probable cause. Leaving out of consideration the indictment itself, the evidence produced shows that Beavers was an officer of the United States connected with the Post Office Department, among other duties having in charge the purchase of supplies of certain kinds for the use of the government in the department. His will or wishes were not absolute in regard to the purchase of these time recorders, but he had charge of the negotiations, and the officers above him having absolute control of the matter were usually guided by his judgment. Beavers had well-established and well-defined duties to perform in this regard. The defendant, Green, was a friend of Beavers, and had been for some years, and exercised some influence in securing his transfer from the position of post office inspector to that of clerk in the Post Office Department, and his subsequent promotion to the position of chief of salary and allowance division. There is not a particle of evidence that Beavers sought the transfer and promotion for any illegal purpose, or that Green aided the transfer or promotion for any improper purpose. The defendant, Green, represented the International Time Recording Company having

these Bundy time recording machines for sale. The government had purchased some of these instruments and had some in use. The company and Green, representing it, were anxious to extend their sales, and Green for this purpose visited the Post Office Department, and from necessity conferred with Beavers, as well as others, on the subject. Beavers in the discharge of his duty necessarily conferred with Green. There is no evidence of any suspicious act or acts on the part of either. No word was uttered by either that would point to the commission or intended commission of any improper act. The contract made called for machines at the old price, and they were delivered by the company at the old price, and paid for. No person ever heard a remark from the lips of either Beavers or Green suggesting any agreement or understanding that Beavers was to be paid anything as a bonus or commission or compensation, or for his influence in connection with the purchase by the government of these time recorders. There is some evidence that at one time a suggestion was made to substitute another time recorder for the Bundy machine, and that Beavers interested himself to prevent such action. There is no evidence that he unduly exerted himself, or that he resorted to any improper or questionable means. He simply advocated the Bundy machine and spoke disparagingly of a change. There is no evidence that more machines were purchased than were needed by the government. Even if some officers at the head of some departments did not desire them, it would not argue that the machines were not needed, or that they were not a good thing for the government. With equal force might it be said that these officers did not desire a record of the attendance of the employes in these departments.

The evidence shows that, after the contract made under Beavers had been in force for some little time, Green, who had charge of the sale of these machines for the company, drew his commissions from the company by check and deposited same to his own credit in his own bank account; that he then on the same day, or within a day or so, in some instances, drew a check against his own account for the same amount; and that within a day, or two, or three, very soon, Beavers' bank account would be credited with this sum and Green's account charged therewith. If these checks drawn by Green on his own account passed to Beavers, there is no evidence that they passed direct. For aught that appears they may have passed through other hands and for a variety of purposes. There is no evidence that Green did not owe Beavers, or that they did not have other business deals which called upon Green to pay money to Beavers. When one person delivers his check to another, the legal presumption is that the check is drawn and delivered in payment of a debt. In this case it is regarded as established that Green paid money by means of his check to Beavers. It is regarded as established that in some instances Green paid to Beavers the amount of his (Green's) commissions received from the Time Recorder Company as he received them from the company. What are the conclusions demanded by the government from these facts? They

are the following: (1) That Green corruptly agreed with Beavers that, if he would use his influence with the Post Office Department and induce it to purchase machines of the Time Recorder Company through him (Green) or otherwise, he (Green), the agent of the company, having a commission on such sales, would pay the amount of such commissions to Beavers, and that by means of this corrupt offer, assented to by Beavers, Beavers was bribed and procured to use his influence with the government for the purchase of these machines. (2) That the payments made by Green to Beavers were in pursuance of such a corrupt agreement. Thus the mere fact of the payment of money by Green to Beavers is made to prove (1) the making and existence of a corrupt agreement, and (2) the performance of the agreement.

The most that can be claimed from the evidence adduced by the government in support of indictment No. 23,927, charging that Green bribed Beavers in relation to the International time recorders, and in violation of section 5451 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3680], is that it creates a strong presumption that there was some arrangement or agreement between Beavers and Green by which Green was to pay or transmit money to Beavers. The time of the making, the nature or character of the agreement, the subject-matter to which it related, and the consideration for such money, are left to mere conjecture and surmise. Not a scrap of writing produced, or a spoken word testified to, gives any light on, or even tends to support, the theory that there was an unlawful agreement or understanding, or that money was paid to influence the official action of Beavers. Neither suspicion, conjecture, nor surmise establishes probable cause either that a crime has been committed or that a designated person is guilty of the commission of such crime, if committed. For anything that appears in the evidence relating to indictment No. 23,927, Green may have borrowed money of Beavers, agreeing to pay him when he received his commissions from the Time Recorder Company, or he may have purchased property from Beavers, agreeing to pay him at such times. We may indulge in speculation as to the existence of other agreements and business transactions, and such imaginary agreements and transactions find as much support in this evidence, outside of the indictment itself, as does this charge of bribery. The defendant in a criminal case is presumed to be innocent until proven guilty, and this presumption obtains in favor of a defendant accused by the government of the United States to the same extent and with the same force as when the accusation is made by an individual. This presumption of innocence obtains in a proceeding of this character. The government is not under obligation to establish a case beyond a reasonable doubt, or beyond a doubt establish cause for believing that a crime has been committed and that the defendant is guilty of such offense. However, suspicion, guess, surmise, conjecture, and speculation, with some evidence as a basis, do not establish probable cause in the eye of the law. The evidence must point to crime and indicate the defendant as the probable criminal.

"Probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted." *Wheeler v. Nesbitt et al.*, 24 How. 544, 16 L. Ed. 765. "Probable cause, as defined in the books, is such a state of facts and circumstances as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably, and without prejudice upon the facts within his knowledge, to believe that the person accused is guilty." *Heyne v. Blair*, 62 N. Y. 22. See, also, *Bacon v. Towne*, 4 Cush. 217; *Carl v. Ayers*, 53 N. Y. 14; *McGurn v. Brackett*, 33 Me. 331. "It is a reasonable ground for believing a person guilty; such reasons and such circumstances as would be satisfactory and convincing to right reason." *Wanser v. Wyckoff*, 9 Hun, 178. See, also, *Anderson v. How*, 116 N. Y. 336, 22 N. E. 695; *Wheeler v. Nesbitt*, 24 How. 544, 16 L. Ed. 765; *Lacy v. Mitchell*, 23 Ind. 67; *Hays v. Blizzard*, 30 Ind. 457; *Driggs v. Burton*, 44 Vt. 124; *Mitchell v. Wall*, 111 Mass. 492; *Harpham v. Whitney*, 77 Ill. 32. There is no reasonable ground for believing a person guilty of a crime when the only fact proved is just as consistent with his innocence as with his guilt. There is no probable cause to believe a crime has been committed when the only fact shown is as consistent with the nonexistence as the existence of a crime. It is true that in some of the cases it is stated that "probable cause" is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offense. *Anderson v. How*, 116 N. Y. 336, 22 N. E. 695. It will be seen there must be "circumstances sufficiently strong in themselves to warrant a cautious man in his belief." Suspicion (Webster) is "the act of suspecting; the imagination or apprehension of the existence of something without proof, or upon very slight evidence or upon no evidence." No one will contend that this suspicion constitutes "reasonable cause," as cause must be based on known facts, or results from which the existence of facts causing the result is certain, and these facts must point to guilt in the estimation of a reasonable mind.

It is a familiar and well-established rule in criminal cases that, where the facts shown and the inferences to be drawn therefrom are just as consistent with the innocence of the defendant as with his guilt, the court is bound to give that construction to the facts and to draw those inferences which are favorable to the defendant. Applying that rule here, we find nothing in the evidence, outside of the indictment, that will justify the holding of this defendant. It appears from the evidence that shortly prior to the finding of these indictments two post office inspectors in the employment of the government waited upon Mr. Green at his office in the city of New York and sought from him an explanation of these payments of money alleged to have been made to Beavers. Green declined to make any statement unless the questions were in writing, and to questions put in writing he stated he would give his answer

within a day or two or soon. These inspectors then put their questions in writing. The general purport of each, with one exception, is whether or not Green at certain dates made payments of money to Beavers, and, if so, why and on what account. Another inquiry was whether or not certain officers of the government had been given or promised stock in the Bundy Manufacturing Company, the International Time Recording Company, or the Doremus Company, with each of which Green had been connected, and from each of which the government had purchased machines. Promptly and within a day or two Mr. Green communicated his reply in writing to these inspectors, in which he stated emphatically and clearly that from the time he first learned the government was seeking to investigate these transactions between himself and Beavers and other officers of the government, or between the companies represented by him (Green) and Beavers, or other officers of the government, he (Green) had been ready and willing at any and all times to afford every facility for furthering and promoting the investigation, and had been ready and willing at any and all times to throw open his bank and business accounts, produce his books and papers, and answer any and all questions relating thereto, and that he had repeatedly so offered in writing, as could be readily ascertained by consulting his letters on file with the department at Washington. Mr. Green also stated in such letter that all his transactions with the government and its officers, including Beavers, had been open and aboveboard, correct and honest. He further stated that, notwithstanding these offers on his part to throw open his accounts, books, and papers to the inspection of the government and fully explain same, the government had seen fit to conduct a secret investigation, producing by criminal process in the courts his private books, accounts, and papers in litigations or criminal proceedings to which Green was not a party, and where, of course, he had no opportunity to explain—all to his detriment as a business man and to his financial discredit and injury. This letter was introduced in evidence by the government, and its assertions are unexplained and uncontradicted.

It was within the power of the government on this examination to show the facts to be otherwise than as stated by Green, if they were and the government so desired, even after putting the letter in evidence. The government made no effort to show that the statements made by Green were incorrect in any respect. Nothing derogatory to Green, no conclusion or inference pointing to criminality on his part, can be drawn from his refusal to answer the specific questions put by these inspectors, in view of Green's letter and the statements therein contained, the substance of which has been given, and which was put in evidence by the government as stated and made a part of its case. At this time and under such circumstances Mr. Green was under no obligation to speak, or explain his transactions with Beavers. The officers of the government, from the fact that Green paid Beavers money, are seeking to draw the inference that there was an agreement by Green to pay money to Beavers to influence his

conduct as a government officer, and an actual bribing, without any proof whatever, other than such payment of money, that there ever was such an agreement or that Beavers' conduct as an officer was in any way influenced by such payment. There is not a particle of evidence in the record relating to the charge made in this indictment, outside of the indictment itself, that Beavers did anything wrong, or that his action was influenced by any consideration other than a desire to promote the best interests of the government he represented. On the other hand, the government, after showing the payment of this money in the mode and manner heretofore pointed out, assuming for our present purposes that the checks passed direct from Green to Beavers, has seen fit to put in evidence the absolute denial of Green that there was any unlawful or improper agreement, any unlawful or improper act or any criminality, whatever, and also his statement, which is not denied, that he (Green) has repeatedly offered to present books and documents and fully explain all of the transactions between himself and Beavers. It will not do for the government to assert that this letter, written by Mr. Green, was a pretense or false in any particular. Its statements are not contradicted or inherently improbable. There is not a particle of evidence to contradict or discredit any assertion made by Mr. Green in that communication. If his statements of fact are true, and I am bound in law to assume they are true, then Mr. Green was fully justified in refusing to answer the written questions put by these inspectors. In short, no inference or conclusion pointing to the guilt of Mr. Green on the charge we are now considering can, under the circumstances, be drawn from his refusal to explain to these inspectors the details of his financial transactions with Mr. Beavers. The evidence shows that Mayer, the complainant, had been in the case but a very few days, when he, with his associate, called on the defendant, Green, and asked him for an explanation of his payments of money, if any were made, to Beavers; that others had been prosecuting the inquiries and investigation prior to that time. If Mr. Green's statements in such letter handed Inspector Mayer were incorrect as to his prior offers to produce books and papers and fully explain all his transactions with Beavers and others, the government had it in its power, and it was called upon, to show the falsity of Green's statements.

We now come to consider the remaining questions in the case, which are: (1) Was this indictment, No. 23,927, in evidence before the commissioner, and is it now before this court, on the question of "probable cause"? And (2) if in evidence on that question, does it state facts (in a proper way and with sufficient distinctness) to show the commission in the District of Columbia of a crime against the United States, and that there is probable cause to believe the defendant, George E. Green, guilty thereof? If these questions are answered in the affirmative, still another must be answered, which is, did the United States, by giving evidence against Green on the examination before the commissioner, in addition to the introduction of the indictment—that is, by calling

witnesses to prove the allegations of the indictment—in legal effect waive, or even limit or impair, the probative force of such indictment? In other words, is this court, and am I as a judge, to assume or presume that the United States produced all the evidence upon which the indictment or charge against the defendant was and is founded, and did or does the evidence so produced contradict, impeach, weaken, or impair the probative force of the indictment? The defendant, in view of the decision of the Supreme Court of the United States in *Beavers v. Henkel*, 194 U. S. 73, 24 Sup. Ct. 605, 48 L. Ed. 882, is compelled to admit that this indictment is *prima facie* evidence of all the facts therein alleged. If such allegations of fact are sufficient to show (1) the commission of an offense in the District of Columbia against the United States and (2) probable cause to believe George E. Green guilty of the commission of such crime, then, in the absence of other evidence, it is my duty as a court to dismiss the writ of habeas corpus and remand the defendant; and it is also my duty as judge to grant the order for the removal of such defendant to the District of Columbia for trial, provided such indictment was in evidence generally before the commissioner, or on these questions. The defendant, by his counsel, insists that the allegations of the indictment are not stronger than the evidence, documentary (aside from the indictment) combined with that given by the witnesses, presented by the government on the hearing before the commissioner in support of the charge contained in the information, of which the indictment forms a part; that, if such evidence (aside from the indictment) fails to show the commission of a crime and probable cause to believe the defendant the guilty party, it cannot be aided, reinforced, or added to by the indictment itself, even if such indictment was in evidence generally in the case before the commissioner, and, if true, sufficient to show the commission of a crime by George E. Green in the District of Columbia at the time alleged. I will dispose of this question before coming to those which in natural order precede it, viz.: Was the indictment in evidence generally and for all purposes before Commissioner Hall? and does it effectively charge the commission of a crime by the defendant in the District of Columbia?

The defendant cites *Emmons v. Westfield Bank*, 97 Mass. 230-243, as correctly defining "prima facie evidence," and says:

"Prima facie evidence is evidence which, standing alone and unexplained, would maintain the proposition and warrant the conclusion to support which it is introduced."

Prima facie evidence, once in a case, stands there all through the trial, and must be given its full probative force, unless stricken out, but may be overcome by evidence given in explanation or contradiction. It is never overcome by the mere silence of the party who has offered it, for he has no occasion to speak further, or by the failure to produce further supporting evidence, for that is not necessary, or by the mere weakness of additional or further evidence introduced in support of such *prima facie* case. If a *prima facie* case is made by the proof of certain facts, and other facts are

also proved which tend to support that case, but which facts, standing alone, would not make it out, the *prima facie* case is not weakened. Nor is a *prima facie* case weakened by evidence intended to support or strengthen it, but which does not, provided such evidence does not contradict or impeach the *prima facie* case.

In *Blanshan v. Russell*, 32 App. Div. 103, 52 N. Y. Supp. 963 (cited by defendant), the note put in evidence recited "for value received." This was ample proof of a good and valuable consideration, and sufficient to support the promise and maintain the action; but the plaintiff, not content with this, sought to prove and did prove the actual consideration for the note, and in so doing showed a want of legal consideration. He thereby actually disproved and overthrew his *prima facie* case. The court said:

"But if the plaintiff, upon the trial, proves that the note was made and delivered for a consideration that the law does not recognize as sufficient to sustain the promise, the burden which rested upon the defendant has been met by the evidence in the case quite as effectively as if it had been introduced by the defendant himself."

It is, of course, true that, when certain facts are proved from which, in law, the court may infer the existence of another fact, such inference is not permissible, when the party by credible and uncontradicted evidence proves the nonexistence of the main fact. The evidence given by the government against George E. Green on the hearing before the commissioner, aside from the indictment, was not and is not sufficient to show that a crime had been committed, or that the defendant was probably guilty of the commission of a crime; but such evidence in no way contradicts or tends to contradict or weaken the allegations of the indictment. In fact, it supports some of the important allegations therein contained. The government did not assert or concede that the evidence given before the commissioner, aside from the indictment, was the evidence, or all the evidence, produced before the grand jury of the District of Columbia when the indictment was found, and upon which the indictment was founded; and such is not the effect of the action of the government in proceeding to give evidence after the ruling made by the commissioner and which will be hereafter fully stated. Nor did the government by its action concede that the evidence (aside from the indictment) produced before the commissioner is all the evidence it will be able to produce on the trial of the defendant under the indictment, if he is removed for trial. If the indictment had been received for some special purpose, other than to show the commission of a crime and probable cause, it could not have been used legally by the commissioner for any other, and it would be a serious question whether this court on the habeas corpus proceeding, or the judge on the motions, could consider it for any other purpose.

The proceedings before the commissioner, so far as they affect this question, were as follows (and I follow the original documents and proceedings and evidence which are before me on the motion for a warrant of removal, and referred to in the return of the com-

missioner to the writ of certiorari): September 19, 1903, indictment No. 23,927 (for bribery of Beavers in connection with the Bundy time recorders), attached to and forming a part of the complaint or information, was placed before the commissioner, together with the warrant for the arrest of Green, dated September 17, 1903, issued thereon out of the Supreme Court of the District of Columbia. Commissioner Hall issued his warrant the same day, September 19, 1903, and the defendant, Green, was arrested thereon and taken before the commissioner. The original record of the commissioner, made at the time, says:

"The defendant, brought before said commissioner, entered a plea of not guilty of the charge stated in the indictment, and demanded an examination as to whether there was probable cause to believe him guilty of the offense charged. Such examination was allowed by the commissioner."

Walter S. Mayer, the complainant, was then sworn on the question of the identity of the defendant, and his evidence established the fact that the defendant, George E. Green, under arrest, was the George E. Green named in the indictment. The further hearing was, by consent of defendant, adjourned to September 22, 1903. On the day to which such hearing was adjourned the following occurred, according to the original record of the commissioner:

"Before U. S. Commissioner Chas. S. Hall, September 22, 1903. Examination resumed pursuant to adjournment of September 19th. Present: Geo. B. Curtiss, for the government, and Theo. R. Tuthill, for defendant. Defendant's attorney moves that the complaint herein be dismissed, and that the defendant be discharged, on the ground that the indictment under section 5451 of the Revised Statutes of the United States, charging bribery, does not recite and allege facts sufficient to constitute a crime. The motion was opposed by Mr. Curtiss, the U. S. attorney, objecting to the dismissal of the complaint and the discharge of the defendant on the grounds stated. Motion denied. The government thereupon offered in evidence an exemplified copy of the indictment charging defendant with bribery under section 5451, together with the bench warrant issued by the Supreme Court of the District of Columbia for the arrest of defendant: also the complaint herein made by Walter S. Mayer September 19, 1903, asking the arrest of defendant under a warrant to be issued by the commissioner. Objected to by defendant on the ground that the indictment alleges no facts constituting a crime. Objection overruled, and the indictment, warrant, and complaint received in evidence and marked, respectively, Exhibits A, B, and C."

The originals are annexed and so marked. It will be noted that all this occurred during the examination of the defendant, held pursuant to his demand, for the purpose of ascertaining whether a crime had been committed in the District of Columbia and whether there was probable cause to believe George E. Green guilty of the commission thereof. These were the questions in issue, and the only ones. Identity had been proven. The offer of the indictment could not have been to establish any facts other than these, and, when the objection was made that the "indictment alleges no facts constituting a crime," the commissioner overruled the objection and received it in evidence, and he in no way limited the purpose for which received. The indictment was offered to show the commission of a crime and probable cause, and it was admitted for that purpose. It is evident that this indictment was after this

ruling in evidence on the examination generally for any legal purpose, and that it was the duty of the commissioner to give it full probative force, and that, whatever his action may have been thereafter, the receipt of such indictment in evidence, assuming its sufficiency, made a prima facie case against the defendant. The indictment might, on motion, have been stricken out; but no such action was had or suggested. Immediately on such indictment being received in evidence, Mr. Curtiss, the United States attorney, made the following statement:

"The government claims, and asks the commissioner to hold, in this case, that the indictment of itself, with the evidence of identity already given, makes out a prima facie case, and establishes probable cause and ground to believe that the defendant is guilty of the offense as charged in the indictment, and that a finding to that effect should be made."

The record says:

"The commissioner declined to accede to this request of the government, and adhered to his ruling of September 19th that an indictment is secondary evidence only, and, when objected to, is not to be deemed conclusive; but evidence must be given aliunde to show that the crime as charged in the indictment has been committed, and that there is probable cause to believe a defendant guilty of the alleged offense."

The record fails to show that any ruling on this question was made September 19th. The further hearing was then adjourned to September 28, 1903, and on that day a further adjournment was taken until October 13, 1903, but that day by consent was changed to October 12th, on which day a further adjournment was had until November 9, 1903, and thereafter further adjournments were had until November 20, 1903. On the 12th day of October the commissioner filed a memorandum of opinion setting forth his views as to the effect of the indictment as evidence, and holding in substance that the government should give further evidence as to the commission of a crime and that there was probable cause to believe the defendant guilty. This memorandum of opinion was not a ruling upon the admissibility of the indictment, and had no effect whatever to limit or restrict the purposes for which the indictment might be used as evidence in the case. It matters not that a judge or commissioner, during an examination, where there is no jury to be influenced by the remarks of the court, expresses an opinion as to the effect of certain evidence, or the weight that should be given it in the decision of the case, which turns out to be erroneous. If objection is made to the admission of the evidence on grounds which would seem to be supported by the remarks or expressions of opinion made by the court or commissioner, and the court or commissioner, notwithstanding such expressions of opinion, overrules the objections and admits the evidence, it must be considered that the commissioner or judge, as the case may be, has either changed his views or declines to rule in accordance therewith, and in such case, if the evidence is not received upon some particular question, it may be used, and must be used at all subsequent stages of the case, if not stricken out, for what it is legally worth.

This indictment was received in evidence without restriction on

the 22d day of September, 1903, under the objection made by the defendant that such indictment alleged no facts constituting a crime, which objection was overruled by the commissioner. On that day, it is true, the commissioner declined to hold the defendant on proof of identity and the indictment itself without further evidence. The commissioner stated and held that the indictment was secondary evidence only, and that, when objected to, it was not to be deemed conclusive, but that evidence must be given aliunde to show the commission of the crime and probable case; but, notwithstanding this ruling and holding, the indictment was in evidence generally and before the commissioner for all legal purposes, and the commissioner was bound in the final decision of the case to give it full probative force, inasmuch as he had not limited the purposes for which it was received in evidence.

This examination on this charge of bribery was continued on the 20th day of November, 1903, on which day the defendant asked to dismiss the indictment in question on the grounds that it was found without jurisdiction, that the grand jury was not a legally constituted body, that the court had no jurisdiction under the facts presented either of the offense charged or of the person of the defendant, that the facts stated in the indictment do not constitute a crime, that the facts stated in the indictment do not constitute the crime alleged and charged therein, and that the indictment is void for duplicity and for repugnancy and contradiction of statement. Certain conversation was then had between the court and the United States attorney in regard to the proceedings had before that time, and also in regard to another indictment. Then Mr. Curtiss asked the counsel for the defendant: "Will it be conceded that George E. Green who is present is the George E. Green named in this indictment?" (referring to one found in October, 1903). Defendant's counsel answered: "Yes." The United States attorney then inquired: "In all of them?" (referring to all of the indictments). To which inquiry the defendant's counsel replied: "Yes." Mr. Curtiss, the United States attorney, then said in open court:

"Then we offer in evidence the indictment against George E. Green and George W. Beavers (being the indictment in question), filed on the 17th day of September, 1903—indictment No. 23,927."

This is the indictment for bribery in relation to the Bundy, or International, time recorders, and is the one we are now considering, and the same that had been offered and received in evidence on the 22d day of September, 1903, as above stated. To the receipt of this indictment in evidence at this time the defendant's counsel objected as follows:

"That there is no proof of the facts contained in it, or as to its competency or materiality upon any question other than the fact that there is an indictment in existence."

The United States attorney then said:

"We offer it in evidence for two purposes—to show the existence and finding of the indictment, and as proof of the acts of criminality as charged in the indictment; proof of the acts constituting the offense."

The objections were thereupon overruled, and the defendant's counsel took an exception. This placed the indictment in evidence a second time for all purposes for which, under the law, it was evidence, and it was the duty of the commissioner in the final decision of the case to give it the full probative force to which entitled; and, it being in evidence generally, it is the duty of this court on the habeas corpus proceedings, and my duty as a judge on the motions for a warrant of removal, to give it all the probative force to which it is entitled under the rulings and decisions of the Supreme Court of the United States. It will be noted that November 20th the indictment was offered by the United States attorney "as proof of the acts of criminality as charged in the indictment; proof of the acts constituting the offense." When the objections were overruled, and the indictment was received under this offer without limitation, it was received for the purposes for which offered and became evidence on those questions. Mr. Curtiss, the United States attorney, then moved that bail be fixed on each indictment and that the defendant be held on the indictment in question. The court denied the motion, and said:

"There is no federal statute making an indictment evidence against the accused. At best it is but secondary evidence, for it presupposes better evidence behind—that produced before the grand jury. It is a transaction to which the accused is neither party nor privy, and therefore not evidence against him; and, further, it reverses every rule of evidence by assuming the accused guilty until he proves his innocence. The motion is denied."

We see that the commissioner had now received the indictment in evidence, under objection that it was not evidence of the acts of criminality recited therein, twice, overruling the objection that it was not evidence of the acts of criminality therein charged and recited, and that he received it for the declared purpose of proving the acts of criminality, charged in the indictment. It may be, but this is matter of conjecture, that the commissioner would have discharged the defendant, had the government failed to present further evidence. The government did produce further evidence, the nature of which we have already seen. The commissioner did not render his decision until the 18th day of December following. The processes of reasoning by which he arrived at the conclusion that the crime charged in the indictment had been committed in the District of Columbia and that there was probable cause to believe the defendant, Green, guilty of the commission thereof, cannot be determined. If there was before him sufficient legal evidence to warrant the finding, then it was justified, and must be upheld by this court and by me on the question of granting a warrant of removal. For anything that appears, the commissioner changed his mind as to the probative force and effect of the indictment; for as he had received it as evidence on the question whether the crime charged had been committed and whether there was probable cause to believe the defendant guilty, and as there was no sufficient evidence produced aliunde the indictment to warrant the holding of Green, I am bound to presume the commissioner held the defendant on the statements of fact contained in the indictment, aided and

supported by the other evidence presented on the examination. In short, the indictment was in evidence generally for all lawful purposes, and hence, if its allegations are sufficient of themselves, or sufficient aided by the other evidence adduced, then the decision was justified and should be upheld.

The question of the probative force of an indictment in a proceeding for the removal of a defendant for trial from the district where found to that where the indictment was found and is pending was settled in *Beavers v. Henkel*, 194 U. S. 73, 24 Sup. Ct. 605, 48 L. Ed. 882. The headnote is as follows:

"Statutory provisions must be interpreted in the light of all that may be done under them. In all controversies, civil and criminal, between the government and an individual, the latter is entitled to reasonable protection. The fifth amendment is satisfied by one inquiry and adjudication, and an indictment found by the proper grand jury should be accepted anywhere within the United States as at least *prima facie* evidence of probable cause, and sufficient basis for removal from the district where the person arrested is found to the district where the indictment was found. The place where such inquiry must be had, and the decision of the grand jury obtained, is the locality in which by the Constitution and laws the final trial must be had."

The court said, at page 82 of 194 U. S., and page 606 of 24 Sup. Ct. (48 L. Ed. 882):

"The controlling questions to be discussed on this appeal are whether the indictment offered in evidence before the commissioner can be regarded as conclusive evidence against the accused of the facts therein alleged, whether it was competent at all as evidence of such facts, and whether such indictment was entitled to be accorded any probative force whatever."

And at pages 84, 85, of 194 U. S., and page 607 of 24 Sup. Ct. (48 L. Ed. 882):

"The thought is that no one shall be subjected to the burden and expense of a trial until there has been a prior inquiry and adjudication by a responsible tribunal that there is probable cause to believe him guilty. But the Constitution does not require two such inquiries and adjudications. The government, having once satisfied the provision for an inquiry and obtained an adjudication by the proper tribunal of the existence of probable cause, ought to be able, without further litigation concerning that fact, to bring the party charged into court for trial. The existence of probable cause is not made more certain by two inquiries and two indictments. Within the spirit of the rule of giving full effect to the records and judicial proceedings of other courts, an indictment, found by the proper grand jury, should be accepted everywhere through the United States as at least *prima facie* evidence of the existence of probable cause. And the place where such inquiry must be had and the decision of a grand jury obtained is the locality in which by the Constitution and laws the final trial must be had."

It is not for this court, or any judge thereof, to question either the wisdom or propriety or correctness of this decision. It is the law of the land as declared by the highest court thereof. It is a holding that the statements of fact contained in an indictment are *prima facie* evidence of the existence of such facts and that they are correctly stated. It is also a holding that in these removal proceedings such indictment may be put in evidence against the defendant, although it is but the presentment or finding of a grand jury, based upon *ex parte* evidence and given in a forum where the defendant was not present or permitted to be present, and where there was no

opportunity for cross-examining the witnesses. When the government closed its case before the commissioner, having introduced the indictment in evidence and having adduced other evidence in support of the allegations contained therein, the defendant, George E. Green, had an opportunity to produce evidence in contradiction. He was not bound to do so, nor can any inference be drawn against him from his silence. The defendant had the right to rely before the commissioner, and has the right to rely here, upon the weakness of the documentary and oral evidence produced, including the indictment. It has been held by the Supreme Court of the United States that a warrant of removal should not be refused because of technical defects in the indictment. That court holds that such defects are for the consideration of the court where the indictment was found and where the trial is to be had, in case removal is ordered. It is not suggested, however, by that court, that a warrant for the removal of the defendant should be issued by the judge when the indictment fails to state a crime; that is, when the facts alleged in the indictment, giving them a fair interpretation, do not constitute the crime attempted to be charged. The indictment, or, more properly speaking, the statements of fact contained in the indictment, is *prima facie* evidence of the commission of the crime charged therein, and is also *prima facie* evidence that probable cause exists to believe the defendant guilty of the commission of such crime. Such indictment cannot be used as *prima facie* evidence of the commission by the defendant of some crime not mentioned in the indictment.

The indictment we are now considering, No. 23,927, is indorsed as follows:

"No. 23,927. United States vs. George E. Green. Bribery of United States Officer in Violation of section 5451, Rev. St. U. S. Witnesses: H. E. Bundy. A. Ward Ford. John T. Tierney. Charles A. Kolstad. Harry F. Burns. A. E. Van Cott. W. S. Mayer. A true bill. A. M. McMachlen, Foreman. Filed in open court September 17, 1903. J. R. Young, Clerk."

This indictment charges that on the 1st day of July, 1901, and from then until the 24th day of March, 1903, George W. Beavers, late of the city of Washington, District of Columbia, at Washington aforesaid, was an officer of the United States of America and a person acting for and on behalf of the United States in an official function, under and by authority of a department of the government; that is to say, general superintendent of salaries and allowances in the office of the First Assistant Postmaster General of the said United States in the Post Office Department of the government thereof, and that during said time he performed the duties of such superintendent. The indictment further explicitly and fully charges that by reason of his said office and its functions said Beavers was charged with the consideration of allowances for items of supplies, including furniture for use at first and second class post offices throughout the United States, involving outlays and increases of expenditure of the moneys of the United States, etc. The indictment then charges that George E. Green, of the city of Binghamton, during the time aforesaid, was the president

and agent of the International Time Recording Company, a corporation existing under the laws of the state of New York, and engaged in the business of selling time-recording devices for use in post offices, etc., and that as such president and agent of the said corporation he undertook to furnish and did furnish large numbers of such time-recording devices to the Post Office Department of the United States for use in the post offices of the United States, and that the said George E. Green at all times during said period well knew that the said George W. Beavers was such officer of the United States and a person acting in an official function as above stated. The indictment then charges that during the said period, and on the 11th day of December, 1901, the said George W. Beavers and George E. Green entered into an unlawful and corrupt agreement, whereby the said Green, as president of the said corporation, undertook and promised on its behalf to pay to the said George W. Beavers from time to time, as the corporation should receive payment therefor, for the personal use and benefit of the said Beavers, and while he continued to be such officer and person acting in the official function as aforesaid, 10 per cent. of all sums paid the corporation by the United States out of the moneys appropriated by the department to said corporation for purchasing its time recording devices for the use of the Post Office Department. The indictment then charges that the defendant, George E. Green, afterwards, and on the 11th day of December, and while said Beavers was still an officer of the United States, and acting for and in its behalf and in the official function in pursuance of the said unlawful and corrupt agreement, at Washington in the District of Columbia—

“Did tender to the said George W. Beavers a certain obligation for the payment of money, to wit, the personal check of him, the said George E. Green, drawn upon the Knickerbocker Trust Company of New York City, N. Y., in favor of the said George W. Beavers, for the sum of three hundred and twenty-five dollars, with intent on the part of him, the said George E. Green, to influence his, the said George W. Beavers', decision and action to the detriment of the said United States on a matter then pending and thereafter to be brought before him in his said official capacity; that is to say, to influence him, the said George W. Beavers, in the matter of his making allowances for and procuring for the said Post Office Department time recording devices of the kind aforesaid, in such manner and to such extent that he would, as he thereafter, from time to time during the said period, did, in consequence of such tender, procure and purchase, in the manner aforesaid, for the said Post Office Department and for the use aforesaid, from the corporation aforesaid, large numbers of such time-recording devices at prices greatly, to wit, by ten per centum, in excess of the prices at which he could, as he, the said George W. Beavers, then well knew, have obtained the same from the said corporation, if he had not entered into or executed the said unlawful and corrupt agreement with the said George E. Green, and if he had procured and purchased the same by honest methods, and in the manner in which such articles are usually bought and sold between individuals (the public exigency then requiring the same to be procured and purchased without any advertising for proposals for furnishing the same), and with intent also on the part of him, the said George E. Green, then and there to influence him, the said George W. Beavers, to commit, and aid in committing, and collude in, and allow, the fraud upon the said United States involved in the said unlawful and corrupt agreement, and also with intent to induce him to omit to do an act in violation of his lawful duty as such officer and person acting

as aforesaid; that is to say, to omit to inform his said superior officers truly and in good faith concerning all matters pertaining to the purchase of such time recording devices from the said corporation, and especially concerning the existence of the said unlawful and corrupt agreement—against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided."

Count 2 charges that on the 13th day of January, 1902, at Washington aforesaid, said Green, under the same agreement and with the same intents before mentioned, tendered and gave to the said George W. Beavers—

"A certain other obligation, to wit, another personal check of him, the said George E. Green, drawn upon the Seventh National Bank of New York City, N. Y., for the sum of \$331.18 in money, payable to him, the said George W. Beavers."

Counts 3 and 4 are the same, except they charge the tendering by Green to Beavers at other dates of other checks, which checks are described in the same language, except as to the amount.

These counts (2, 3 and 4) fail to charge the commission of a crime. Each alleges that Green tendered at a certain date to said Beavers, with the several intents hereinbefore specified, "a certain other obligation." The statute requires that the obligation tendered be one for the payment of money, or one for the delivery or conveyance of something of value. An obligation is not necessarily one that provides either for the payment of money or for the delivery or conveyance of something of value, and hence these counts of the indictment are insufficient to charge a crime. Neither of these counts is aided by the allegation following: "To wit, another personal check of him, the said George E. Green," etc. The check is not set out in full, nor is its legal effect even stated. Such checks are not alleged to have been obligations for the payment of money, or obligations for the delivery or conveyance of something of value.

Under section 5451 of the Revised Statutes [U. S. Comp. St. 1901, p. 3680] it is a crime to tender a contract for the payment of money, and it is a crime to tender an undertaking for the payment of money, and it is a crime to tender an obligation for the payment of money, and it is a crime to tender a gratuity for the payment of money, and it is also a crime to tender a security for the payment of money. The Congress in that section has used the words "contract," "undertaking," "obligation," "gratuity," and "security." These words have different meanings in the law. The tendering of a contract for the payment of money, or the tendering of an undertaking for the payment of money, are different offenses from the tendering of an obligation for the payment of money. It is a crime to do either of these acts. The check mentioned in count 1 of the indictment in question is not set out. It is described as—"The personal check of him, the said George E. Green, drawn upon the Knickerbocker Trust Company of New York City, New York, in favor of the said George W. Beavers, for the sum of three hundred and twenty-five dollars."

Its date is not given, nor is its language. For anything that appears, this check may have had conditions and limitations and re-

strictions. It may have contained other agreements. Having described the crime committed as the tendering of an obligation for the payment of money, this count of the indictment could not be supported by proof that Green tendered a contract for the payment of money, or an undertaking for the payment of money, or a security for the payment of money. The offenses are different. Each of these offenses may be sustained by different proof, and by proof of the tender of a different instrument.

In *U. S. v. Cruikshank et al.*, 92 U. S. 542, 557, 558, 23 L. Ed. 588, it was held:

"In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. 6. In *United States v. Mills*, 7 Pet. 142 [8 L. Ed. 636], this was construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged'; and in *United States v. Cook*, 17 Wall. 174 [21 L. Ed. 538], that 'every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species—it must descend to particulars.' 1 Arch. Cr. Pr. & Pl. 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances."

In *United States v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516, the court held:

"In an indictment for committing an offense against a statute, the offense may be described in the general language of the act; but the description must be accompanied by a statement of all the particulars essential to constitute the offense or crime, and to acquaint the accused with what he must meet on trial. A count in an indictment under Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3697], which charges that the defendant, 'having devised a scheme to defraud divers other persons to the jurors unknown, which scheme he * * * intended to effect by inciting such other persons to open communication with him * * * by means of the post office establishment of the United States, and did unlawfully, in attempting to execute said scheme, receive from the post office * * * a certain letter' (setting it forth), 'addressed and directed' (setting it forth), 'against the peace,' etc., does not sufficiently describe an offense within that section, because it does not state the particulars of the alleged scheme to defraud; such particulars being matters of substance, and not of form, and their omission not being cured by a verdict of guilty."

In *Hughes' Federal Procedure*, p. 38, it is said:

"In statutory offenses the language of the statute may be followed, but this does not dispense with the necessity of setting out the specific elements of the offense itself with sufficient definiteness to put the prisoner on his defense and to enable him to protect himself from a second prosecution"—citing *U. S. v. Fero* (D. C.) 18 Fed. 901; *U. S. v. Brazeau* (C. C.) 78 Fed. 464; *Peters v. U. S.*, 94 Fed. 127, 36 C. C. A. 105; *Cochran v. U. S.*, 157 U. S. 286, 15 Sup. Ct. 628, 39 L. Ed. 704.

As the date and contents of the check alleged to have been an obligation for the payment of money are not set out in this indictment, should the defendant be tried and acquitted, the government might obtain another indictment in the District of Columbia for having tendered the same check precisely, alleging generally a check of this description, without giving its date, and charging the defendant, Green, with having tendered an undertaking for the payment of money, or possibly a contract for the payment of money. The record would not show a prior indictment for and acquittal of the same offense.

In Hughes' Federal Procedure, at page 39, it is said:

"An indictment must set out a written document in *hæc verba*, though, as to certain matter made unobtainable by the federal statutes, an allegation in the indictment that it is improper to be put upon the records of the court renders it discretionary with the court whether to require such matter to be set out in the indictment, and the exercise of such discretion is not reviewable; nor does a failure to require it to be set out infringe the prisoner's constitutional right to be informed of the nature and cause of the accusation."

If the instrument be lost or destroyed, this, however, may be alleged as an excuse for not setting out the instrument in *hæc verba*.

In *U. S. v. Noelke* (C. C.) 1 Fed. 426, it was held that the circular alleged to have been mailed in violation of the statute should be set forth in *hæc verba*, and that the omission so to do was not cured by a verdict.

In *U. S. v. Watson and others* (D. C.) 17 Fed. 145, it was held:

"By all rules of pleading, criminal as well as civil, when a written document is relied on to sustain the prosecution or plaintiff's case, it must be set out either verbatim or in substance, and not a statement of the opinion of the pleader as to the effect it was intended to or might produce; and a criminal information that does not give the substance of a document relied on, but only its effect, is not sufficient."

In *Rosencrans v. U. S.*, 165 U. S. 257, 17 Sup. Ct. 302, 41 L. Ed. 708, it was held:

"The indictment of a person employed in the postal service for secreting, embezzling, or destroying a check or draft in a letter delivered to him as such agent need not give a full description of the check or draft; but it is sufficient to say that, the instrument having been destroyed, the grand jury is unable to give any further description than is found in the indictment."

The court in its opinion said:

"The gravamen of the charge is the destruction of the letter. It is an offense against the postal laws of the United States, and while the letter must contain a draft, check, or some other thing of value, or supposed value, in order to bring the case within the compass of this statute, yet it is unnecessary to describe this draft, check, etc., with the same precision as if forgery or some other crime directed against the instrument itself was charged. A full description of the check or draft being unessential, it is clearly sufficient when the grand jury say that, the instrument having been destroyed, they are unable to give any further description than such as is found in this indictment; for that, as will be seen, contains some matters of description and identification."

In the indictment now under consideration the charge is that Green tendered to Beavers an "obligation for the payment of

money." This allegation thus far uses the words of the statute. But such allegation is clearly insufficient.

In *Batchelor v. U. S.*, 156 U. S. 426-429, 15 Sup. Ct. 446, 447, 39 L. Ed. 478, it was held:

"By the settled rules of criminal pleading, and by the previous decisions of this court, the words 'willfully misapplies,' having no settled technical meaning (such as the word 'embezzle' has in the statutes, or the words 'steal, take, and carry away' have at common law), do not, of themselves, fully and clearly set forth every element necessary to constitute the offense intended to be punished; but they must be supplemented by further averments, showing how the misapplication was made, and that it was an unlawful one. Without such averments there is no sufficient description of the exact offense with which the defendant is charged, so as to enable him to defend himself against it, or to plead an acquittal or conviction in bar of a future prosecution for the same cause. *United States v. Britton*, 107 U. S. 655, 661, 669, 2 Sup. Ct. 512, 27 L. Ed. 520; *United States v. Northway*, 120 U. S. 327, 332, 334, 7 Sup. Ct. 580, 30 L. Ed. 664; *Evans v. United States*, 153 U. S. 584, 587, 588, 14 Sup. Ct. 934, 38 L. Ed. 830."

In *Evans v. U. S.*, 153 U. S. 584-587, 14 Sup. Ct. 934, 38 L. Ed. 830, the court said:

"A rule of criminal pleading, which at one time obtained in some of the circuits, and perhaps received a qualified sanction from this court in *United States v. Mills*, 7 Pet. 138, 8 L. Ed. 636, that an indictment for a statutory misdemeanor is sufficient, if the offense be charged in the words of the statute, must, under more recent decisions, be limited to cases where the words of the statute themselves, as was said by this court in *United States v. Carll*, 105 U. S. 611, 612, 26 L. Ed. 1135, 'fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.' The crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged. *United States v. Cook*, 17 Wall. 168, 174, 21 L. Ed. 538; *United States v. Cruikshank*, 92 U. S. 542, 558, 23 L. Ed. 588. 'The fact that the statute in question, read in the light of the common law and of other statutes on the like matter, enables the court to infer the intent of the Legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent.' *United States v. Carll*, 105 U. S. 611, 26 L. Ed. 1135."

In *Cochran and another v. U. S.*, 157 U. S. 286-290, 15 Sup. Ct. 628, 630, 39 L. Ed. 704, the court said:

"But the true test is, not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."

In view of the authorities it is perfectly evident that an indictment must be so clear and precise in its allegations and description of the crime charged that the defendant may not only know what he is called upon to meet on the trial, but be able to show by the record itself—that is, the indictment and judgment of acquittal or conviction, in case another indictment is found against him—that his prior acquittal or conviction is a bar to his prosecution under a second indictment.

Clearly this indictment, to be valid, must allege the tendering of a written instrument. Such written instrument must be an obligation for the payment of money. The indictment says that an ob-

ligation for the payment of money was tendered, and it further says that this obligation for the payment of money consisted of the personal check of George E. Green, drawn on the Knickerbocker Trust Company in favor of George W. Beavers for a certain sum of money. The date of this check is not given, nor does the indictment give or purport to give the substance of the language used in the check. Here the gravamen of the charge is the tendering of the check, and this general description, without giving the date of the instrument or the substance of the language contained therein, is clearly insufficient to protect the defendant in case of a subsequent indictment for the same offense, or to show that the check was in fact an obligation for the payment of money.

In *U. S. v. Simmons*, 96 U. S. 360, 24 L. Ed. 819, the court held:

"An indictment under section 3266 of the Revised Statutes [U. S. Comp. St. 1901, p. 2119], charging the defendant with causing or procuring some other person to use a still, boiler, or other vessel, for the purpose of distilling, within the intent and meaning of the internal revenue laws of the United States, is bad, unless it states the name of such other person, or avers that the same is unknown. An averment that such use was 'in a certain building and on certain premises where vinegar was manufactured and produced' is not sufficient, as it does not state that vinegar was manufactured or produced there at the time the still and other vessels were used for the purpose of distilling."

It will be further noted that this indictment fails to state, even by fair inference, that this alleged check was drawn either upon a bank or persons doing a banking business. It is not stated that the Knickerbocker Trust Company was either a corporation or an organized company. In short, the existence of the drawee of the check referred to is not alleged. If we were at liberty to presume in a criminal indictment that this "company" on which the check is stated to have been drawn had existence, still it is not alleged either that it was authorized to do or was doing a banking business. It is not alleged that Green had money on deposit or credit with such company. An order to pay money, in the form of a check, is not a check in the legal meaning of the word, unless drawn on a bank or bankers. See cases, etc., hereinafter cited. Is it to be presumed that this is the only check of this general description given at any time by Green payable to George W. Beavers? Is Green to be prepared on the trial to show the facts and circumstances attending the making of every check of this general description drawn by him? Is he not entitled to such a description of the alleged check by date and contents as will enable him to say whether or not he ever drew or had in his possession such a paper? Neither the loss nor destruction of the writing alleged to be a check is alleged, and, as it was drawn on a trust company (if that company has existence and it was paid), the presumption is it is in its possession and obtainable. In any event no reason for not giving a more detailed description is stated. Full descriptions of written instruments have not been required when the grand jury has said the further description or contents was to it unknown. See *Rosencrans v. U. S.*, 165 U. S. 257, 17 Sup. Ct. 302, 41 L. Ed. 708.

Coming, then, to the question, was this check (assuming that it was a check drawn on a bank or banker, and that it contained a

date, and directed the payment by such bank of the sum of money specified, and was signed by Green, and that it contained no other words either enlarging or restricting its meaning or legal effect) an obligation for the payment of money? it is worthy of note that, as it was the check of Green, made payable to Beavers, and tendered for an illegal and corrupt purpose, and was not delivered to the payee and indorsed and presented to and accepted by the bank, same was not property, or a thing of value, or enforceable by Beavers or any one. Green could have stopped payment at any time. It was not accepted by the trust company and hence was not enforceable against it. See *United States v. Driggs* (C. C.) 125 Fed. 520; *Merchants' Bank v. State Bank*, 10 Wall. 604, 19 L. Ed. 1008; *Bull v. Bank of Kasson*, 123 U. S. 111, 8 Sup. Ct. 62, 31 L. Ed. 97; *Florence Mining Co. v. Brown*, 124 U. S. 385, 8 Sup. Ct. 531, 31 L. Ed. 424; *Fourth Street Bank v. Yardley*, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855. See, also, *Negotiable Instrument Law N. Y.* (Laws 1897, p. 756, c. 612) § 325. Nor did it constitute an equitable assignment of the fund on which drawn, if there was a fund. See same authorities.

A "check" is defined to be:

"A written order or request, addressed to a bank or persons carrying on the banking business, and drawn upon them by a party having money in their hands, requesting them to pay on presentment, to a person therein named or to bearer, a named sum of money." 1 *Bouv. Law Dict.* 225.

Also:

"A written order or request, addressed to a bank or banker, directing the drawee to pay a specified sum, either to the bearer, or to the payee named, or his order." 1 *Abb. Law Dict.* 214.

Also:

"A check is a draft or order upon a bank or banking house, purporting to be drawn upon a deposit of funds, for the payment at all events of a certain sum of money to a certain person therein named, or to him, or his order, or to bearer, and payable instantly on demand." 2 *Daniel on Negotiable Instruments* (4th Ed.) § 1566; 5 *Am. & Eng. Enc. of Law* (2d Ed.) 1029.

The giving of a check is a representation by the drawer that he has money on deposit with the drawee subject to his order. The law implies a consideration for the check, and also implies a promise on the part of the drawer to pay the amount of the check in case it is not paid or accepted by the bank or banker on which drawn. The giving of the check is a written admission by the drawer that he owes the amount of money specified therein to the payee, and the order or check is a mode of paying an admitted indebtedness due by directing a bank or banker who has the debtor's funds to apply such funds in satisfaction of the debt. The giving of the check is not the creation of an obligation, but the admission of the existence of an obligation to pay a certain sum of money. It creates no additional obligation or liability on the part of the drawer, but it furnishes written evidence of the debt and directs payment by another. If payable to bearer, or to the order of the payee, it is negotiable, and passes by delivery or indorsement, as the case may be. The check imposes no obligation upon the drawee to pay the same, at

least as between the drawee and payee. If the bank refuses to pay the check, having funds with which to pay the same, the payee cannot maintain an action either at law or in equity against such bank, unless the bank has accepted the check. Acceptance by the bank, in the absence of fraud, is equivalent to payment, and such acceptance discharges the drawer, the principal debtor, and the bank on which drawn then becomes the principal debtor. The legal consequence of giving a check upon a bank or banker is to furnish written evidence of the obligation of the drawer to pay the sum of money therein specified to the payee or indorsee thereof, if payable to order and properly indorsed, or to the bearer, if payable to bearer, in case the bank or banker on which drawn refuses to pay same on demand. The payee of a check, including the bearer, when made payable to bearer and delivered, accepts the same in payment (the law presumes) of a debt, and when such check is either accepted or paid, which is the same thing, by the drawee, the liability of the drawer is discharged. If not accepted or paid, the debt remains, and the holder of the check has the written admission of the drawer that he owes so much money and that it is due. A check does not contain a promise to pay in case the drawee fails to honor it. The payee of the check on its delivery becomes the acknowledged creditor of the drawer, and if such check is payable to bearer, or to his order, and the check is properly indorsed, the holder then becomes the creditor of the drawer. The giving of a check does not operate as an assignment pro tanto of the funds in bank belonging to the drawer of the check. If the holder of the check unreasonably delays to present the same for payment, and the bank or banker on which same is drawn fails, the drawer is discharged. These principles are well recognized: A check is neither a draft nor a bill of exchange, although it has many of the features of a bill of exchange and some of the features of a draft. *Bull v. Bank of Kasson*, 123 U. S. 110, 111, 8 Sup. Ct. 62, 31 L. Ed. 97; *M. Bank v. State Bank*, 10 Wall. 604, 19 L. Ed. 1008. It is not a bond or a promissory note. It is not a contract, for it contains no promise by the drawer to any person. The law implies, however, from the giving, both the representation and the promise above specified.

Is a check such as is described in this indictment an obligation or an undertaking for the payment of money, within the meaning of section 5451 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3680]? April 30, 1790, Congress passed an act to punish the bribery of a judge (Act April 30, 1790, c. 9, 1 Stat. 117), and used this language (see section 5449, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3679]):

"Every person who directly or indirectly gives any sum of money or other bribe, present or reward or any promise, contract, obligation or security for the payment or delivery of any money, present or reward, or any other thing of value, to obtain * * *, shall be fined. * * *"

February 26, 1853, what is now embodied in section 5450 of the Revised Statutes [U. S. Comp. St. 1901, p. 3680], was enacted to punish bribery of members of Congress, and in March, 1863, what is now embodied in section 5451 of the Revised Statutes was en-

acted to punish the bribery of any United States officers. In each of these sections we find mention of contract, undertaking, obligation, and security for the payment of money. These were common-law terms and expressions. It has been held, and is undoubtedly the law, that, where common-law phrases are used in an indictment or information, such phrases must have the common-law interpretation. *Chapman v. People*, 39 Mich. 357-359; *In re Richter* (D. C.) 100 Fed. 295-297. See, also, *U. S. v. Royall*, 3 Cranch, C. C. 618, Fed. Cas. No. 16,201.

"Obligation" is defined as follows:

"The term 'obligation' also signifies an instrument or writing by which the contract is witnessed. And in another sense an obligation is said to be a bond containing a penalty, with a condition annexed for the payment of money, performance of covenants, or the like. It differs from a bill, which is generally without a penalty or condition, though it may be obligatory."

"In its general and most extensive sense 'obligation' is synonymous with 'duty.' In a more technical meaning it is a tie which binds us to pay or do something agreeably to the laws and customs of the country in which the obligation is made." 2 *Bouvier's Law Dictionary*, 254.

Bouvier also says that:

"A single obligation is one without any penalty, as where I simply promise to pay you one hundred dollars."

Also:

"A several obligation is one by which one individual, or, if there be more, several individuals, bind themselves separately to perform the engagement."

Also:

"A joint obligation is one by which several obligors promise to the obligee to perform the obligation."

Wharton's *Law Dictionary* defines an obligation thus:

"An act which binds a person to some performance; also a bond containing a penalty with a condition annexed for paying of money at a certain time, or for the performance of a covenant," etc.

Abbott's Law Dictionary, vol. 2, p. 193, defines an obligation thus:

"In a general sense a binding; a legal recognition of a person's engagement or undertaking; an enforceable duty assumed or imposed. In a stricter sense, and much more common in practical jurisprudence, a sealed instrument containing an engagement or promise. It includes bonds and other writings similarly enforceable, but not having the form and all the characteristic incidents of bonds."

In *Strong v. Wheaton*, 38 Barb. 616, it was held that in a statute the word "obligation" should not be given its popular signification, but its legal meaning, viz.:

"Obligation means a bond or other writing in the nature of a bond, such as statutes merchant and staple, recognizances, etc."

In *Crandall v. Bryan*, 15 How. Prac. 48, it was said:

"Obligation is sometimes used as equivalent to legal liability or legal duty."

In *Rippon's Ex'rs v. Townsend's Ex'rs*, 1 Bay, 445, it was held:

"The words 'bonds or other obligations,' in a statute, do not include promissory notes."

In *Basehore et al. v. Rhodes et al.*, 85 Pa. 44, held, a protested draft is not an "obligation," within the meaning of the proviso in a statute declaring that the assignees of an insolvent bank "shall receive in payment of debts due to said bank its own notes and obligations and the checks of its depositors at par." If a draft drawn and issued by a bank in due course of business, duly presented and dishonored, is not an obligation, it is difficult to see why "a check" should be held to be an obligation, especially in a criminal statute. Again, "a draft" and "a bill of exchange" are the same thing. *Hinnemann v. Rosenback*, 39 N. Y. 100, 101. Hence, within this decision, if a check is the same as a draft, it is not an obligation for the payment of money.

In *Elsasser v. Haines*, 52 N. J. Law, 10, 18 Atl. 1095, the action was upon a recognizance entered into in open court by which Haines bound himself that if Owen did not pay a certain debt, amount specified, within a certain specified time, he (Haines) would. The question was whether the statute of limitations applied to this recognizance. That statute provides:

"That every action of debt, or covenant for rent founded upon a lease under seal, whether indented or poll, and every action of debt upon any single or penal bill for the payment of money, or upon any obligation with condition for the payment of money only, * * * shall be commenced and sued within sixteen years," etc.

The court held that this recognizance was not "an obligation with condition for the payment of money only," within this statute. It only provided for the payment of money, and the point was that a recognizance is not an obligation.

In *Sinton v. Carter County (C. C.)* 23 Fed. 535, 537, 538, the county had issued coupon bonds, which were unpaid. An act was passed authorizing the county court of the county to execute to the holders of the outstanding bonds and coupons "new obligations" in place of the old ones. The act provided that:

"Said obligations shall contain such stipulations as to interest as may be agreed upon by the court and the holders of said bonds."

It was held that coupon bonds were within the authority granted. In other words, it was held that bonds under seal, duly executed and having coupons for interest attached, each promising to pay a certain sum of money, were obligations. Clearly they were obligations for the payment of money.

In *Munzinger v. United Press et al.*, 52 App. Div. 338-340, 65 N. Y. Supp. 194, the claim was that a claim for services and rentals was an obligation, within the meaning of section 48 of the stock corporation law of the state of New York. Laws 1892, p. 1838, c. 688. That section provides that no corporation which shall have refused to pay any of its notes or other obligations when due in lawful money of the United States, nor any of its officers or directors, shall transfer any of its property to any of its officers, directors, or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property paid in cash. The United Press had entered into certain contracts

by which it had leased certain wires, and hired from the telegraph company certain services, for which it had agreed to pay certain rentals, to be paid in monthly installments, and the rate to be paid for such services was fixed in the agreement. Bills for these rentals and services had been presented. The court held that these debts for rentals and services were not an obligation, within the meaning of this statute, and said:

"The word 'obligation' originally meant a bond containing a penalty, with a condition for the payment of money or to do or suffer some act or thing. Co. Litt. 172a. The meaning of the word, however, has gradually been enlarged by the courts, and it has ceased to be restricted to a bond or writing obligatory, and has been extended to mean a paper by which some fixed duty is assumed to be performed at a certain time, or an instrument in writing whereby one party contracts with another for the payment of money at a fixed date or for the delivery of specific articles. But, however various have been the definitions given to the word, the one essential element has always been that it must be a written paper, the duty assumed by which must be a fixed duty."

In *Regina v. White*, 9 *Carrington & Payne*, 282, the defendant was indicted for forging and uttering "a certain forged request for the delivery of goods." The order or request read as follows:

"Mr. Turner: Please to let the lad have a hat about 9s., and I will answer for the money. Ed. Barrett."

It was contended on the part of the defendant that this was not a request for the delivery of goods, but an undertaking for the payment of money, under section 3 of the statute. St. 1 Wm. IV, c. 66. The court held that it was none the less a request for the delivery of goods because it might be also an undertaking for the payment of money. This case is important in connection with *Regina v. Reed*, 8 *Carrington & Payne*, 623, where it was held that an instrument dated and containing these words:

"I promise to pay to Mr. William Bellerby, or order, the sum of one hundred pounds, or such other sum of money, not exceeding the same, as he may incur, or be put unto, for or by reason or means of his becoming one of the sureties to Mark Millbank, Esq., sheriff-elect for the county of York for the year ensuing for John Reed of this city, sheriff's officer.

"[Signed]

Val. Wilson."

—was an undertaking for the payment of money under St. 1 Wm. IV, c. 66, § 3. From these cases we may draw the distinction between an undertaking for the payment of money and an obligation for the payment of money.

Bishop on Statutory Crimes (2d Ed.) p. 299, § 328, says:

"A check in common form on bankers is an order, and so is a bill of exchange; and, if the check is postdated, this makes no difference."

Mr. Bishop also says (page 298, § 327):

"An order is in its principal elements the same, whether it is for the payment of money or for the delivery of goods."

It may be that a promissory note, a bank note, or bill of exchange is an undertaking for the payment of money. See Bishop on Statutory Crimes, § 339. But of this there is doubt. However, if a promissory note or a bill of exchange is an undertaking for the

payment of money, they are not obligations for the payment of money; nor is a check either a promissory note, a bank note, or bill of exchange, as we have already seen. *Merchants' Bank v. State Bank*, 10 Wall. 604, 19 L. Ed. 1008; *Bull v. Bank of Kasson*, 123 U. S. 110, 111, 8 Sup. Ct. 62, 31 L. Ed. 97. See, also, *People v. Howell*, 4 Johns. 296-301.

In *Merchants' Bank v. State Bank*, 10 Wall., at page 604, 19 L. Ed. 1008, the Supreme Court said:

"Bank checks are not inland bills of exchange, but have many of the properties of such commercial paper; and many of the rules of the law merchant are alike applicable to both."

The court then points out the similarities and differences, and then accepts the doctrine above stated as the law.

The same author, Bishop, in 2 *Bishop's New Criminal Law*, p. 323, § 566, says:

"Obligation, Bill Obligatory.—These words require a sealed instrument. At least they do under the before-mentioned St. 5 Eliz. c. 14. Coke says 'obligation' is a word of a large extent, but it is commonly taken in the common law for a bond containing a penalty with condition."

St. 5 Eliz. c. 14, reads:

"If in like manner, any one shall forge or assent to the forging of any false charter, deed, or writing, to the intent * * *; or shall, as is aforesaid, forge any obligation or bill obligatory," etc.

In Wharton's *Criminal Pleading and Practice* (8th Ed.) § 198, p. 141, the word "obligation" is thus defined:

"Obligation.—Under statutes based, as those of Louisiana, on the Roman law, an obligation is a unilateral engagement by which one party engages himself to another to do a particular thing. The English common-law authorities sometimes speak as if the term is limited to bonds with penalties. But, when the term is used in a statute as *nomen generalissimum*, it must be construed in its most liberal sense."

In all the definitions of a check found in the books it is not declared to be an engagement by which one party engages himself to another to do a particular thing. The law, however, implies certain obligations from the giving of a check in order to make such writings effective.

In *People v. Howell*, 4 Johns., at page 301, Kent, C. J., said:

"A check is not, either in common parlance or in the technical language of the books, called a bill of exchange or promissory note, though it may in some respects have the same legal operation. The statute, in discriminating between bills and notes and orders for the payment of money, must be interpreted according to the usual and settled understanding of those terms, and a check will, therefore, fall within the description of an order for the payment of money. * * * Penal statutes ought to be read according to the ordinary import of language, and, if a term would equally admit of two constructions, the one attended with the milder consequences ought to be adopted."

"It is a well-settled rule of construction that language used in a statute, which has a settled and well-known meaning sanctioned by judicial decision, is presumed to be used in that sense by the legislative body." *Kepner v. United States*, 195 U. S. 100-124, 24 Sup. Ct. 797, 49 L. Ed. —; *The Abbotsford*, 98 U. S. 440, 25 L. Ed. 168.

Applying that rule here, and we must assume that Congress in using the expressions "contract," "undertaking," "obligation," etc.,

"for the payment of money," used them in their legal sense, as determined by judicial decisions. Given that meaning, this indictment fails to charge George E. Green with the doing of acts constituting a crime.

Again, "bribery," or the attempt, was an offense at common law. 1 Bishop, New Crim. Law, p. 288, § 468, subd. 3. It was "the voluntary giving or receiving of anything of value in corrupt payment for an official act done or to be done." 2 Bishop, New Crim. Law, § 85, p. 51. At common law the offering or tendering of anything of value for such purpose was an attempt to commit the crime. *Id.* § 88. The check tendered by Green to Beavers, having been drawn and tendered for an illegal and corrupt purpose, was void, worthless. *United States v. Driggs* (C. C.) 125 Fed. 520. It is true that the statute under which this indictment against Green is drawn does not specifically say that the tender must be of a valid, collectible, or enforceable contract, undertaking, or obligation for the payment of money; but can an instrument be either of those required by the statute if void and nonenforceable, and known to be such by the person tendering and the officer to whom tendered?

Again, is it not the plain meaning and intentment of the statute that the instrument tendered must be a thing of value; that is, a valid instrument? Section 5431 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3671] reads as follows:

"Sec. 5431. Every person who, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or brings into the United States with intent to pass, publish, utter, or sell, or keeps in possession or conceals with like intent any falsely made, forged, counterfeited, or altered obligation, or other security of the United States, shall be punished by a fine of not more than five thousand dollars, and by imprisonment at hard labor not more than fifteen years."

It is not stated therein that the person who passes, utters, publishes, or sells, etc., such instrument or instruments so forged, etc., with intent to defraud, must have known it to have been false, forged, counterfeited, and altered. At common law such knowledge was necessary to make out the crime intended to be covered by or embraced within such statute. Section 5431, *supra*. In *United States v. Carl*, 105 U. S. 611, 26 L. Ed. 1135, the Supreme Court of the United States, opinion per Gray, J., unanimously held that such knowledge must be averred in the indictment and proved. The indictment was held bad, even after verdict, because it did not allege that defendant knew the obligation passed and uttered by him, with intent to defraud, to be false, forged, counterfeited, and altered. The court said:

"The language of the statute on which this indictment is founded includes the case of every person who, with intent to defraud, utters any forged obligation of the United States. But the offense at which it is aimed is similar to the common-law offense of uttering a forged or counterfeit bill. In this case, as in that, knowledge that the instrument is forged and counterfeited is essential to make out the crime; and an uttering, with intent to defraud, of an instrument in fact counterfeited, but supposed by the defendant to be genuine, though within the words of the statute, would not be within its meaning and object."

I have no doubt that Congress, the legislative body, in enacting section 5451 of the Revised Statutes [U. S. Comp. St. 1901, p. 3680], intended to punish by statute what was punishable by common law, but which law could not be invoked against officers of the United States, because we have no common-law offenses against the United States. *United States v. Eaton*, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591. I do not doubt that the contract, undertaking, obligation, etc., for the payment of money, tendered must be a valid, enforceable instrument. This indictment shows on its face that the check tendered by Green to Beavers was worthless, not enforceable, not a thing of value. Hence, within the meaning of the section and the intent of the Congress of the United States, the check was neither a contract, undertaking, obligation, gratuity, nor security for the payment of money. This indictment cannot be sustained on the theory that it alleges a promise by Green to Beavers to pay him money to influence his official action in the respects stated. The indictment plainly and sufficiently alleges such a promise, but the statute requires that such promise shall be made with the intent stated in the section above quoted, and the promise alleged in the indictment is not stated to have been made with any intent whatever. Where intent is of the essence of the offense attempted to be charged, it must be set out in the indictment. If not set out, the indictment is not good. *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588.

These defects are not technical, but go to the very life of the indictment. An offense or crime is not defectively stated. No crime or offense whatever is stated. Neither the evidence given before the commissioner on this charge, nor this indictment, nor both together, state facts showing the commission of a crime within the District of Columbia, or facts showing or tending to establish probable cause to believe that the defendant, George E. Green, has committed the crime charged, or any crime, in that District. His detention and holding by the marshal on the charge and commitment based on indictment No. 23,927 is illegal and unauthorized. The writ is sustained, and the defendant is discharged. The application for a warrant removing said Green to the District of Columbia for trial under such indictment is denied.

We will now consider indictment No. 23,940, which charges the defendant, George E. Green, with having offended against section 5440 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3676], hereinbefore quoted, by conspiring with George W. Beavers, superintendent of the salary and allowance division of the Post Office Department of the United States, having the powers and duties hereinbefore mentioned, and other unknown persons, to defraud the United States in connection with the purchase by the United States from the International Time Recorder Company, through said Green, its president and agent, of so-called Bundy time recorders or time clocks. This indictment was filed October 1, 1903, and contains 11 counts. Each count, after the first, charges that Green and Beavers, at a date named (a different date being

stated in each count), "did conspire, combine, confederate, and agree together, and with divers other persons to the grand jurors aforesaid unknown, knowingly to defraud the said United States in the manner and by the means in the said first count mentioned and described." Then follows a statement of the overt act, which consists, in count 2, of the indorsement by Green of a check drawn by the International Time Recorder Company on the Central National Bank of New York City for a sum named and payable to the order of said Green; in count 3, of the giving of the personal check of Green to Beavers for a sum and on a bank named; and of similar acts in each of the other counts. If count 1 is not good—that is, if it does not state facts sufficient to show the commission of a crime by some one, and to charge George E. Green with the commission thereof—then the whole indictment is bad; for the vice and insufficiency, if insufficient, does not lie in charging the overt act, but in the statements found in count 1, preceding the statement of the overt act, and only referred to in the subsequent counts.

It is not necessary that an indictment for conspiracy state how, why, or wherein the act alleged as an overt act operated, or would or could operate, to aid in the execution or furtherance of the conspiracy. Count 1, after stating the official station and duties of Beavers, and also the office and agency held by Green in and with the International Time Recorder Company, and its business, the sale of time recorders, and the fact that Green, as president and agent of said company, undertook to sell and furnish, and did sell and furnish, to the United States, through Beavers, while Beavers was such officer and during the time mentioned, large numbers of such time-recording devices for the use of the first and second class post offices of the United States, says:

"That during the period aforesaid, to wit, on the first day of November, in the year of our Lord nineteen hundred and one, at Washington aforesaid, in the said District of Columbia, the said George W. Beavers (then still being general superintendent as aforesaid) and the said George E. Green unlawfully did conspire, combine, confederate, and agree together, and with divers other persons to the grand jurors aforesaid unknown, knowingly to defraud the said United States in the manner following; that is to say: The said George E. Green then and there did promise and agree with the said George W. Beavers, in behalf of the said International Time Recorder Company, that upon each and every time-recording device of the kind aforesaid then and thereafter ordered from the said International Time Recorder Company, through the procurement and influence of the said George W. Beavers, while he, the said George W. Beavers, continued to be an officer as aforesaid and a person acting as aforesaid, the International Time Recorder Company would pay to the said George W. Beavers, for his own private use and benefit, a commission of ten per cent. of the purchase price thereof, whereby," etc.

Here, with the word "thereof," ends the statement of the agreement made between Green and Beavers. This agreement was the conspiracy, so far as charged directly. Then follows:

"Whereby" (meaning, evidently, by the making and execution of such agreement) "the said United States would be and were defrauded of the sums of money so paid as commissions, by reason of the fact" (now follows a statement of what is alleged to be a fact, viz.:) "that but for the payment thereof" (said commissions), "and but for the said unlawful agreement and its exe-

cution" (the agreement of Green in behalf of the company to pay Beavers, for his own use and benefit, 10 per cent. upon all sales made to the government, and the actual payment thereof) "the said time-recording devices could and would have been procured by the said George W. Beavers in his said official capacity, for the said Post Office Department, at prices less than the prices paid and to be paid therefor by the said Post Office Department by the amount of such commissions at least."

It is insisted that the language:

"The said George W. Beavers and the said George E. Green unlawfully did conspire, combine, confederate, and agree together, and with divers other persons to the grand jurors aforesaid unknown, knowingly to defraud the said United States in the manner following; that is to say: The said George E. Green then and there did promise and agree with the said George W. Beavers"

—Fails to show or state a combination, agreement, and meeting of the minds of Green and Beavers as to Green's proposition, an assent by Beavers, a joint assent of minds, and therefore no conspiracy is charged. *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419.

I do not think this contention can be maintained. The fair import of the language is, and all readers and hearers would understand, that Green not only promised Beavers, but that, on the making of the proposition by Green, he and Beavers agreed, had a meeting of minds; that there was an assent by both to such proposition. True, one may say to another, "I promise," or "I agree with you," and, if that is all there is of the transaction, no agreement is made. This alone is a mere proposal to agree. But when a grand jury or a court says, speaking of what has been proved or established, or of what it charges the fact to be, "G. then and there did promise and agree with B.," the fair import and meaning and construction is that not only did G. promise and propose, but B. accepted and agreed to the proposition. The defendant cannot be misled or prejudiced; for he cannot misunderstand that the indictment intends to charge that he and Beavers mutually agreed together, the one with the other, to do the acts charged. It was not necessary to allege what each said.

It is further insisted that the acts stated as having been agreed upon to be done by Green and Beavers would not, if done, necessarily defraud the United States, and hence a conspiracy to defraud the United States is not alleged. It is claimed that the indictment is no more valid, as charging an offense against section 5440 of the Revised Statutes [U. S. Comp. St. 1901, p. 3676], than it would be had it charged that Green and Beavers agreed and conspired together, and with each other, to defraud the United States in the manner following, that is to say: they, said Green and said Beavers, conspired and agreed together and with each other that they would, before the presidential election, go to Europe, and remain until after election, and so deprive the United States of their votes at the election. It is insisted that an agreement by Green to pay (in behalf of the International Company) to Beavers a sum of money for each sale of a clock device made to the government through his influence could not defraud the government, if executed, unless it

was part of the agreement that the government was to be induced to purchase more of such devices than it needed, or was to be induced or compelled to pay a higher price for such devices than it otherwise would have been required to pay, and that nothing of this kind is found or contained in the alleged illegal agreement. It is also insisted that the agreement did not constitute a conspiracy to defraud, for the reason it is not alleged the parties knew, or understood, or contemplated, that the agreement would or could defraud the United States; that the only purpose fairly inferable is that the government would be induced to purchase the Bundy recorders, rather than others; that, if such was the only purpose of the agreement alleged, it was not a conspiracy to defraud. It is insisted that the agreement as charged, fully executed, would not operate to defraud or have the effect of defrauding the United States, for the reason that there was nothing in the conspiracy agreement that was to affect the price or cost of these time-recording devices to the government. It is insisted that it is absurd to assert that a conspiracy to defraud the United States is stated, when the agreement made (the conspiracy) is such that, if fully executed by the performance of all the acts agreed to be done, the United States would not necessarily be defrauded, unless it was also made a part, and charged to be a part, of the agreement that by doing such acts they would defraud the United States of money, property, or rights.

In this indictment the statement of what was agreed to be done is followed with this allegation:

"Whereby" (referring to the agreement) "the said United States would be and were defrauded of the sums of money so paid as commissions, by reason of the fact that, but for the payment thereof" (the sums agreed to be paid and paid to Beavers), "and but for the said unlawful agreement and its execution, the said time-recording devices could and would have been procured by the said George W. Beavers, in his said official capacity for the said Post Office Department, at prices less than the prices paid," etc.

If so, why? Not because of anything contained in the conspiracy agreement, for nothing on that subject was contained or agreed upon therein. It is not stated that either Green or Beavers knew of or contemplated the above result as the consequence of their conspiracy. It is not alleged that either Green or Beavers knew or had reason to believe the agreement to pay Beavers the said commissions would in any way affect the cost of the time recorders to the government, or that they or either had anything to do with causing that result to be a "fact." They agreed to do a certain act. The doing of that act might and might not lead to a certain result, the defrauding of the United States. If it did lead to such result, it would have been because of further acts done by Green or his company, not, so far as appears, agreed to be done when the conspiracy was formed. Such result was not the natural or probable result of the agreement.

There are many ways of defrauding the United States. Numerous ways and means for accomplishing that result have been devised and others may be devised. Very many acts may be done, each of which, or several of a class of which, when done, would

operate to defraud the United States—some necessarily; obviously others because of peculiar surroundings, circumstances, and conditions. In a criminal indictment charging a conspiracy to defraud the United States, the defendants are entitled to be informed in the indictment of the acts they are charged with having agreed to do, by which the fraud is to be perpetrated or consummated. *Pettibone v. United States*, 148 U. S. 197-202, 13 Sup. Ct. 542, 37 L. Ed. 419; *United States v. Hess*, 124 U. S. 483-486, 8 Sup. Ct. 571, 31 L. Ed. 516; *United States v. Britton*, 108 U. S. 199, 2 Sup. Ct. 531, 27 L. Ed. 698. The defendants in such an indictment, aside from meeting the overt acts, are required to be prepared to defend themselves against proof that they agreed to do the acts charged as having been agreed to be done. They are not to be called upon—they are not required to be prepared—to show that they did not make or enter into an agreement, the terms of which are not fairly stated or set forth in the indictment. It is not sufficient to charge the crime in the words of the statute, or to state an agreement to do acts which, if done, would not operate to defraud the United States. *United States v. Cruikshank et al.*, 92 U. S. 558, 559, 23 L. Ed. 588, and cases there cited.

This indictment says these parties "knowingly" conspired to defraud the United States in the manner following; and in giving the manner in which the government was in fact defrauded it is stated that it was so defrauded—

"By reason of the fact that, but for the payment thereof (such commissions), and but for the said unlawful agreement and its execution, the said time-recording devices could and would have been procured by the said George W. Beavers, in his said official capacity, * * * at prices less than the prices paid and to be paid therefor * * * by the amount of such commissions at least."

It seems to me, while it is true that facts must be alleged, and nothing essential to be stated can be taken by implication or inference (*Pettibone v. United States*, and *United States v. Hess*, supra), that it was the plain intention of the pleader to allege, and that it is alleged (defectively, it is true), that time recorders were to be made to cost the government more than they otherwise would, by reason of the agreement, and that it was a part of the agreement, understood and assented to by Green and Beavers, that such should and would be the effect of the agreement when executed. The indictment says the defendants "knowingly" conspired, and conspired and agreed "knowingly, to defraud the said United States, in the manner," etc. I think the indictment fairly charges knowledge on the part of Green and Beavers that, if the commissions were to be paid, the government must pay more for the devices. It will be for the trial court on a demurrer to the indictment, or at some other appropriate stage of the proceedings, to pass on the sufficiency of the indictment, in view of the defects to which attention has been called. It is a matter of considerable doubt whether the defects invalidate the indictment; but, in view of the decision of the Supreme Court in *Beavers v. Henkel*, 194 U. S. 73, 24 Sup. Ct. 605, 48 L. Ed. 882, and other cases, I am satisfied it is my duty to hold this indict-

ment good for the purposes of this proceeding and motion. As it was put in evidence on the question of probable cause, and furnishes prima facie evidence, and makes a prima facie case, I am not called upon to pass upon the sufficiency of the evidence given aliunde in support of this charge; nor am I called upon to express my opinion as to what the decision of the Supreme Court of the District of Columbia should be as to the sufficiency of the indictment to put the defendants on trial. These questions are for the trial and appellate courts. The true test of the sufficiency of an indictment is—

“Whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.” *Cochran v. U. S.*, 157 U. S. 286-290, 15 Sup. Ct. 628, 39 L. Ed. 704; *Putnam v. U. S.*, 162 U. S. 687, 16 Sup. Ct. 923, 40 L. Ed. 1118.

In this case, based on indictment No. 23,940, charge of conspiracy to defraud in connection with the Bundy time recorders, the writ is dismissed, and the defendant remanded. The warrant of removal applied for is granted.

The third indictment above mentioned, No. 23,928, charges that Green and Beavers, each holding the position and being charged with the duties hereinbefore stated, unlawfully conspired and agreed together, on a day named, at Washington, D. C., and with divers other persons to the grand jury unknown—

“Knowingly to commit an offense against the United States in the manner following; that is to say: The said George E. Green then and there did promise and agree with the said George W. Beavers, in behalf of the said International Time Recording Company, that upon each and every time-recording device of the kind aforesaid then and thereafter ordered from the said International Time Recorder Company, through the procurement and influence of the said George W. Beavers, while he, the said George W. Beavers, continued to be an officer as aforesaid, the said International Time Recorder Company would pay to the said George W. Beavers, for his own private use and benefit, a commission of ten per cent. of the purchase price thereof.”

The indictment then charges an overt act by Beavers, to wit, the writing, etc., of a letter to procure the ordering and purchasing of one or more of these time recorders in execution of the said agreement and conspiracy. The other counts of this indictment, so far as they charge a conspiracy, are the same; for they refer to count 1 for a statement of the conspiracy agreement.

This indictment is defective, if substantially defective, in that it fails to charge a conspiracy to defraud the United States, or to commit any other offense against the United States, for the reason that it fails to state, if it does so fail, an agreement to perform acts which, if done, would constitute a crime against the United States. As already pointed out, it is not sufficient to state this offense in the words of the statute. “When the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment.” *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419. There are scores of statutory offenses or crimes against the United States.

The defendants are entitled to know in any event what particular offense or crime they are charged with having conspired or agreed to commit. In some cases the defendants would be entitled to be informed of the specific acts agreed to be performed. Here we find a statement of acts agreed to be done.

As we have seen in considering indictment No. 23,927, it is a crime against the United States, under section 5451 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3680], to promise, or offer, or give, or to procure to be promised, offered, or given, any money or thing of any value to any officer of the United States, or to any person acting for or in behalf of the United States in any official function, etc., "with intent to influence his decision or action on any question, matter, cause or proceeding which may at any time be pending or which may by law be brought before him in his official capacity * * * or to induce him [said officer] to do or omit to do any act in violation of his lawful duty." The doing of the acts, etc., above mentioned, do not constitute an offense against the United States unless done with the intent specified. Intent in some cases may be inferred. A man is presumed to intend the natural or known result of his act. Still an indictment for the commission of a statutory offense, when a particular intent is made a substantial element of the crime, must state the intent. *United States v. Cruikshank*, 92 U. S. 558, 23 L. Ed. 588. It is there held:

"A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place, and circumstance."

"The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly, and not inferentially, or by way of recital." *Pettibone v. United States*, 148 U. S. 202, 13 Sup. Ct. 542, 37 L. Ed. 419; *United States v. Hess*, 124 U. S. 483-486, 8 Sup. Ct. 571, 31 L. Ed. 516.

It is true that the manner or mode of committing the offense is stated in the indictment. Green, in behalf of the company represented by him, is to pay, or the company is to pay, to Beavers a commission of 10 per cent. upon each and every device sold the government through the influence of Beavers while he remains such officer. The International Time Recorder Company is to pay the commission to Beavers; it may be through Green; it may be through some other agency. Beavers agrees to receive it. The meeting of minds is sufficiently charged, as I have already held in considering the indictment charging these same defendants with the crime of having, on the same day, by making this same agreement, conspired to defraud the United States. Beavers does not agree to be active and use his influence in any way to secure the purchase of time recorders. He cannot purchase one. He has not that power. It is not stated that Green and Beavers agreed, or that either proposed, that this agreement for the payment of commissions was to influence the action of Beavers as an officer of the government, or as a person employed to perform an official function in one of the departments, or was made for that purpose, or that either had such a result in mind. Nor was it agreed, or stated, or

understood that such agreement was made for the purpose of inducing Beavers to do or to omit to do any act in violation of his duty. For the intent we are left to surmise, conjecture, and inference. Did not Green intend the promise of the money should have the effect named? Did not Beavers fully understand the money was offered, and that it was to be paid for that purpose? Did not Beavers, in assenting to the agreement, understand it was proposed—impliedly consent—that he would use his influence to procure the purchase of devices by the government? This may be, and may not be.

It is evident to any rational mind that under the decisions of the Supreme Court an indictment purporting to charge a conspiracy to "commit an offense against the United States," which is merely the general name of the crime, must state an agreement to do acts which, if done, would constitute a crime or offense against the United States. The acts to be committed or done must be stated, and, if the conspiracy be one to commit a crime, where the acts done constituting the crime must be done with an intent specified in the statute, then the indictment for the conspiracy must allege an agreement not only to do the acts, but to do those acts with the intent, or for the purpose embraced within the intent, specified in the statute creating the offense. The existence of the intent cannot be left to inference. It is as essential to allege the intent as to allege the acts. *United States v. Cruikshank et al.*, 92 U. S. 558, 23 L. Ed. 588. This indictment fails wholly to state facts which, admitted to be true, show the commission of a crime, or probable cause to believe that George E. Green has been guilty of the commission of the crime charged, or of any crime. A careful reading of the testimony given before the commissioner demonstrates that, for reasons already given, there is no evidence, aside from the indictment, even tending to show the commission of the crime charged or of any crime, or probable cause to believe the defendant, George E. Green, guilty of the crime charged, or of any crime.

On this charge of conspiracy to commit an offense against the United States in connection with the Bundy time recorders, in violation of section 5440 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3676], and which charge is based on indictment No. 23,928, filed September 17, 1903, the writ of habeas corpus is sustained, and the defendant is discharged. The motion for a warrant of removal is denied.

In respect to indictment No. 23,961, filed October 5, 1903, charging a conspiracy to defraud the United States in violation of section 5440, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3676], in relation to the Doremus stamp-canceling machine, in which George W. Beavers, George E. Green, and Willard D. Doremus are defendants, and indictment No. 23,960, against George E. Green and said Doremus, filed the same day, and charging the bribery or attempted bribery of George W. Beavers, in violation of section 5451, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3680], in connection with the sale of said machines to the government, but little need be said. Indictment No. 23,961, and the charge based therein, must be sustained, for the same

reasons indictment No. 23,940 was sustained; the difference being that indictment charged a conspiracy to defraud in relation to the Bundy time recorders. Indictment No. 23,960 must be sustained for the reason that it charges distinctly the offering of money to Beavers and its actual payment in the District of Columbia, with the necessary intent, whereas the bribery indictment before considered and held invalid alleges the offering of checks.

As to indictments No. 23,960 and No. 23,961, and the charges based thereon, the writs are dismissed, and the defendant remanded. In both these cases the warrants of removal applied for are granted.

It has been suggested that under the decision in *Beavers v. Henkel*, *supra*, it has become the duty of commissioners and judges, on the presentation of an indictment found by a grand jury in another district and proof of identity, to direct the removal of the indicted party to that jurisdiction, without presuming to question the validity of the indictment, or taking or hearing evidence offered to establish the innocence of the defendant in the indictment. Some expressions in the opinion in that case might seem to sustain that contention, but it must be remembered that the court there was considering a case where the validity of the indictment itself was not in question. All the court said was on the assumption that the indictment was valid. The question was its effect, or the probative force to be given it on that assumption. A void indictment—that is, one void on its face, for the reason it does not charge the commission of a crime—is not *prima facie* evidence to an intelligent court or judge of anything, except that the person who drew it and the grand jury that found it made a mistake. It will be a sad day for the cause of justice when it is decreed by Congress or the courts that a citizen may be removed from Maine to California for trial on a void indictment. That question may be determined by the court where the arrest is made; for it is jurisdictional. The proper way to test the question is by a writ of habeas corpus. That writ cannot be made to serve the purpose of an appeal or of a writ of error, but it is properly used to determine whether a person under arrest is held lawfully. If held by virtue of a void indictment, or a process or warrant issued and based thereon, he is not, of course, in this Republic, lawfully detained and deprived of his liberty. In each of the cases where I have sustained the writ and directed the discharge of the defendant, I have found and hold that there is no evidence, taking the facts stated in the indictment as true, either that the crime alleged has been committed, or that there is probable cause to believe the defendant, Green, guilty of the commission of that or any other crime. He is therefore illegally held and deprived of his liberty.

CARRELL v. McMURRAY.

(Circuit Court, W. D. Arkansas, Ft. Smith, Division. March 25, 1905.)

1. REFORMATION OF CONTRACT—GROUNDS—MISTAKE OF LAW.

Where a contract as written, through mistake of either fact or law, fails to embody the actual agreement and intention of the parties, a court of equity will reform it to conform to such agreement and intention.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Reformation of Instruments, §§ 68-78.]

2. SAME—DEED.

Plaintiff and defendant entered into a parol agreement for the exchange of a farm owned by plaintiff for a store and stock of goods owned by defendant, subject to an examination thereof by plaintiff. By such agreement, as testified by both parties, plaintiff was to retain possession of the farm until the ensuing January and receive the rents for the current year. Plaintiff had a deed drawn, stating the agreement fully to the draftsman; but the latter made no reservation in the deed, being of the opinion that it was not proper or necessary. Defendant also had a written contract drawn, which was signed by the parties and which contained no reference to the rents or time of giving possession, although such terms were stated by defendant to the draftsman. Owing to subsequent occurrences defendant became desirous of repudiating the contract, and demanded its modification, so as to give him immediate possession of the land and the rents, which plaintiff refused, insisting on the agreement as made. Defendant then consulted a lawyer, who, on examining the deed, which defendant had not previously seen, advised him that it carried the right to immediate possession and the rents, and defendant then completed the trade and accepted the deed, without stating the fact of such advice to plaintiff. *Held*, that plaintiff was entitled to have the deed reformed to embody the actual agreement and understanding of both parties when the contract was made, both on the ground of mistake and of fraud.

In Equity.

J. V. Walker, for complainant.

Brizzolara, Fitzhugh & Wellshear, for defendant.

ROGERS, District Judge. This is a bill of complainant to reform a deed and to enjoin the defendant from the prosecution of a suit at law against the complainant. The complainant, John W. Carrell, owned a farm in Benton county, Ark. He resided at Springdale, a village in that county, and was by occupation a farmer, merchant, and banker. The defendant was a citizen of Memphis, Tenn., and had a store at Cameron, in the Indian Territory. The defendant desired to go out of business at Cameron. The complainant, having learned of this fact, perhaps through Mr. Black (who was a brother-in-law, and a merchant at Cameron), opened correspondence with the defendant at Memphis, proposing to trade him his Benton county farm for the store and goods at Cameron. The correspondence culminated in defendant going to Benton county on the 11th or 12th of July, 1900, to examine the farm. After going over the farm the parties entered into a conditional oral agreement to exchange the farm for the store and out-houses and the goods at Cameron. In the exchange the farm was to be valued at \$20 per acre, and the balance due on the goods and

houses at Cameron to be paid for in cash after the goods were invoiced. Indeed, defendant testifies that at that time complainant refused to go to Cameron to examine the goods, unless it was agreed he should have \$20 an acre for his land and retain possession of the farm until January 1, 1901, and have the rents for 1900. The reason for retaining possession and the rents is conclusively shown, viz., that complainant's stock of hogs and cattle were on the farm and had to be cared for, and there were also unsettled accounts with complainant's tenants that he wanted to adjust out of that year's rent. There is no dispute about so much of the agreement as is above stated. There is some controversy about the terms of the oral agreement then made as to the properties at Cameron, as will be seen later. Accordingly, on the 13th of July, defendant left for Cameron, and arrived there the same day, and immediately gave directions for the store to be cleaned up, so that the plaintiff (who was expected next day) could look over it to advantage. On the next day, the 14th of July (which was on Saturday), complainant arrived at Cameron. They proceeded at once to look over and invoice the showcases and fixtures. Defendant contends that during the day, while negotiating about the Cameron properties, there was some friction, growing out of a disposition by complainant to embrace things which were not included in the oral agreement made at Springdale on the 12th of July. There were some differences in the valuations of the showcases and fixtures, natural enough between the parties. These differences were, however, adjusted; and beyond this I am unable to find that there was any other friction about the trade until defendant, at his own suggestion, prepared a memorandum in writing of what he claimed was the oral contract at Springdale, and submitted it to complainant. Parts of this memorandum agreement were objected to and stricken out. The paper was then redrafted and signed by the parties. It is as follows:

"This agreement, made and entered into between J. W. Carrell and W. H. McMurray, made this the 14th day of July, witnesseth: That the above-named parties agree to the following trade and conditions hereinafter named: That for and in consideration of J. W. Carrell's 486-acre farm, situated about 15 miles east of Springdale, Arkansas, which is valued at \$20.00 per acre, amounting to \$9,720.00, W. H. McMurray agrees to sell his store building, two frame storerooms situated back of store and stables, also the vacant property on west side of and back of the store and enclosed under barn fence, all of which is valued at \$3,000.00. This does not include either of the dwelling houses nor the lots on which they are situated. It is further agreed that the goods in the store shall be furnished at invoice prices to the amount of \$6,720.00, which with the above-mentioned \$3,000.00 is in full payment for the 486 acres farm land. It is further agreed that said Carrell shall pay W. H. McMurray cash for the balance of goods at the rate of 80 per cent. on the invoice cost of goods. It is further understood by both parties that any goods that are damaged shall be put in at their actual value.

"J. W. Carrell.

"W. H. McMurray."

This agreement I find, after a careful review of the evidence pro and con, embraces the same terms as the oral agreement (as far as it goes) made at Springdale, Ark., July 12th. Defendant at-

tempts to show by his own evidence that this agreement was not the same as the agreement made at Springdale, and gave complainant advantages which the oral agreement did not. This is unimportant now; but I do not think the evidence sustains that contention, but quite the contrary. There were some details, as stated, which had to be and were adjusted at Cameron, which were not specifically adverted to in the agreement at Springdale. This was necessarily contemplated by the parties. The values of fixtures and showcases and the like could not be settled fairly by either party except after inspection, and complainant had not examined these at all, and defendant had not seen them for some time. It may be noted in this connection that, while these fixtures and show cases were not adverted to at Springdale, neither are they mentioned in the written agreement of July 14th, although it is conceded that they went with the store and were paid for by complainant. Defendant contends, further, that the barns and lots adjoining were not embraced in the agreement at Springdale. The written notes made by complainant in a small book at the time spoke of the real property at Cameron as "the storeroom and outbuildings," and they were valued at \$3,000. No doubt the barn and adjoining lots were embraced in the words "outbuildings" in the Springdale agreement. At all events they are specifically embraced in the written agreement of July 14th prepared by defendant. It does not appear that there was any controversy over them. Indeed, they appear in the original draft of the agreement made by defendant himself as embracing what he understood the Springdale agreement to be. I conclude that these contentions by defendant relating to price of fixtures and barns and lots were mere afterthoughts, intended to make some moral showing for his course of procedure about the rents for 1900. In this connection it is apposite to note that in his letter of August 4, 1900, in which he reviews at considerable length the negotiation and trade, and asserts his rights, he never refers to the barns and adjacent ground. At all events, they are of no importance now, inasmuch as he voluntarily embraced them in the written agreement of July 14th, and no one can read the evidence in this case and fail to get the impression that in that trade defendant's sole purpose was to get something for all he let go.

It may be of some importance to note, contrary to the impression defendant seeks in his evidence to make, that the negotiation at Springdale went so far that complainant learned from defendant to whom he wished the deed to the lands made; for, on the same day defendant left Springdale for Cameron, complainant took his title papers to the land to his brother-in-law, Anderson Sanders, who was a merchant at Springdale, and not a lawyer, and gave him the terms of the trade, stating, among other things, to whom to make the deeds, and that Carrell was to retain the rent for 1900 and the possession of the land for that year, and instructed him to draw the deed and get his sister, plaintiff's wife, to sign and acknowledge it. This Sanders did, and held the deed for further

orders from complainant. In drawing the deed he did not reserve the rent for 1900 or the right to the possession for that year. Complainant and Sanders both say they did not think it proper to put that in the deed. They doubtless thought the oral agreement sufficient to hold possession and the rents for 1900. It thus appears that when the written memorandum agreement of July 14th, providing the terms of the sale, was signed, the deed to complainant's farm was already drawn, signed, and acknowledged, and defendant was totally ignorant of its contents. When complainant left Springdale for Cameron, he left the deed with Sanders. After the written agreement of July 14th, *supra*, was executed at Cameron, complainant telegraphed for Sanders' son to bring him the deed and a \$3,000 draft to pay for the Cameron real estate. Sanders came on Monday at noon, and brought both deed and draft. Meantime a generous rain fell on Saturday night at Cameron, brightening the outlook for the cotton crop already suffering from drouth. The evidence discloses no controversy, or even mention, at Cameron of the rents or possession of the farm for 1900 before the contract of July 14, 1900, was signed. Up to that time the contract at Springdale stood, as to the rents and possession of the farm for 1900, as agreed upon at Springdale. But next day, after the rain on Saturday, we first hear of the rents as a matter of contention by defendant. Durwood McCarty, a witness for the complainant, and who is a cousin of defendant, testifies that he was with defendant on Sunday afternoon—

"And we was talking about the trade, and he told me then something about how they traded. He said they had a good rain, and the prospects of a good crop, and he didn't think it was right to turn over the store to Mr. Carrell then and not get the farm until January, and if he wouldn't agree to let him have the farm then he wouldn't make no trade on Monday, or back out; that he didn't think it was right for him to turn over the goods then and not get the farm until January. All his year's profits in the store would be from there on."

It was the very next morning, early, when McMurray himself testifies that he told Carrell he did not intend to go on with the trade. He says he did not enter into his reasons to complainant for repudiating the contract. James M. Burdick, the brother-in-law of defendant and his own witness, testifies that defendant told him Monday morning, before Carrell came into the store, that he believed he would not trade, and that the contention that day was over the rents. J. P. McDow, defendant's witness, also testified that early Monday morning, when he went to the store, complainant and defendant were talking over the trade. Defendant wanted to call it off, and complainant was insisting on going on under the contract. McMurray was contending for the rents. Robert Stalcup, complainant's witness, heard part of the conversation Monday morning, and states it as follows:

"Q. Now, you may begin, and in your own way tell what you heard of this conversation, and state the names of the parties who entered into the conversation and what they said. A. On Monday morning, after the trade was made on Saturday, Mr. McMurray was in the store, and Mr. Carrell came in presently, and when Mr. Carrell came in Mr. McMurray approached him,

and he said he inferred from a letter he had received from him in Memphis that he got the rent of that farm for the year 1900, I believe it was. And Mr. Carrell says: 'No.' He says: 'That wasn't the trade.' Mr. McMurray says: 'Well, we just call the deal off then.' And Mr. Carrell says: 'No; we will have it just like we had it Saturday.'"

A little later in the deposition the same witness said:

"A. Yes sir; I heard him [McMurray] say something about the rain. He said that we had had a nice rain, and something to that effect, and that he believed he wouldn't trade. He said it had rained, and he believed he would call the deal off if he could, or something like that."

W. P. Pollard, a witness for complainant, testified that on Monday morning—

"I was working around there in the store and I passed behind where they were sitting on the counter— Q. (interrupting). Now, you say 'they.' Give the names of the parties. A. Mr. McMurray and J. W. Carrell were sitting on the counter, and I passed around behind the counter to make a ticket on the register they use there, and make change, and I heard Mr. McMurray say to Mr. Carrell: 'As you are to keep the farm until the first of January, why not me keep the store and both turn over at the same time?' And Mr. Carrell said: 'No; we will not make a new contract. We will just go on with the old one.' And Mr. McMurray said: 'Well, if you will turn over the rent corn, why we will go ahead and invoice.' And Mr. Carrell said: 'No; we will go ahead just as the trade was made Saturday.' And that was about all I heard about it. That is all I know."

C. G. Adkins, who was the bookkeeper of McMurray, and who did the writing on Saturday for McMurray, testifies that when McMurray was dictating the terms of the sale he said:

"Q. Did he say anything about who was to get the rent for that year? A. Well, he said Mr. Carrell was to get the rent for that year, and he wanted the preference of renting it for the next year."

Complainant relates what took place Monday morning as follows:

"Q. Where did you first meet McMurray on Monday morning, after Saturday night. A. At the store. Q. You may begin at that point and state what occurred between you. A. I went to the store, as we agreed to meet and go to work Monday morning, close up and all, and he said he didn't want to go ahead with the deal unless I would throw in the rent. Q. What reply did you make? A. I told him I didn't want to do that, and that the deal would go on as we had commenced. Q. What next was said by either of you? A. He says that 'as you are to keep the farm until January,' he says, 'I ought to keep the store and we will both turn over at the same time.' I told him he ought to have thought of that sooner. He said he didn't want to go on with the deal, then, unless I would agree to one or the other."

The result of this controversy about the rents on Monday morning was a refusal of defendant to go on with the trade. Meantime the train arrived, and Sanders' son came and brought the deed and draft for \$3,000. These were tendered to McMurray, and refused. Both parties went to consult attorneys; Carrell insisting that he would see if there was any law to force defendant to complete the trade. His attorneys told him to go to Adkins and get the written contract of July 14th, and when he went to get it McMurray had taken it and gone. While in the store McMurray came in and asked complainant for the deed, that he might submit it to his attorney. Up to this time McMurray did not know the contents of

the deed. His attorney, after reading the contract and the deed, advised him that the deed carried the rents, in the absence of any reservation in the deed. McMurray immediately returned to the store and ordered the store closed and the clerks to invoice the goods. Carrell's attorneys had never seen either the deed or the agreement, and gave him no advice in regard thereto. McMurray concealed from Carrell the fact that his attorney advised him that the deed would give him the corn and the right to immediate possession, but did tell him, he says, "I wanted it understood the corn crop went to me, and I didn't want any trouble over it." And he says "Carrell replied: 'If this contract gives you the crop, you can have it; but you cannot get it, except at the end of a lawsuit.' To which he replied: 'All right; it certainly gives it to me.' And we went to work to invoice the goods to him." It will be observed that according to McMurray's own evidence the conversation was confined entirely to the contract. No mention was made of the deed, while it was the deed which carried the corn, and not the contract.

It is thus made clear by defendant's own evidence, with a full knowledge on his part that Carrell had never consented for him to have the corn crop or possession of the land for 1900, and he could only get it by a lawsuit, he consummated the deal, in open, flagrant violation of their oral agreement, as to the possession of the land and the rents for the year 1900, at Springdale, knowing and concealing from Carrell the fact that his attorneys had advised him that the deed, and not the agreement, carried the corn, because there was no reservation of it in the deed. This is clearly and conclusively shown by all the evidence bearing on the point, and to the entire satisfaction of the court. It is fair to assume that, up to the time when defendant submitted the July 14th agreement to his attorney, he supposed the agreement did not give him the corn, or, if he supposed he could get the corn, that it would pass by reason of the fact that it was not mentioned in the agreement, and that the agreement would exclude all the oral agreement made at Springdale on the 12th of July; but this cannot be assumed after the defendant submitted the agreement to his attorney, because he was immediately sent back by his attorney for the deed, and at that time he did not know the contents of the deed. When the deed was submitted to his attorney, then it was clear that the deed contained no reservation of the corn, and therefore passed the corn to him. He therefore not only concealed this fact from Carrell, but he misled him by saying the contract, not the deed, gave him the corn. This was not true, and he must have known it, because the attorney did not advise him until he had examined the deed. It is true that on cross-examination Mr. McMurray says:

"Q. Did you tell Carrell that you consulted with your lawyer, and the lawyer said you would get the corn? A. I don't know that I told him I had consulted with my lawyer, and that my lawyer had told me that; but I told him I wanted to have the deed examined, and I told him this deed gave it to me. Q. You didn't tell Carrell, then, that the lawyer told you that the deed gave you the corn? A. I cannot say that I did or did not."

Obviously this testimony cannot be true, at least in the way in which it is stated, because it appears from all the evidence that McMurray knew nothing about the contents of the deed when he applied to Carrell for it, with the statement that he wanted to have his counsel examine it. He could not, therefore, have told him at that time that the deed gave him the corn, because he didn't know anything about the deed, even if he were capable of construing it. And in the same cross-examination, and prior thereto, this testimony appears:

"Q. Did you have any further conversation about the corn on that trip [that is, the trip to Springdale, when the defendant went to examine the farm]? A. It was understood— I don't remember the wording. We had an understanding, if we traded at Springdale on the terms as outlined there, that Mr. Carrell was to keep the rent corn. Q. When you left Springdale to come to Cameron, the understanding was that Carrell was to get the rent corn? A. Yes, sir; and I was to get the cost of my goods in the house at Cameron. Q. After that time, and up to and including the time when the goods were turned over to Carrell, did Carrell ever agree you were to have the rent corn? A. Yes, sir; he said if I could get it under the contract I could have it. Q. Did you understand from that that he had surrendered his claim to the rent corn? A. I told him that contract would take the corn, and that under the contract made Saturday it was mine. I didn't want any lawsuit or trouble; and he said, 'If you cannot get it under the contract, you cannot get it any other way.' Q. Did you understand from Carrell that he had surrendered his claim to the rent corn? A. Well, I don't know that I did. I don't know that he had surrendered. My impression was he thought under the contract he could still hold the corn."

I take it this testimony is true, and what Mr. McMurray said about the deed is untrue. Both cannot be true. It must be remembered that, when both the deed and the written agreement of July 14th were drafted and signed, neither of them embraced the full agreement of the parties. Both parties agreed that there was no controversy between them as to the terms of the oral agreement at Springdale, so far as it related to the rent corn and the right to the possession of the land for 1900; and both parties agreed that there was no controversy at Cameron as to the rent corn and the possession of the land for 1900 up to the time they signed the agreement of July 14th. The controversy began on Monday morning, July 16th, after the rain had fallen on the night of the 14th of July previous. It is not contended that defendant gave any directions to the draftsman as to the contents of the deed, but it stands admitted that the plaintiff advised the draftsman that complainant was to retain the rents and the possession of the land for the year 1900; but the draftsman did not include the reservation of either in the deed. On the other hand, complainant gave no instructions as to the written agreement of July 14th. Defendant did that, and he also informed the draftsman of the agreement that the rents of 1900 were to go to the complainant; but Adkins did not include any reservation of the rents in the agreement. The mistake, therefore, was in both instances the mistake of the draftsman. The terms of the agreement were not misunderstood by either of the parties, and no controversy had arisen about the rents until the rain had fallen on the night of July 14th, after which I think the

conclusion is irresistible that defendant decided that he had made a bad bargain and set to work to rue the contract or get the rent corn in plain violation of his agreement. A fair consideration of all the evidence leaves no reasonable doubt on this point. The mistake as to the legal effect of the first written agreement, and the deed when drawn, was mutual, and remained so until the rain fell, whereupon the defendant, in his effort to escape his agreement, gained from his attorney the knowledge of the legal effect of the deed, and sought to gain a legal advantage by disregarding his agreement as he admits it was originally made. In his effort to do so he misled the plaintiff, both by concealing his knowledge of the legal effect of the deed and by representing to plaintiff that the agreement, and not the deed, gave him the corn. It required no legal advice to apprise defendant that his conduct in these respects was both unfair and unconscionable, and no court should suffer itself used to permit such a result as he seeks to consummate.

In volume 24, *American and English Encyclopædia of Law* (2d Ed.) p. 648 et seq., the author states the rules governing the reformation of deeds as follows:

"(1) The most usual ground for granting the reformation of an instrument is that through a mistake it does not correctly set forth the true intent of the parties. Thus a clerical mistake of the scrivener who drew up the instrument may be corrected. (2) In order to grant relief on the ground of mistake, the mistake must have been mutual. The minds of the parties must have met upon some agreement other than that which the instrument expresses. (3) In some jurisdictions the court will grant reformation in all cases of mistake, even though the mistake be one of law, such as, for example, the legal effect of terms employed in the writing. But in other jurisdictions the courts hold that relief can be granted only in case of a mistake of fact. (4) The presumption always is that a written instrument expresses the true intent of the parties, and hence the burden of proof is upon the party seeking reformation, who must, in order to obtain the relief, furnish clear and satisfactory evidence that the circumstances are such as to warrant the interposition of a court of equity to grant the relief asked for. (5) But where the proofs are satisfactory, and the mistake is made entirely plain, relief will not be denied merely because there is conflicting testimony. (6) The existence of a mistake may be shown by parol evidence. (7) It has been asserted that, while fraud has been a ground for rescission, it is not a ground for reformation; but the better rule is that fraud may be a ground for reformation, especially where it is accompanied by mistake, as where there is a mistake of one of the parties accompanied by fraud on the part of the other."

The text notes are supported by numerous decisions, state and federal. In different jurisdictions there is a hopeless conflict. No profit could result from an effort to distinguish classes of cases, or from any review I might make. I am of the opinion that the deed in this case should be reformed on either the first, second, or seventh grounds quoted supra. I think the old rule of equity, confining the reformation of instruments to mistakes of fact only, is in modern times gradually being relaxed in all the courts, and decisions enforcing exceptions to the rule resting on special circumstances have well-nigh undermined the rule itself. Courts do not make contracts for the parties, whether the matters complained of result from errors of law or fact, but will correct errors so as to enforce contracts, whether they be errors of law or fact, and whether tainted with

fraud or not, if it is made clear that the contract does not embody the agreement of the parties. This view is sanctioned in a note to *Williams v. Hamilton* (Iowa) 65 Am. St. Rep. 489:

"A perusal of adjudged cases also justifies the statement that the distinction between errors of law and errors of fact is of much less importance in the reformation of contracts than is commonly supposed, that it has had very little practical effect upon the decisions of the court, and that, while not ignored, it is not unfrequently mixed up with other considerations which outweigh it. 'It is no longer true, if it ever was,' says Torrance, J., in *Park Bros. & Co. v. Blodgett & Clapp Co.*, 64 Conn. 23, 33, 29 Atl. 133, 'that a mistake of law is no ground for relief in any case, as will be seen in the cases hereinafter cited. Whether, then, the mistake in question be regarded as one of law or of fact is not of much consequence. The more important question is whether it is such a mistake as a court of equity will correct; and this, perhaps, can only, or, at least, can best, be determined by seeing whether it falls within any of the well-recognized classes of cases in which such relief is furnished.'"

In *State v. Paup*, 13 Ark. 137, 56 Am. Dec. 303, after stating the general rule, the court said: "Ignorance of law excuses no man." And, quoting from an authority cited to the effect that "there are cases in which a court will interfere on the ground of such mistake in order to relieve a party from the effect of a contract, as, for instance, if one is ignorant of a matter of law involved in the transaction, and another one, knowing it to be so, takes advantage of such circumstances to make the contract, here the court will relieve, although, perhaps, more probably on account of fraud in the one party than of ignorance of law in the other." The Supreme Court of Arkansas says:

"So, if both parties should be ignorant of a matter of law, and should enter into a contract for a particular object, the result whereof would by law be different from what they mutually intended, here on account of the surprise, or immediate result of the mistake by both, there can be no great reason why the court should not interfere in order to prevent the enforcement of the contract and relieve from the unexpected consequence of it. To enforce it would be to permit one party to take an unconscientious advantage of the other and to derive a benefit from a contract which neither of them intended it should produce."

In *Bank v. Arndt*, 69 Ark. 410, 65 S. W. 1052, the whole subject is ably discussed by Judge Battle on a motion for rehearing, and it may be inferred, therefore, was thoroughly considered, and he clearly recognizes the principle announced. Indeed, in reviewing the cases, as it is not unusual with Chief Justice Marshall's decisions, all the cases go back to *Hunt v. Rousmanier*, 8 Wheat. 174, in which he says, at page 175 of 8 Wheat. [5 L. Ed. 589]:

"Although we do not find the naked principle that relief may be granted on account of ignorance of law asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake of law is beyond the reach of equity."

In reviewing the authorities in *Bank v. Arndt*, supra, Judge Battle quotes, in support of that decision, from Story's Equity Jurisprudence, Bispham's Equity, Pomeroy's Equity Jurisprudence, *Snell v. Insurance Company*, 98 U. S. 85, 25 L. Ed. 52, and *Griswold v. Hazard*, 141 U. S. 260, 11 Sup. Ct. 972, 999, 35 L. Ed. 678.

To avoid extending this opinion, which I have found it difficult

to shorten because of the evidence, I cite, as sustaining the conclusion reached, *Champlin et al. v. Laytin*, 1 Edw. Ch. 472; *Clack v. Hadley et al.* (Tenn. Ch. App.) 64 S. W. 403; *Pickett et al. v. Merchants' National Bank of Memphis et al.*, 32 Ark. 352; *Thompson v. Phoenix Ins. Company*, 136 U. S. 295 et seq., 10 Sup. Ct. 1019, 34 L. Ed. 408; *Trenton Terra Cotta Co. v. Clay Shingle Co.* (C. C.) 80 Fed. 46; *Fulton v. Colwell et al.*, 112 Fed. 831, 50 C. C. A. 537; *Chicago & A. Ry. Co. v. Green* (C. C.) 114 Fed. 676; *Elliott v. Sackett et al.*, 108 U. S. 132, 2 Sup. Ct. 375, 27 L. Ed. 678. In *Walden v. Skinner*, 101 U. S. 577, 25 L. Ed. 963, quoting from page 583 of 101 U. S., the Supreme Court say:

"Decisions of undoubted authority hold that where an instrument is drawn and executed that professes or is intended to carry into execution an agreement, which is in writing or by parol, previously made between the parties, but which by mistake of the draftsman, either as to fact or law, does not fulfill, or which violates, the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement; the reason of the rule being that the execution of agreements fairly and legally made is one of the peculiar branches of equity jurisdiction, and, if the instrument intended to execute the agreement be from any cause insufficient for that purpose, the agreement remains as much unexecuted as if the party had refused altogether to comply with his agreement, and a court of equity will, in the exercise of its acknowledged jurisdiction, afford relief in the one case, as well as in the other, by compelling the delinquent party to perform his undertaking according to the terms of it and the manifest intention of the parties. *Hunt v. Rousmanier's Admrs.*, 1 Pet. 1, 13 [7 L. Ed. 27]; *Id.*, 8 Wheat. 174, 211 [5 L. Ed. 589]. Even a judgment, when confessed, if the agreement was made under a clear mistake, will be set aside, if application be made and the mistake shown while the judgment is within the power of the court. Such an agreement, even when made a rule of court, will not be enforced, if made under a mistake, if seasonable application be made to set it aside; and, 'if the judgment be no longer in the power of the court, relief,' says Mr. Chief Justice Marshall, 'may be obtained in a court of chancery.' *The Hiram*, 1 Wheat. 440, 444 [4 L. Ed. 131]."

In *Chicago & A. Ry. Company v. Green*, *supra*, at page 678 of 114 Fed., Judge Philips uses this language:

"The same rule respecting the province of a court of equity to correct mistakes is laid down by Bispham in his work on the *Principles of Equity* (4th Ed.) § 185, as follows: 'A mistake exists when a person, under some erroneous conviction of law or fact, does or omits to do some act which, but for the erroneous conviction, he would not have done or omitted.' And this principle has application to the omission to write into the release the additional consideration of the undertaking that the railway company would assume the payment of the doctor's bill. Thus, Mr. Bispham, at section 190, says that 'where there was an agreement that part of the purchase money of certain real estate should be paid by a judgment note for a certain sum, with interest, and the words "with interest" were omitted from the note by the mistake of the scrivener by whom it was written, it was held that this was such a mistake as equity would correct.' And if in fact this additional consideration to pay the doctor's bill entered into the contract of settlement and was not inserted in the release, either from inadvertence or misconception of the law as to the necessity of inserting it in the instrument to make it operative as a release, such fact does not deny to complainant the assistance of a court of equity to reform it in this respect. As said by the Supreme Court of this state in *Corrigan v. Tiernay* (Mo.) 13 S. W. 401: 'In such cases equity will reform the contract; and this, too, though the instrument fails to express the contract which the parties made, by reason of the mistake of law.' Says Pomeroy: 'In short, if a written instrument fails to express

the intention which the parties had in making the contract which it purports to contain, equity will grant its relief, affirmative or defensive, although the failure may have resulted from a mistake as to the legal meaning and operation of the terms or language employed in the writing.”

The testimony in the case shows that the farm was surrendered by the plaintiff to the defendant before the 1st of January, 1901. A decree, therefore, reforming the deed at this time, would be of no service to the complainant, and would be futile. Courts of equity do not render decrees which give no relief. A decree, therefore, should be entered enjoining the defendant from the prosecution of his suit at law for the rents, pasturage, possession, or damages for the retention of the place from the date of the deed to the 1st day of January, 1901.

Such will be the decree of the court. It is so ordered.

THE C. R. HOYT.

(District Court, D. New Jersey. March 31, 1905.)

1. COLLISION—STEAM VESSELS MEETING—VIOLATION OF RULES.

The tug Hoyt, passing up East river on the Brooklyn side in the daytime, exchanged crossing signals with the ferryboat Fulton, crossing from New York; the Hoyt, as the privileged vessel, being required to keep her course and speed, and the Fulton to cross under her stern. The Fulton, however, held her course, and came so close to the Hoyt that the latter, to avoid collision, when under the Fulton's bows starboarded her helm, throwing her head nearly across the river. During such time the tug No. 9 was coming down the river, and had given three signals to the Hoyt for passing port and port, none of which were answered. After the Hoyt had passed the Fulton, both she and the No. 9 gave alarm signals, ported, and reversed, but were then so near together that a collision occurred. *Held*, that the danger of the Hoyt from the Fulton, which was within full view of the pilot of the No. 9, was a "special circumstance" within the meaning of the rules (23 Stat. 438 et seq., rule 23) which required the latter to slacken speed or to stop and reverse, and that she was in fault for keeping her course and speed; that the Hoyt was also in fault for failing to answer the signals of the No. 9, although not for her maneuver in passing the Fulton.

[Ed. Note.—Collision. Signals of meeting vessels, see note to *The New York*, 30 C. C. A. 630.]

2. SAME—DIVISION OF DAMAGES.

Under the American, and also the English, rule in admiralty, where each of two vessels contributes by her fault to a collision, the damages will be equally divided.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, § 296.]

In Admiralty. Libel and cross-libel for collision.

James J. Macklin, for libelant.

Carpenter & Park, for cross-libelant.

LANNING, District Judge. On August 17, 1895, a collision occurred in the East river, New York, just below the Brooklyn Bridge, and just east of the middle of the river, between steam tug No. 9 and the steam tug C. R. Hoyt. Each of the vessels claims damages against the other. The libelant is the owner of No. 9.

The Derby Transportation Company is the owner of the Hoyt. The libel was filed September 23, 1895, and the answer thereto on June 10, 1896. The first witness for the libelant, John B. Baulsir, the pilot of the ferryboat Fulton, was examined December 2, 1896. On April 9, 1898, George Ward Smith, engineer, John Rennerts, fireman, and Alec Brant, oiler, of steam tug No. 9, were examined. On October 22, 1898, John Curran, pilot of the steam tug Charles H. Senff, and Nicholas Geneo, a laborer employed on a float which steam tug No. 9 was towing at the time of the collision, were examined. On November 3, 1898, the last witness for the libelant, Lorenzo Sheffer, the pilot of steam tug No. 9, was examined. The witnesses for the owner of the Hoyt, Nathan A. Hull, the pilot of the Hoyt, and Charles H. Brashing, her engineer, were examined on April 28, 1900. On the last-mentioned date the counsel in the case stipulated that the testimony of the witnesses taken on that day and theretofore taken should be used and be applicable to any cross-action that might thereafter be instituted. On March 12, 1901, the Derby Transportation Company filed its cross-libel, and not until June 1, 1903, nearly eight years after the collision, did the libelant in the principal suit file its answer to the cross-libel. This record is certainly a remarkable one. The first witness was not examined until more than 15 months after the date of the collision, and the last two witnesses not until nearly 5 years after the collision. The frailty of the human memory renders it necessary to accept with caution the statements of the witnesses, and to determine nothing as a material fact in the case that is not substantially corroborated by other witnesses, or by circumstances and the common experiences of men. I have carefully studied the proofs in the case, and, without incumbering this opinion with a detailed statement of the testimony of the witnesses, which is in many respects flatly contradictory, the following is a narrative of the facts relating to the case as I now find them:

On August 17, 1895, between 8:30 and 9 o'clock in the morning, the ferryboat Fulton pulled out of her slip on the New York side of the East river, for the purpose of crossing to Brooklyn to her slip there, just below the Brooklyn Bridge. The day was perfectly clear. There was an ebb tide, making it necessary for her to starboard her wheel before leaving the slip, as she was to pass up and across the river. Almost immediately after passing out of her slip, she headed up the river. At the same time the Hoyt was passing up the river 300 or 400 feet from the Brooklyn shore; the river being at this point some 1,500 or 1,600 feet in width. The Hoyt was partially loaded with coal, and was passing up near the Brooklyn shore for the purpose of taking advantage of the slack water and avoiding the necessity of making her way against the strong ebb tide in the middle of the river. She was, however, gradually making her way toward the middle of the river, as she intended to cross it and stop at Pier 28 on the New York side, just below the Brooklyn Bridge, to take on some lumber. She was on the starboard side of the ferryboat Fulton, and therefore had the right of way. She gave one blast of her whistle to the Fulton, indicating her intention of

continuing her course and passing across the Fulton's bow. The Fulton answered the signal with one blast, indicating her intention of complying with the signal of the Hoyt and passing behind the Hoyt. The pilots of the two vessels, therefore, understood and agreed upon the signals. But the Fulton, continuing her course, came so close to the Hoyt that the latter vessel was in imminent peril of being run down, and, as she was crossing the Fulton's bow, her pilot starboarded her wheel, so as to throw her stern away from the Fulton's bow and avoid a collision. By this maneuver of the Hoyt her bow was made to point nearly across the river toward the New York side. The Hoyt had escaped collision with the Fulton, but at this point a new peril presented itself. The libellant's steam tug No. 9 was coming down the river with the ebb tide, and very near to the middle of the river, probably slightly on the Brooklyn side of the middle. She is 90 feet in length. She had in tow, lashed to her starboard side, a car float 214 feet in length. The stern of the float and the stern of No. 9 were about even with each other. Just before reaching the Brooklyn Bridge, or possibly at about the time of reaching it, and just previous to the Hoyt's crossing the bow of the Fulton, the pilot of No. 9 gave to the Hoyt a signal of one whistle, thus indicating that No. 9 intended to pass the Hoyt port to port. The Hoyt gave no response to the signal of No. 9. At the moment of this signal the Hoyt and No. 9 were, as the pilot of No. 9 says, not more than 700 feet apart. Very shortly afterwards, either at the bridge or just below it, No. 9 gave another signal of one whistle to the Hoyt, which was not answered. Very shortly after the second signal had been given by No. 9 she gave a third signal to the Hoyt, which was not answered. At this instant, I am satisfied, the Hoyt was rounding, or possibly had just rounded, the bow of the ferryboat Fulton. Shortly after No. 9 had given her third signal, and, as I think, when the Hoyt was headed across the river as though she intended to pass in front of No. 9, both No. 9 and the Hoyt sounded danger whistles. They were then very near together. It would have been foolhardy for the pilot of the Hoyt to have attempted to cross the bow of No. 9. The pilot of the Hoyt, who had hard starboarded his wheel for the purpose of getting around the bow of the Fulton, now seeing the danger of collision with No. 9, reversed his engine and hard ported his wheel so as to pass on the port side of No. 9, and the pilot of No. 9 hard ported his wheel and gave a jingle bell for full speed, that a collision between the two tugs might be avoided. But these movements were too late. The Hoyt struck No. 9 amidships at an angle of about 45 degrees. Both of the vessels were considerably damaged. No. 9, to the very moment of giving her danger signal, had continued her straight course down the middle of the river at full speed, notwithstanding she had received no answer to any of her signals. This appears from the admissions of the pilot of No. 9, as follows:

"Q. When did you say you blew the second whistle to the Hoyt? A. Off the abutment of the Brooklyn Bridge on the Brooklyn side. Q. What answer

did you get to that? A. I got no answer. Q. You were still going ahead full speed? A. Certainly. Q. Then what did you do? A. I blowed my third long whistle. Q. What? A. I blowed another whistle off the ferry slip. Q. A single whistle? A. Yes, sir, I did—a long whistle. Q. Off which ferry slip? A. Off the Brooklyn Ferry Slip on the Brooklyn side. Q. Which one, the down river slip or the up river slip? A. Oh, it was just after opening [?] the upper slip. I blowed the three whistles not a great ways apart. Q. Were you going full speed? A. Yes, sir. * * * Q. Where were you when you blew the alarm signal? A. Well, it was very shortly after I blowed the last long whistle. She was coming over pretty well then. Q. Still going full speed? A. Yes, sir. Q. When you blew the alarm? A. Yes, sir."

At the time of the accident the regulations for preventing collisions were contained in chapter 354 of the Laws of 1885 (23 Stat. 438). The articles of that act applicable to the case in hand are as follows:

"Art. 15: If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard so that each may pass on the port side of the other.

"Art. 16: If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other."

"Art. 18: Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary.

"Art. 19: In taking any course authorized or required by these regulations, a steamship under way may indicate that course to any other ship which she has in sight by the following signals on her steam whistle, namely: One short blast to mean 'I am directing my course to starboard,' two short blasts to mean 'I am directing my course to port,' three short blasts to mean 'I am going full speed astern.' The use of these signals is optional, but if they are used the course of the ship must be in accordance with the signal made."

"Art. 22: Where by the above rules one of two ships is to keep out of the way, the other shall keep her course.

"Art. 23: In obeying and construing these rules due regard shall be had to all dangers of navigation and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

The Pilot Rules for Atlantic and Pacific Coast Inland Waters in force at the time of the collision, necessary to be here referred to, are as follows:

"Rule 1. When steamers are approaching each other 'head and head', or nearly so, it shall be the duty of each steamer to pass to the right or port side of the other; and the pilot of either steamer may be first in determining to pursue this course, and thereupon shall give, as a signal of his intention, one short and distinct blast of his steam whistle, which the pilot of the other steamer shall answer promptly by a similar blast of his steam whistle, and thereupon such steamers shall pass to the right or port side of each other. But if the course of such steamers is so far on the starboard of each other as not to be considered by pilots as meeting 'head and head,' or nearly so, the pilot so first deciding shall immediately give two short and distinct blasts of his steam whistle, which the pilot of the other steamer shall answer promptly by two similar blasts of his steam whistle, and they shall pass to the left or on the starboard side of each other.

"Rule 2. When steamers are approaching each other in an oblique direction (as shown in diagram of the fourth situation) they shall pass to the right of each other, as if meeting 'head and head', or nearly so, and the signals by whistle shall be given and answered promptly, as in that case specified."

Article 16 of the above-mentioned regulations shows that, as between the ferryboat Fulton and the Hoyt, the latter was the

privileged vessel, and it was the duty of the Fulton to keep out of the way of the Hoyt. She did not do so. As between the steam tug No. 9, which was going down the river on the Brooklyn side of the middle thereof, and the Hoyt, which was passing up the river nearer to the Brooklyn side, but gradually making her way out toward the middle of the river, it is clear that No. 9 and the Hoyt were meeting "nearly end on, so as to involve risk of collision." By article 15 of the regulations it was therefore the duty of each, if nothing had intervened to prevent it "to alter her course to starboard, so that each might pass on the port side of the other." By rule 1, above given, the pilot of No. 9 had the right to give a signal of one blast, indicating his intention to pass the Hoyt on her port side. But before No. 9 and the Hoyt had passed each other, a "special circumstance" intervened which, by the provisions of article 23, rendered a departure from article 15 and rule 1 necessary in order to avoid immediate danger to the Hoyt. The day was clear. When the pilot of No. 9 blew his first signal, he was not more than 700 feet from the Hoyt. The Hoyt and the Fulton were therefore in his full view, and, if he had been reasonably attentive to his duty, he must have seen the danger which suddenly confronted the Hoyt and produced the "special circumstance" which rendered a departure from the usual rules necessary. The pilot of No. 9 blew three signals without receiving any reply from the Hoyt. By continuing on his course at full speed he incurred serious risk of collision. In such circumstances, article 18 made it his duty to slacken his speed, or to stop and reverse if necessary. I have no difficulty in reaching the conclusion that the collision would not have occurred if the pilot of No. 9 had followed the regulations and managed his vessel with reasonable prudence. The Hoyt was properly proceeding in her course until she faced the danger of a collision with the Fulton. By force of article 22 the Hoyt was bound to keep her course. The effect of the decision in *The Britannia*, 153 U. S. 139, 14 Sup. Ct. 795, 38 L. Ed. 660, in construing a similar regulation, is that the pilot of the privileged vessel must continue his course without assuming that the obligated vessel will not yield to him in accordance with the signals already exchanged. In *The Delaware*, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771, it appears that two vessels, the Delaware and the *Talisman*, were approaching each other on crossing courses. The *Talisman* was on the starboard side of the Delaware. The Delaware was therefore bound to keep out of the way and the *Talisman* to keep her course. The Delaware continued on her course, and struck and sunk the *Talisman*. The Delaware was, of course, at fault. It was insisted that the *Talisman* was also in fault, it appearing that, when the Delaware was about a mile off, the *Talisman* blew a single blast of her whistle, which was not answered; that, when the Delaware was a quarter to an eighth of a mile off, she sounded another single blast, which was not answered; and that, when the Delaware was about a length off, the *Talisman* sounded an alarm signal, but did not change her helm or reduce her speed before the collision. It

was charged that the *Talisman* ought to have stopped and reversed her engine when the failure of the *Delaware* to take measures to avoid her became apparent. In commenting upon this point, the court said:

"In *The Britannia*, 153 U. S. 130, 14 Sup. Ct. 795, 38 L. Ed. 660, which was also a case of starboard hand collision, the preferred steamer, the *Beaconsfield*, was held to have been in fault for stopping and reversing under similar circumstances: in other words, for doing what it is claimed the *Talisman* should have done in this case. Two members of the court dissented, upon the ground that the *Beaconsfield*, having been brought into a position of peril by the negligence of the *Britannia*, was not in fault for stopping and reversing; the substance of their opinion being that, under such circumstances, the master might exercise his judgment as to the best method of avoiding a collision, and that an error in judgment should not be imputed to him as a fault. In neither opinion, however, was it intimated that, if the *Beaconsfield* had kept her speed, she would have been in fault for so doing."

It was held that the cases of *The Britannia*, *supra*, and *The Northfield*, 154 U. S. 629, 14 Sup. Ct. 1184, 24 L. Ed. 680, settled the law that the preferred steamer will not be held in fault for maintaining her course and speed so long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty. The court further said:

"If the master of the preferred steamer were at liberty to speculate upon the possibility, or even of the probability, of the approaching steamer failing to do her duty and keep out of his way, the certainty that the former will hold his course, upon which the latter has a right to rely, and which it is the very object of the rule to insure, would give place to doubts on the part of the master of the obligated steamer as to whether he would do so or not, and produce a timidity and feebleness of action on the part of both, which would bring about more collisions than it would prevent."

The conclusion reached was that there was too much doubt about the fault of the *Talisman* to justify the court in apportioning the damages. The decision in the case of *The Delaware* makes it clear that the *Hoyt* was not at fault in continuing on her course in accordance with the signals exchanged between her and the *Fulton*. The peril of a collision between the *Hoyt* and the *Fulton* justified the pilot of the *Hoyt* in starboarding his wheel so as to throw the stern of the *Hoyt* away from the bow of the *Fulton*, even though by this maneuver the bow of the *Hoyt* was pointed directly across the course of No. 9. In this maneuver the pilot of the *Hoyt* was not at fault.

But in another respect I think he was at fault. He admits that he heard at least two of the signals of No. 9, and that he answered neither of them. If his tug, at both of the times when he heard the signals of No. 9, was in such imminent peril of a collision with the *Fulton* as to excuse him for his failure to answer those signals, or either of them, he should have shown it. His silence on this point must be construed against him. He says that when he was directly across the *Fulton's* bow No. 9 was 400 or 500 feet away from him; that when No. 9 gave her last signal of one blast she was 300 or 400 feet away from him; that he was not going fast; that No. 9 and the *Hoyt* each blew a danger signal, but that he is uncertain which one first gave such signal; and that he, about the time

of giving his danger signal, reversed his engine. He also testified as follows:

"Q. When you sent down the bells to reverse your engines, where were No. 9 and the car float? A. Oh, I should judge they were three or four hundred feet to the eastward of me up the river. Q. On which hand? A. They were on my starboard hand as I was then; they were on my starboard hand as my boat was in that position. Q. How much on your starboard hand? A. Oh, they were a good deal on my starboard hand."

He has failed to show that, after passing the point of danger of collision with the *Fulton*, he acted with promptness in the discharge of a plain duty to No. 9. It is clear that he heard at least one of the signals of No. 9 before crossing the bow of the *Fulton*, and that he had failed to respond to that signal. With the proof of such neglect of duty and violation of the navigation rules before me, he is not entitled to any presumptions in his favor. Indeed, inasmuch as he says that, after rounding the bow of the *Fulton*, No. 9 was a "good deal" on his starboard hand, the question arises whether, instead of hard porting his wheel so as to pass on the port side of No. 9, he should not have starboarded his wheel and passed down the river, thus giving No. 9 a better opportunity, by starboarding her course, to escape danger. As the pilot of the Hoyt has failed to make this point clear, and as, by failing to respond to the first signal of No. 9, he had inexcusably violated article 15 and rule 1, above quoted, I conclude that he ought to be held jointly responsible with the pilot of No. 9 for the accident.

The damages, therefore, must be divided between the two vessels. In the old admiralty practice of England there was a question as to whether, when two vessels were both at fault in a collision, the damages should not be apportioned according to the degree of fault. But the rule in the English practice is no longer in doubt. In *Cayzer v. Carron Company*, 9 App. Cas. 881, Lord Blackburn said:

"When the cause of the accident is the fault of both, each party being guilty of blame which causes the accident, there is a difference between the rule of admiralty and the rule of common law. The rule of common law says, as each occasioned the accident, neither shall recover at all, and it shall be just like an inevitable accident; the loss shall lie where it falls. Admiralty says, on the contrary, if both contributed to the loss, it shall be brought into hotchpotch and divided between the two. Until the case of *Hay v. Le Neve* [2 Shaw, App. 395], which has been referred to in the argument, there was a question in the admiralty court whether you were not to apportion it according to the degree in which they were to blame; but now it is, I think, quite settled, and there is no dispute about it, that the rule of the admiralty is that if there is blame causing the accident on both sides they are to divide the loss equally, just as the rule of law is that if there is blame causing the accident on both sides, however small that blame may be on one side, the loss lies where it falls."

This rule has been frequently recognized in the admiralty courts of this country, and especially in the case of *The North Star*, 106 U. S. 17, 1 Sup. Ct. 41, 27 L. Ed. 91.

There will be an interlocutory decree that the vessel which received the greater damage shall recover from the other one-half of the difference between the amounts of their respective losses. This is in accord with the rule stated in *The Manitoba*, 122 U. S.

111, 7 Sup. Ct. 1158, 30 L. Ed. 1095. There will also be a reference to a commissioner to take proofs for the purpose of ascertaining the amount which shall be assessed in favor of the vessel receiving the greater damage.

McVICAR REALTY TRUST CO. v. UNION RY. POWER & ELECTRIC CO.
et al.

(Circuit Court, D. New Jersey. April 28, 1905.)

1. MORTGAGE—FORECLOSURE—NEGOTIABLE BONDS—FRAUD.

On a suit by a trustee to foreclose a mortgage securing negotiable bonds, *held* that, while the general rule is that a holder of such securities purchased in the open market is a bona fide holder, and the burden of proof is upon him who would attack such title, nevertheless when the mortgage and bonds are found to have been without consideration, and fraudulent in their inception, the burden shifts, and the holder must show that he was an innocent purchaser.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Bonds, § 222.]

2. SAME—EVIDENCE—BONA FIDE HOLDERS.

Held, also, under the evidence, that the mortgage and the bonds in question were fraudulent, and without consideration, and that those claiming to hold the bonds were not bona fide holders.

(Syllabus by the Court.)

In Equity.

Northrop & Griffiths, for complainant.

McCarter, Williamson & McCarter, for defendants.

CROSS, District Judge. The complainant is trustee under a mortgage executed by the defendant Union Railway Electric Company, which purports to have been issued to secure \$100,000 of its bonds of the par value of \$500 each, with interest thereon at the rate of 6 per cent. per annum, payable semiannually. The bill of complaint was filed to foreclose this mortgage, and among other things alleges that subsequent to its execution 112 of such bonds were issued. The mortgage was dated July 1, 1902, and the bonds were to run for a period of 20 years. The Union Railway Power & Electric Company was organized May 12, 1902, under the laws of the state of New Jersey, with a nominal capital of six million of dollars. The main promoter of the company was one Frank C. Hollins, who had at the time an office in Wall street, in the city of New York, where he conducted business under the name of F. C. Hollins & Co. His office adjoined that of J. F. Pierson, Jr., & Co., of which latter firm his son was a member. Subsequently Hollins procured the incorporation of a new company, known as the American Union Electric Company. This corporation had a nominal capital of seven millions of dollars, and almost its earliest act was to authorize the purchase of 90 per cent. of the capital stock of the Union Railway Power & Electric Company, after which it immediately took possession of all the assets of that company. These assets consisted of property belonging to the several subsidiary companies which Hollins had bought up prior to its incorporation, and which had been turned

over to it when it was incorporated. It should be said at this point that it appears incontrovertibly from the testimony that both of the above-mentioned corporations were of the flimsiest character. Each of their boards of directors was what is popularly known as a "dummy" board. The testimony shows that the directors had only a nominal interest in their respective corporations; that they knew absolutely nothing of their affairs; that such resolutions as were adopted at the meetings of the boards were prepared in advance in a lawyer's office, and were introduced and passed by the directors without any knowledge as to their propriety, importance, or effect. They even testified—or some of them did—that they did not know where the property of their corporations was situated, and, although the board of directors of the mortgagor passed a resolution that that company was indebted to the American Union Electric Company in the sum of \$57,000, yet as a matter of fact they could not testify whether that company was so indebted or not. Many of the statements of these directors show such alarming ignorance, and such utter disregard of official duty as seem incredible. It would take pages to properly set forth and characterize them, but this is wholly unnecessary.

The corporation last organized practically had no property except such as it acquired from the earlier company, and this was of inconsiderable value. It is now in the hands of Frederick K. Day, receiver, who has filed an answer herein, setting up that the mortgage under foreclosure was and is fraudulent, and without consideration, and his interest in this suit lies in the fact that, if he succeeds, the stock of the mortgagor company which he holds as receiver will have some value. It is unnecessary to go into the evidence in detail to show that the mortgage was of this character. Suffice it to say that beyond question the allegations of the answer in the above respects are proven. As above stated, there is no evidence to show that at the time the bonds under this mortgage were issued there was any indebtedness due from the Railway Power & Electric Company to the American Union Electric Company, as a resolution of the former company declared when it issued the bonds. Instead of having been issued to pay any such indebtedness, they appear to have been issued for the purpose of reimbursing Hollins for moneys which he had expended for the running expenses of the subsidiary companies taken over by the mortgagor. These advances, however, under his agreement made with the owners, corporate and individual, of the various concerns so bought up and taken over, were to be made without security, and without payment other than from the profits which he might derive from the sale of the stock of the Union Railway Power & Electric Company. The clear understanding of such owners with Hollins was that they were to take stock in said corporations for their properties, that he was to make the necessary advances to run the same, that he would accept like stock in payment for such advances, and that there should be no mortgage put upon the property. The doubtful character of the mortgage under foreclosure was so clearly shown while

the testimony was being taken that counsel for the complainant promptly withdrew all claim on the outstanding 112 bonds, excepting 24, which are claimed to have been purchased by the Misses Hollins, daughters of said Frank C. Hollins. There are three of these ladies interested equally in the 24 bonds above mentioned, and counsel contends that they are bona fide holders thereof, and that as to these bonds the mortgage is a valid and subsisting lien against the property described in said mortgage.

The rule of law in general is that the burden of proof is upon the defendant to show that a person holding negotiable securities purchased in the open market is not a bona fide holder; but, while this is so, nevertheless in cases where there is clear proof of fraud or illegality shown in the issue of such securities the burden of proof shifts, and the holder is then required to show that he is an innocent purchaser. The question for present consideration, then, is this, were the Misses Hollins bona fide holders of the 24 bonds in question? The principal evidence offered to maintain this contention is given by one Lamberson and by one of the three Misses Hollins. The other two ladies, although equally interested, were not sworn, nor was their absence accounted for, although it appears that they all lived in the city of New York. I am not disposed to give much credence to the testimony of the one who was sworn, both because at various points it was contradicted by that of the witness Lamberson, and because of her unwillingness to testify fully, or at all, on several material points. Her story is that she and her sisters invested about \$9,000 in 24 of these bonds in the year 1902; that she had had previous investments in various stocks and bonds; that some of these were sold, and the bonds in question purchased from the proceeds of the sale of such earlier investments. She further states that she received the bonds from her brother, who was a member of the firm of J. F. Pierson, Jr., & Co., and that the particular stock which had been sold and the proceeds of which were invested in these bonds was Steam Pump preferred, which, however, she says had been sold without her direction. Lamberson, on the contrary, says that he delivered the bonds to her, but took no receipt therefor, and adds that they were purchased with the proceeds of an entirely different stock than the one she alleges. Furthermore, she cannot say of whom or when she purchased the Steam Pump preferred. On cross-examination the witness, under the advice and direction of her father, who was sitting by, refused to answer any questions which would tend to throw light upon the transaction. Among these questions were the following: "How many shares of Steam Pump preferred were sold when these bonds were purchased? What is Steam Pump preferred? How long had you owned the Steam Pump preferred? By whom had you obtained it? What had you paid for it? Was the Steam Pump preferred bonds or stock?" There were many other similar questions which the witness either declined to answer at all or to which she simply answered, "I do not care to say." Under these circumstances, if her testimony is discredited, she had no one to blame but herself.

The matter was a proper one for investigation, and when pertinent and proper questions were put to her by counsel on cross-examination she took refuge in silence. Of the witness Lamberson it may be said that he was a clerk both in the office of Frank C. Hollins and in the office of J. F. Pierson, Jr., & Co., but was not a member of either firm. Much in his evidence is manifestly superficial, and some of it hearsay. For instance, in one place, in answer to the following question, "And all that you know about the rest of it is that J. F. Pierson, Jr., & Co. told you that these bonds were to be held for the Misses Hollins in lieu of what they owned them?" He answered, "Which bonds?" and upon it being explained that the bonds referred to were the bonds of the Union Railway Power & Electric Company, he answered, "Yes." Furthermore, his evidence is not only uncertain and self-contradictory, but is contradicted by that of Miss Hollins, whose claim he is endeavoring to support. It is quite obvious, therefore, that but little reliance can be placed upon it. It should be added in this connection that Frank C. Hollins says in his testimony that he himself sold the bonds to his daughters, and it also appears by the testimony of one Bailey, after Miss Hollins says she owned the bonds, that Hollins told him (Bailey) that he had given \$12,000 of the bonds to a married daughter, and added that he had all of the bonds in his safe, including his daughter's. There is also evidence which shows that both Lamberson and the firm of J. F. Pierson & Co. must have known all about the inception, character, and comparative worthlessness of these bonds. Upon what theory, then, did they sell other securities belonging to Miss Hollins without her request, and substitute these bonds? Her own brother was a member of that firm, and if we take her testimony it was he who delivered the bonds to her. Why did she take them without objection? Or, if she did object, why has she not told us so, and told us why? Why is it that no member of this firm was called as a witness? They knew all there was to know about the affair, and could have told us whether the Misses Hollins were bona fide holders. Then, too, it must be borne in mind that the Miss Hollins who testified did not deny that she and her sisters knew of the tainted character of these bonds. For all that appears from her testimony, she may have known all that her father or brother knew. An obvious intent to cover up and conceal appears throughout this part of the case, which does not bespeak the favorable consideration of the court.

Under the circumstances detailed—and they might be added to almost indefinitely—it is impossible to escape the conclusion that the Misses Hollins are not bona fide holders of the bonds they claim to own. We are rather inclined to think, as was suggested by counsel of the defendant, that this whole matter is but an attempt on the part of Frank C. Hollins to secure a portion of the bonds, the whole issue of which in the first instance he intended for himself.

The bill of complaint will be dismissed, with costs.

THE SANTURCE.

(District Court, S. D. New York. March 27, 1905.)

SALVAGE—AMOUNT OF AWARD—TOWING DISABLED VESSEL AT SEA.

The freight steamer Santurce, on a voyage from Porto Rico to New York, when in the vicinity of the Bahamas became almost wholly disabled by the breaking of her propeller blades, and, after proceeding with sails for three days, in answer to her distress signals was taken in tow by the Rosewood on a voyage from Portugal to New Orleans, with a cargo of ore, and towed to Nassau, a distance of about 240 miles. The service delayed the Rosewood about $2\frac{1}{4}$ days, and she was subjected to some danger, owing to unfavorable weather. The time was early in January, and the Santurce was in a position of considerable peril. Each vessel was of a net tonnage of about 1,100. The Santurce, with cargo and freight, was of a value of \$210,000; and the Rosewood, \$70,000. *Held*, that the Rosewood was entitled to a salvage award of \$10,000, in addition to disbursements; 25 per cent. to go to the officers and crew.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Salvage, §§ 80-83.

Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.]

In Admiralty. Suit to recover salvage.

Convers & Kirlin and John M. Woolsey, for libellant.

Wing, Putnam & Burlingham, for claimant.

ADAMS, District Judge. This was an action brought by Richard C. Oliver, master of the steamship Rosewood, against the steamship Santurce, to recover salvage compensation, with disbursements, for services rendered to her and cargo, in the vicinity of the Bahama Islands from January 4th to 6th, 1905.

On the 18th of December, 1904, the Santurce arrived at Porto Rico from New York with two propeller blades gone and upon the advice of surveyors there, she loaded only a small cargo of sugar, about 363 tons, for the return voyage, while her carrying capacity was 2000 tons. She was trimmed about 6 feet by the stern. Her draft was 7 feet 3 inches forward and 13 feet 10 inches aft. On the 28th of December, she started for New York, under easy steam, aided by her fore and aft sails. She carried a spare propeller between decks. On the 31st of December, when in latitude $26^{\circ} 32'$, longitude $68^{\circ} 59'$, the greater portion of all of her propeller blades was carried away. The wind being favorable, she then set four regular stay sails and try sails, measuring 2873 feet, and used her awnings to make four additional sails, measuring 2125 feet. She changed her course towards Nassau, seeking an opportunity in some harbor to ship the spare propeller, the master intending, however, to keep away from dangerous locations and if assistance were not obtained, to attempt to reach the coast of the United States. On January 1st she made 93 miles, on the 2nd 82 miles, and on the 3rd 61 miles. In the afternoon of the 3rd, the Rosewood was sighted and signalled by a rocket, the Santurce burning distress signals. The Rosewood approached to within about a half of a mile and stopped, whereupon the Santurce's chief mate went to the former in a small boat.

The Rosewood was bound from Portugal to New Orleans, with a cargo of ore. She was deeply laden, having at the beginning of the voyage, a freeboard of but 1 foot and 10 inches. She sighted the signals of the Santurce about 5.30 o'clock P. M. and bore down upon her, and received the chief mate of the Santurce. An agreement was then made to tow the latter to Nassau.

Both vessels were cargo steamers of about the same dimensions. The Rosewood was 259 feet long. Her tonnage was 1737 gross and 1104 net. The Santurce was 255 feet long. Her tonnage was 1836 gross and 1122 net. The latter was a single screw vessel equipped with a four bladed propeller, 12 feet in diameter, the length of the blade having been about 5 feet and the diameter of the boss about 2 feet. The value of the Santurce was \$175,000, her cargo \$34,178.78, and her freight \$1093.50. The value of the Rosewood was \$70,000.

After the agreement to tow was made, no steps were taken that evening to carry it into effect, owing to darkness coming on and the weather being boisterous, but in the morning of the 4th, a steel wire bridle having been prepared on the Rosewood, a buoy from her to the Santurce was floated down, by means of which a 12 inch manilla hawser was run between the vessels. The tow started, about 8.30 A. M. very slowly at first, the Rosewood's engines making only 15 or 16 revolutions per minute, but gradually increasing to 30 revolutions at 11 o'clock and to 32 at 1 o'clock P. M. Her full speed of 54 revolutions was not attained until the next day. There is some difference between the vessels with respect to the positions they were in when the towage began, the Rosewood putting the longitude at $73^{\circ} 23'$ and the Santurce $73^{\circ} 35'$. This variance would make a difference of about 11 miles but being so slight, it is not important to determine which was correct.

It is claimed by the libellant that the weather was stormy and the sea rough on the 4th, 5th, and 6th, and by the Santurce that they were moderate. It is probable that the views of the witnesses were somewhat influenced by their respective interests, as well as by the difference in the freeboards of the vessels, the Santurce being so high out of the water that the waves seemed small to those on her, while the deep immersion of the Rosewood tended to increase the estimates of her crew as to the severity of the weather. The testimony shows that the winds were high and the sea rough but nothing occurred to do any damage, except some wear on the towing apparatus, and the weather may be regarded as not very perilous to either vessel. It is no doubt true that towing on the ocean is always attended with more or less risk to both vessels and the existence of some danger must be considered, even though it turns out to have been slight.

During a part of the towing the wind was fair and part of the time somewhat adverse. The testimony in this respect shows that the services of the Rosewood were timely and necessary, though it is possible that the Santurce might by her sailing power have avoided any danger of stranding by keeping away from the vicinity of the Bahama Islands, but she would have been subject to it

from easterly storms on the coast of the United States. Her master, however, recognizing the necessity for assistance, caused distress signals to be exhibited and quickly availed himself of the Rosewood's services.

The vessels reached the vicinity of Nassau about 11:15 A. M. the morning of the 6th and anchored. Subsequently the Rosewood took on 15 tons of coal, communicated with her owners and, late in the afternoon, proceeded on her voyage to New Orleans. The Santurce secured the services of a tug and was taken into the inner harbor, where she was tipped by the shifting of cargo, her broken propeller was removed and the spare one shipped by her own men, with the aid of carpenters from the shore making floats. The work was completed on the 17th of January and her cargo being properly stowed, she started for New York the 19th, reaching there the 24th.

Nothing of importance occurred during the towing to Nassau. The Rosewood lost of actual time in getting on her original voyage again about $2\frac{1}{4}$ days. On her voyage to New Orleans, she was bound on a course which would have brought her in the vicinity of the Great Abaco Light, or the Hole in the Wall, therefore, she did not deviate very much in rendering the service. Many of the elements of meritorious salvage services, however, are present in this case. They were rendered with promptitude, and some skill and energy exhibited. There was some risk in rendering the service owing to unfavorable weather, as well as to the hazard which always accompanies an undertaking of this kind. Property of considerable value was rescued from a position of some danger. It is urged that the Santurce was in the track of commerce and doubtless would have received other assistance. No other efficient vessels, however, came to her aid and if they had, would doubtless have been entitled to as much salvage compensation as will be granted here.

Another feature of the case is the claim that the propeller of the Santurce still retained some efficiency. It is estimated that 10% of the original power remained but it is obvious that there was not enough to give the navigating officers any confidence in the steamship's ability to take care of herself, hence the exhibition of distress signals and the resort to the first available assistance. It is probably true that the steamship was almost completely disabled, as her log shows, so far as her own motive steam power was concerned in any adverse weather and it satisfactorily appears that her sailing power was dependent upon favorable winds, which were uncertain. Her propeller was used during the sailing and towing but apparently more for the purpose of allowing it to turn with a view to removing resistance than from any actual aid it would afford in the progress, although the log says in one place it was to assist the sails. When the Rosewood was asked for aid, she was advised that the Santurce was helpless. When aid is rendered upon such a representation, it is questionable whether the party making it is not estopped from denying that such was the condition. However that may be, I regard that the Santurce was,

for the purposes of the case, in practically a helpless condition and in great need of the Rosewood's assistance. There is no testimony to show that there was any available anchorage among the reefs of this vicinity and it was doubtless advisable for this reason also that the Santurce should have aid.

The Rosewood was no doubt subjected to some danger in the ocean towing, as alluded to above, and the evidence shows that the thrust block had been started and the tail and shaft worn down, apparently owing to the pressure involved in the towage. The distance towed was about 240 miles.

The Rosewood is entitled to be reimbursed for the actual expenses incurred. It appears by agreement, that certain expenses at Nassau should be allowed: They amounted to \$216 44

Other claims are made on behalf of the Rosewood as follows:

Detention due to towage, on the basis of $2\frac{1}{4}$ days at demurrage rate provided for by charter £30 per day.....	\$327 37
Removing bolts on warping chocks started by the strain of towage	15 00
Damage to thrust block.....	60 00
Estimated delay in making engine room repairs, 3 days @ \$145.50	436 50
Expense of replacing new wire hawser, injured in towage..	50 00
It is claimed that the steamship had expected to arrive in New Orleans on the 7th of January and she did not reach there by reason of these services until several days later, and thus was forced to employ men to hastily put up shifting boards in order to save a cancelling date of charter, which would otherwise have been done by the crew on board	185 00

The figures given in connection with many of the items are mere estimates and several of the claims are not in a condition to be allowed as disbursements or as actual losses. The only ones legally proved are \$216.44, \$327.39 and \$185, making \$728.81, which the owners of the Rosewood are entitled to recover. The remainder of the items can not be specifically allowed, owing to deficiency of proof, but the fact that the Rosewood was liable to be put to some expense in these particulars may be considered in making the salvage award.

The question of the proper amount of salvage to be allowed is a difficult one. The libellant asks for from \$12,000 to \$15,000 in addition to the total of the items given above. The claimant urges that \$50 per hour while towing (\$2,500) and \$25 per hour while lying by (say \$500), or \$3,000 in addition to the disbursements of about \$400 according to the claimant's contention, and an allowance of \$500 to \$600 to the master and crew, so that the entire recovery shall not exceed \$4,000, will be ample.

Numerous authorities have been cited on both sides, but none closely in point. Many of them were passenger carrying vessels and not applicable here for that as well as other reasons.

The libellant urges that a good basis on which to start a com-

pensation would be to take a number of similar values and compute the rate allowed for the towage of \$1,000 worth of value for one mile and submits the following list of cases:

Name.	Miles.	Thousands.	Award.	Rate.
California 36 Fed. 563.	250	260	15,000	.23
Benison 36 Fed. 793.	60	200	7,000	.583
Tancarville 45 Fed. 903.	360	87	8,000	.255
Wellington 52 Fed. 605.	150	100	12,500	.833
Akaba 54 Fed. 197, 4 C. C. A. 281.	130	130	30,000	1.775
Great Northern 72 Fed. 678.	125	100	10,000	.80
Dupuy de Lome 60 Fed. 921, 9 C. C. A. 292.	97	110	18,700	1.76
Chinese Prince 61 Fed. 697.	70	250	5,000	.285
Phoenix 62 Fed. 487, 10 C. C. A. 506.	300	160	20,000	.417
Florence 71 Fed. 527, 18 C. C. A. 240.	140	240	8,500	.252
Alaska 75 Fed. 430.	250	150	7,500	.20
Catalina 105 Fed. 633, 44 C. C. A. 638.	60	200	2,400	.20
Erin 36 Fed. 712.	240	26	4,000	.64

It is urged that The Florence and The Tancarville, *supra*, cases in this district, are fair analogies to be used as guides in the present case and that an average between the two, .253, taking the distance towed here as 240 miles and the value as \$210,000, would bring this award to \$12,751.20.

The claimant of the Santurce also submits a list of cases as follows:

Values not over \$200,000.			
Salved Vessel.	Value Salved.	Service.	Award.
Saragossa 1 Ben. 551, Fed. Cas. No. 12,334.	\$100,000	4 hours, 65 miles.....	\$ 900
Saragossa 1 Ben. 553, Fed. Cas. No. 12,335.	100,000	34 hours	9,000
Rebecca Clyde 5 Ben. 98, Fed. Cas. No. 11,621.	70,000	9 hours, lost 24 hours.....	4,000
E. B. Souder..... 7 Ben. 550, Fed. Cas. No. 4,455.	200,000	18 hours, 100 miles.....	3,000
15 Blatch, 185, Fed. Cas. No. 4,458.		Reduced on appeal to.....	1,000
Rosedale 20 Fed. 447.	100,000	2 hours, and passengers forwarded	1,000
Swiftsure 29 Fed. 462.	185,000	Fog, 15 miles	4,000
Erin 36 Fed. 712.	26,000	240 miles, Dangerous coast	4,000

Benison	199,500	10 hours. Hawser broken. Benison having had stem carried away by collision	7,500
36 Fed. 793.			
Pomona	14,330	240 miles to Charleston, S. C.	2,000
37 Fed. 444.			
Tancarville	87,432	50 hours towage to New York	8,200
45 Fed. 903.			
Sirius	143,539	Towage 320 miles to San Diego (4 days)	8,000
57 Fed. 851, 6 C. C. A. 614.			
Akaba	130,000	Towage from off Hatteras to Hampton Roads (three days)	30,000
54 Fed. 197, 4 C. C. A. 281.			
Phoenix	160,000	Four days towing in February, 375 miles in gales and fog to Hampton Roads	20,000
62 Fed. 487, 10 C. C. A. 506.			
Great Northern	100,000	Broken shaft off Hatteras. Towed 125 miles to Hampton Roads	10,000
72 Fed. 678.			
Gambetta	26,500	Disabled; towed 520 miles to mouth of the Mississippi	2,216
74 Fed. 260, 20 C. C. A. 417.			
Alaska	152,250	Str. out of coal, towed 250 miles to New York	7,500
75 Fed. 430.			
Waverly	67,000	Engine broken down, towed 20 miles to Milwaukee...	1,500
78 Fed. 191.			
Elm Branch	150,000	Steamer without propeller towed by ocean tug into Port Townsend	8,175
106 Fed. 952.			
Values over \$200,000, not exceeding \$400,000.			
Adirondack	\$300,000	5 days, 662 miles.....	\$ 7,500
2 Fed. 387.			
Leipsic	264,000	24 hours, 125 miles	3,750
5 Fed. 108.			
Leipsic	264,000	24 hours, 125 miles. Increased to \$5,500 on appeal.	
10 Fed. 585.			
D. Steinman	252,000	Towage, 630 miles.....	25,000
19 Fed. 918.			
California	260,000	Towage, 300 miles. Lost a week by putting back....	15,000
36 Fed. 563.			
Veendam	375,000	Towage, 191 miles while engines repairing. Veendam then came to port unassisted	8,500
46 Fed. 489.			
Dupuy de Lome	224,600	4 days' towage during a 'Norther' in Gulf Mexico	18,716
60 Fed. 921, 9 C. C. A. 292.			
Chinese Prince	250,000	69 miles to Charleston....	5,000
61 Fed. 697.			
Hekla	213,300	Cattle steamer turning back and towing passenger steamer 750 miles (lost 12 days)	30,000
62 Fed. 941.			
Spokane	320,000	Towed from off Manistee in L. Michigan to Milwaukee during storm. 24 hours' delay	3,600
67 Fed. 254.			
City of Para	335,000	Passenger steamer towed 325 miles into Hampton Roads	7,554
69 Fed. 479.			
Florence	240,000	Towage 140 miles to N. Y., with 4 to 5 days' delay..	8,500
65 Fed. 248.			
71 Fed. 527, 18 C. C. A. 240.			

Obdam	384,000	Passenger stmr. towed 200 m. from off Sable Island to Halifax, losing 2½ days	18,000
72 Fed. 543.			
Strathnevis	220,000	To Miowera towing stmr. without propeller 450 m. in severe weather, then lost her in storm.....	25,200
76 Fed. 855.		o Mineola for bringing her from dangerous anchorage to Port Townsend	20,500
City of Puebla	343,000	Stmr., broken crank pin, towed in high seas into Port Townsend	16,000
79 Fed. 982.			
Catalina	200,000	Stmr. disabled, towed to mouth of Mississippi—about 60 m. in good weather	2,400
105 Fed. 635, 44 C. C. A. 638.			
Ereza	269,250	Steamship losing propeller blades towed in winter 415 miles to Del. Breakwater, involving 9 days' delay, with about \$1,500 disbursements	20,000
124 Fed. 659.			
Values over \$400,000.			
Colon	\$480,000	6 days, 731 miles, Etna detained 2½ days	\$10,000
10 Ben. 60, Fed. Cas. No. 3,024.			
4 Fed. 469.			
Edam	450,000	One week lost. Vessel in great danger	25,000
13 Fed. 135.			
Alaska	1,041,542	Steamer used slower stmr. as rudder 600 miles.....	26,039
23 Fed. 597.			
Gallego	476,000	Eight days' loss. Steamer in danger	25,000
30 Fed. 271.			
Wisconsin	505,234	Seven hours' steering rudderless stmr.	4,000
30 Fed. 879			
Italia	473,421	750 m. to N. Y. towing steamer only partially disabled, assisting with own engines	25,000
42 Fed. 416.			
Chas. Wetmore	409,219	Towage steamer disabled drifting upon lee shore with serious damage to saloon, crossing bar Columbia River	20,000
51 Fed. 449.			
Chatfield	435,000	Brixham first towed steamer within 43 m. of Cape Henry (9 hours) and City of Augusta towed her into Hampton Roads (12 hours)	27,000
52 Fed. 479.			
Dania	426,000	Stmr. broken shaft towed 360 m. to N. Y., 2 days and 2 hours	17,500
70 Fed. 398.			
Winifred	710,000	Stmr. disabled; lost smoke-stack; towed 250 m. to Nassau; hawsers twice parted	23,000
102 Fed. 988.			

Special stress is laid by the claimant upon the award in The Colon, supra. That was a case arising in the same vicinity as this,

where there was a salved value of \$480,000 and a towage of 731 miles. The Colon was one of a line of passenger carrying steamers, running between New York and Colon. She had a non-perishable cargo on board worth \$250,000, which formed a part of the saved value. On the occasion in question, she was bound for the latter place and broke her crank shaft. She incurred damage thereby that could not be repaired at sea, nor could she be sailed efficiently without disconnecting her propeller, excepting with a favorable wind, which was generally towards New York. It was said by Judge Blatchford that the part of the ocean where the Colon lay disabled, latitude 28° 17' north, longitude 74° west, was much frequented by both steam and sail vessels. The accident happened on the 20th of August, 1876, about 11 o'clock in the forenoon. A few hours afterwards the steamship Etna, worth with cargo \$200,000, bound for New York, came in sight and was engaged to tow the Colon back to New York. Each vessel furnished a hawser. They got under way about 7 o'clock in the evening and reached New York early in the morning of the 26th of August. During the towing the weather was fine and nothing occurred to interrupt progress, except the stranding of the Etna's hawser, which caused a short stoppage while it was being repaired. Both vessels used their sails. The salving vessel there demanded \$150,000. A salvage compensation of \$10,000 was awarded by the district court, which included \$5,125 paid by the owners to master and crew. A further sum of \$2,200.28, covering costs, was allowed to certain consignees of cargo, damaged by the detention. The salvor's appeal was disallowed with costs.

The award in *The Colon* tends to sustain the claimant's contention.

All salvage cases, however, must stand to a certain extent upon their own merits and be governed by the discretion of the court, which is naturally influenced by a desire to award such an amount as will prove an incentive to salving vessels to perform the services required of them, without inflicting too heavy a burden upon the saved property. Having these considerations, as well as the special facts of the case in view, I conclude that an award of \$10,000, will be proper, 25% of which will go to the officers and crew of the *Rosewood* in proportion to their wages, excepting that the master will have a double share.

Decree for libellant accordingly.

INGERSOLL v. CORAM et al.

(Circuit Court, D. Massachusetts. March 22, 1905.)

No. 1,757.

1. FEDERAL COURTS—LOCAL SUIT TO ESTABLISH LIEN—LIMITATION OF DECREE.

In a suit in a federal court, brought under section 738, Rev. St., to establish a lien on the interest of defendants in property in the hands of an ancillary administrator in the state in which the suit is brought, the decree is necessarily confined to the property localized within the juris-

diction, although personal judgments may be entered against the defendants, to which the liens are incidental.

2. EQUITY—SUIT TO ENFORCE LIEN—DISREGARD OF FORMAL OBJECTIONS.

The fact that in ancillary probate proceedings the will of a testator was admitted to probate without any expressed reference to a compromise decree entered in the state of original jurisdiction by which contesting heirs not named in the will were given a certain share in the estate, so that the record in the ancillary proceedings does not show any interest in such heirs, will not preclude a court of equity from fastening a lien upon their interest in the assets within the ancillary jurisdiction; the objection being one of form only, which such court will disregard.

In Equity. On final hearing.

Hollis R. Bailey, E. N. Harwood, and John H. Hazelton, for complainant.

Louis D. Brandeis, for defendants Coram and Root.

Thaddeus D. Kenneson, for defendant Root.

F. N. Wier, for defendants Coram, Root, Cummings, and Palmer.

H. G. Allen, for defendants Davis and Leyson.

L. S. Dabney, for defendant Leyson.

Adler & Hall, for defendants Coram, Root, and Palmer.

PUTNAM, Circuit Judge. This case was heard on demurrers which were disposed of by an opinion passed down on December 30, 1903 (127 Fed. 418), accompanied with an order which directed that on final decree the bill should be dismissed as to certain parties respondent, and which determined all the other issues in favor of the complainant. It was again heard on motion for interlocutory injunction, and an opinion passed down on August 15, 1904. 132 Fed. 168. The case has now been heard on bill, answer, and proofs. The substantial conditions on the present hearing are so little changed from what they were at the hearing on the demurrers, and the order on the demurrers so far disposed of the issues in the case, that we have occasion to discuss only a very few topics. Some propositions were argued somewhat more fully by the respondents than when the case was submitted on the demurrers; but, with the following exceptions, we do not think it advantageous to attempt to review the questions which we then disposed of.

The respondents especially urge on us that the remedy must be limited to assets which are localized within this district by the proceedings in the probate court for Suffolk county, in Massachusetts, all of which were intended to be described in the decree for an interlocutory injunction which was entered on the 6th day of September, 1904. As this proceeding is under section 738 of the Revised Statutes, and can only be sustained in that aspect, it is very plain that the position of the respondents in this respect is correct, and the decree to be entered hereon must be framed accordingly, subject only to the necessity of entering personal judgments to which the liens asserted herein are incidental.

The respondents also claim that John A. Davis, who was the principal legatee in the will of Andrew J. Davis as the same was offered for probate, has deceased, and that no person has been appointed by the probate court within this jurisdiction as the legal

representative of his estate, so that, therefore, there is an inevitable lack of necessary parties on the present bill. Under the circumstances of the case, however, John A. Davis, or his estate, stands, so far as these proceedings are concerned, in the same position as Mrs. Ellen S. Cornue, as explained in our opinion passed down on December 30, 1903, already referred to. If any representative of the estate of John A. Davis had been joined as a respondent in this bill, he would necessarily be dismissed therefrom, so that the proposition of the respondents in this particular is wholly ineffectual.

The respondents urge again on us the fact that the probate court for the county of Suffolk formally probated the will of Andrew J. Davis as a will, so that, whatever the nature of the proceedings in Montana may be, the relations in the state of Massachusetts are those of legatees; and, also, so that, according to the probate records of Massachusetts, the estate of John A. Davis as principal legatee represents, and must be the sole representative of, all the interests sought to be reached by this bill. It is, therefore, maintained that, on a distribution made by that probate court, no apparent interest would be vested in any of the present respondents. This, however, is all a matter of form, with which equity does not seriously trouble itself. It may be that, inasmuch as the probate proceedings in Massachusetts are purely ancillary, and so appear on their face when taken altogether, the probate tribunals in that state will regard the proceedings in Montana as dominant, and make decrees of distribution accordingly, if they order distribution. Of course, we do not presume to undertake to determine what they ought to do in this respect, nor do we know what they ought to do; but, again, whatever may be the result of their proceedings in distribution, and whosoever may be regarded by them as the proper nominal distributees, such result involves a mere question of form so far as we are concerned. Our only duty is to reach the beneficial interests as they must finally rest.

It is now urged on us for the first time that the agreement made with Mr. Ingersoll, which forms the basis of this bill, created no lien, either legal, equitable, or statutory. We determined on the demurrers that there is no statutory lien. The respondents now press on us that the words in the agreement of August 17, 1891, as follows: "In no event is the said J. A. Coram obligated, except to pay such fee out of the funds secured from the estate of J. A. Davis, deceased," etc.—created no legal or equitable lien; and they cite several authoritative decisions which they maintain sustain that proposition. We came to a different conclusion on the determination of the demurrers, and remain of the same opinion. Whether or not a particular agreement creates a lien is a matter of construction. In this case, the fact that there was no primary personal responsibility on J. A. Coram especially serves to stamp the agreement in issue as declaring a purpose to create a lien. Therefore, on the whole, we hold that, on this final hearing on bill, answer and proofs, the bill must be sustained.

Consequently there will be a decree for the complainant, which will provide as follows:

First. It will direct that the bill be dismissed, with costs, as against the parties as to whom the order on the demurrers determined that it should be dismissed.

Second. The decree will declare the amount remaining due to the estate of Robert G. Ingersoll according to the agreement of August 17, 1891, with interest to be computed on the balance at 6 per cent. per annum, simple interest, from the time the compromise agreement described in our former opinions became finally effective as a judgment of the courts of the state of Montana, such interest to be included with the balance remaining unpaid on the principal, making a total amount, with a further declaration that such total amount carries interest at the rate of 6 per cent. per annum, simple interest, from the entry of the decree herein.

Third. It will declare a personal judgment against Henry A. Root for the amount so determined, to be executed against him, so far as the same is not liquidated, from the interests subject to the complainant's lien.

Fourth. It will make perpetual the interlocutory injunction granted on September 6, 1904, so far as the same is applicable to the final decree.

Fifth. It will declare that nothing in the decree is intended to contravene, or shall contravene, any action of any probate tribunal in Massachusetts with reference to distribution, or to any order or judgment remitting to the courts of the domicile.

Sixth. It will declare a lien or liens in favor of the complainant for the total amount remaining due as stated, with interest thereon from the entry of the decree as stated, on the several interests which this opinion, as interpreted in connection with our former opinions, finds to be subject thereto; and in this respect it shall state in detail and clearly the property within this jurisdiction which, according to said opinions, is subject to such decree, and describe specifically the separate portions thereof subject thereto, and by whom each of the same was originally owned or possessed, and by whom each is at the entry of the decree owned or possessed.

Seventh. It will declare that such lien attaches, and shall attach, to each of said several interests and the proceeds of each, by whomsoever received and into whosoever hands the same may come, whether the same are received by virtue of any order, judgment, or decree of any probate tribunal or other tribunal within the commonwealth of Massachusetts, or within the state of Montana, or elsewhere.

Eighth. It will provide distinctly and in detail for marshaling as between all of said shares and interests, and between all parties respondent in this bill who are not dismissed therefrom, and especially with reference to said Henry A. Root and Joseph A. Coram, and each of them; but it shall be declared that all of said shares and interests are jointly and severally liable, so that any marshaling shall not prejudice the complainant.

Ninth. It will provide for personal judgment against said Joseph A. Coram so far as he has received, or may receive, the proceeds of the shares of the assets within this jurisdiction pertaining

originally to Maria Cummings, Lizzie S. Ladd, M. Louise Dunbar, Ellen S. Cornue, or Henry A. Root, as stated in said agreement of August 17, 1891, except so far as he may be relieved by a marshaling to be provided for as already stated.

Tenth. It may, if necessary, provide for such process or supplemental proceedings as may be required on the entry of said decree, or from time to time thereafter, to secure the proceeds of said shares or interests, or either of them, subject to the marshaling as already stated, and the application of said shares or interests, or either of them, or proceeds thereof, to the extinguishment of the amount remaining due to the estate of Robert G. Ingersoll at the entry of this decree, with interest thereon, all as already stated.

Eleventh. It will provide for the recovery of a single bill of costs by the complainant against Henry A. Root and Joseph A. Coram.

Let the complainant file a draft decree, in accordance with our opinion passed down this day, on or before the 4th day of April next, the respondents to file corrections thereof on or before the 18th day of April next, all in accordance with rule 21.



THE JOSEPH B. THOMAS.

(District Court, E. D. Pennsylvania. March 24, 1905.)

No. 2.

1. SEAMEN—SHIPPING ARTICLES—LEGALITY OF PROVISIONS.

A provision in shipping articles that "the crew shall make no claim for wages or provisions while the vessel is detained by ice, prior to departure," is not in violation of Rev. St. §§ 4511, 4524 [U. S. Comp. St. 1901, pp. 3068, 3076], and is reasonable and valid.

2. SAME—RIGHT TO WAGES.

Libelants signed as seamen for a voyage on a vessel then ready to sail from the port of Philadelphia, but detained by ice; the shipping articles containing a provision that they should make no claim for wages or provisions while the vessel was so detained. They went on board and were furnished light work and given their provisions for a few days, and were then sent on shore by the master, but were told to be in readiness to come back whenever the vessel should be able to get away. When that time came they could either not be found or refused to go. *Held*, that they were not entitled to wages for the time they were on board, nor for extra pay, under Rev. St. § 4527 [U. S. Comp. St. 1901, p. 3077], as upon wrongful discharge.

In Admiralty. Suit by seamen to recover wages. On final hearing.

Joseph Hill Brinton, for libelants.

J. Frank Staley, Francis C. Adler, and John F. Lewis, for respondent.

J. B. McPHERSON, District Judge. The libelants are seamen who signed articles on December 31, 1903, at the port of Philadelphia for a voyage on the schooner Joseph B. Thomas to Brunswick, Ga. The vessel was then lying at a pier in the river Delaware, ready for sea, and only waiting for an opportunity to get away. She was detained because of the ice in the river, which was especially an obstruction below

the city. A tug had been engaged to tow her to the Capes; but the tug refused to undertake the work, declaring it to be too dangerous. The libelants came on board in the afternoon of January 2, 1904, and were put to shoveling snow off the deck, and during their stay on the ship they performed one or two other trifling services. The shipping articles contained this clause:

"The crew shall make no claim for wages or provisions while the vessel is detained by ice, prior to departure."

This agreement has been decided by Judge Holland to be valid, and not in conflict with sections 4511 and 4524 of the Revised Statutes [U. S. Comp. St. 1901, pp. 3068, 3076] (The Lillian [D. C.] 131 Fed. 375); but, although the master was under no obligation to feed the libelants, he furnished them with regular meals for six days, and while he then told them that he could no longer afford to do so, he gave them liberty to go ashore and see if they could find any temporary work to do. When the vessel was permitted to sail, they would be expected to come on board and fulfill their contract. Accordingly the libelants left the ship, but sent for their clothes the next day, and evidently paid no further attention to their agreement; for, when the ship was finally able to get away on January 14th, and the libelants were sent for, only two of them could be found, and they refused to go. This suit is brought for six days' wages and a month's extra pay, under section 4527 [U. S. Comp. St. 1901, p. 3077]. Upon the facts above stated, however, I do not think that any ground of recovery has been shown. The libelants expressly agreed not to claim wages or provisions while the vessel was detained by ice, and they should not be permitted to repudiate their contract. The very slight services they performed were amply compensated by the provisions they received, and, so far as I can see, they have no reason whatever to complain. They were not discharged, although they so declare, but were merely directed to await on shore the time when the ship would begin her voyage. It is true their necessities may have compelled them to accept other employment, and their failure to carry out their agreement may thus be excused; but I am unable to perceive any obligation on the part of the ship to pay wages in the face of the contract, and certainly there is no liability to a penalty, which is only to be inflicted in case of wrongful discharge.

The libel must be dismissed.

WRIGHT v. SKINNER.

SAME v. WILLIAM SKINNER MFG. CO.

(District Court, S. D. New York. April 4, 1905.)

1. BILLS IN EQUITY—ALLEGING CITIZENSHIP.

A bill in equity in a federal court need allege the citizenship of the parties only where jurisdiction depends on diverse citizenship.

2. SAME—DEMURRER AND MOTION.

Omission of a bill to allege citizenship of the parties pursuant to equity rule 20 is to be corrected by motion, not by demurrer.

3. SAME—RECOVERY OF PAYMENTS BY BANKRUPT—DEMAND.

A bill in equity by a trustee in bankruptcy to recover payments made by a bankrupt within four months prior to bankruptcy need not allege a previous demand, though this is necessary in actions at law.

4. BANKRUPTCY—BILL BY TRUSTEE—INCONSISTENT CAUSES OF ACTION.

A bill by a trustee in bankruptcy to recover a payment of money made by a bankrupt within four months prior to bankruptcy, by alleging that the transaction amounted to a preference or a fraudulent payment, and that in either case he was entitled to its return, does not unite inconsistent causes of action.

These were demurrers to two bills in equity, filed by a trustee in bankruptcy to recover money paid by the bankrupts to the defendants within four months prior to the bankruptcy. The grounds of objection alleged in the demurrers were that the bills contained no statement of the place of abode or citizenship of the parties, as required by the twentieth equity rule, and that it appeared, by the plaintiff's own showing, by the bills, that the plaintiff was not entitled to the relief prayed for. In support of the latter ground of demurrer, it was argued that the bills did not allege any demand before suit, and that they alleged inconsistent causes of action; one cause of action being for a return of the money on the ground that it was a preference, and the other on the ground that it was a fraudulent transfer.

James, Schell & Elkus (James N. Rosenberg and Joseph M. Proskauer, of counsel), for complainant.

Austin B. Fletcher (William P. S. Melvin, of counsel), for defendants.

HOLT, District Judge. An allegation of citizenship is not jurisdictional, except in cases in which the jurisdiction depends on the diverse citizenship of the parties. 2 Abb. U. S. Prac. 68. An allegation of the residence of the parties is not necessary to impart jurisdiction. *Teese v. Phelps*, 1 McAll. 17, Fed. Cas. No. 13,818. An omission to comply with the provisions of rule 20, requiring the place of abode of the parties to be stated, is, in my opinion, not properly corrected by demurrer, but by a motion. *Harvey v. Richmond, etc., Co.* (C. C.) 64 Fed. 19.

The general rule established by the authorities is that, in suits in equity of this kind, a previous demand is not necessary. It is undoubtedly necessary in actions at law, but in equity the bringing of the suit is itself a sufficient demand. *Bruce v. Tilson*, 25 N. Y. 194, 202.

The demurrers do not allege as grounds of demurrer that the bill is multifarious, or that the two causes of action are inconsistent. But in any event I think that it is not necessarily impossible that the payment may have been at the same time a preference, and a payment made with intent to hinder, delay, and defraud creditors; and, if it is either, it seems to me that the bill may be drawn so as to meet the alternative. There is alleged in these bills one transaction, consisting of a payment of money. The plaintiff alleges that it amounted to either a preference or a fraudulent payment, and that in either case he is entitled to its return. I cannot see in such an allegation any such inherent inconsistency, as there is in those cases in which it has been held to be not per-

missible to unite two absolutely inconsistent causes for equitable relief, such as a claim to set aside a transfer as void, or to base a recovery on it as valid, and the other instances of legal inconsistency referred to by Judge Wallace in *Wilkinson v. Dobbie*, 12 Blatchf. 298, Fed. Cas. No. 17,670.

The demurrers are overruled, with costs, with leave to the defendants to answer within 10 days upon payment of such costs.

BURK v. McCAFFREY et al.

(Circuit Court, E. D. Pennsylvania. April 6, 1905.)

No. 40.

ABATEMENT—PENDENCY OF ACTION IN STATE COURT.

It is no ground for abatement of a suit in a federal court that an action for the same subject-matter between the same parties is pending in a state court; and it is immaterial that a counterclaim is set up in the state court, it not appearing that the same defense may not be available in the federal court.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Abatement and Revival, §§ 87-91.]

Pendency of action in state or federal court ground for abatement of action in the other, see note to *Bunker Hill & Sullivan M. & C. Co. v. Shoshone M. Co.*, 47 C. C. A. 205.]

Demurrer to Plea in Abatement.

J. Whitaker Thompson, for plaintiff.

J. Joseph Murphy, for defendants.

J. B. McPHERSON, District Judge. The plaintiff's action is correctly brought in the circuit court, unless the plea in abatement that has been filed by two of the defendants is well founded. The plea sets up that before the suit was brought another action had been begun by the plaintiff against all the defendants in one of the common pleas courts of Philadelphia county for the same subject-matter, asserting the same rights and asking for the same relief, and that this action in the state court is still pending and undetermined. The plaintiff has demurred to the plea, and I think there can be no doubt that the demurrer must be sustained. The decided weight of authority is in favor of the position that the pendency of a suit in one court is not a defense to an action in another court between the same parties, where one of the tribunals is a federal and the other is a state tribunal of the same state, having concurrent jurisdiction: *Stanton v. Embrey*, 93 U. S. 554, 23 L. Ed. 983, and the cases cited in *Rose's Notes to U. S. Reports*, page 1010; *Gordon v. Gilfoil*, 99 U. S. 178, 25 L. Ed. 383; *Barber Asphalt Co. v. Morris* (C. C. A.) 132 Fed. 945; *West v. McConnell*, 25 Am. Dec. 195, note; *Smith v. Lathrop*, 84 Am. Dec. 456, note; and an elaborate note to *Wilson v. Milliken* (Ky.) 44 S. W. 660, 42 L. R. A. 449, 82 Am. St. Rep. 578. There are some decisions to the contrary, but the citations from the Supreme Court of the

United States are, of course, controlling, to say nothing of numerous other cases. The fact that the defendants set up a counterclaim in the state court does not seem to be material. So far as is now apparent, the same defense will be available in the circuit court.

The demurrer to the plea in abatement is therefore sustained.

In re SAXTON FURNACE CO.

(District Court, E. D. Pennsylvania. March 27, 1905.)

No. 1,837.

1. BANKRUPTCY—SALE OF PROPERTY DISCHARGED OF LIENS—RIGHTS OF BOND-HOLDERS.

Holders of the bonds of a bankrupt corporation, secured by a mortgage, which gives them the right to use such bonds in the purchase of the property if sold at judicial sale, should not be deprived of such right by an order authorizing the trustee to sell the property free from liens, so long as their title to the bonds is unimpeached.

2. SAME—NOTICE OF APPLICATION.

To authorize an order for the sale of a bankrupt's property free of liens, the record should show affirmatively that every creditor whose lien will be discharged has received notice of the application therefor, and a general statement by the referee that such notice has been given is insufficient.

In Bankruptcy. On certificate from referee concerning order to sell, discharged of liens.

Arthur G. Dickson and Beck & Robinson, for trustee.

Rudolph M. Schick, for objecting creditor.

J. B. McPHERSON, District Judge. I do not see how the proposed order of sale can be supported. The creditors who hold the furnace company's bonds have a right, under the mortgage, to use them in payment of the purchase money if the property shall be sold by a judicial sale, and of this right they should not be deprived if their title is unimpeachable. If the trustee disputes their right to retain the bonds, averring that they have received a preference, it would seem to be his duty to obtain a judicial decision of the question, even at the cost of delay and inconvenience.

Moreover, the record should show affirmatively that every creditor whose lien will be discharged by the sale has received notice of the trustee's application to sell. The referee's general statement that such notice "was given to each and every general creditor and lien creditor" is obviously insufficient. No doubt, this is his opinion, and it may be true, but his record must show the facts by which other persons can verify the correctness of his statement.

If the present is a favorable time for the sale of such property as furnaces and rolling mills, I regret the inevitable postponement, but the defects in the proceedings are fundamental, and can only be cured by the consent of the parties whose rights are involved. But as they must all desire to be paid, and paid speedily, I trust they may see

their way to an agreement that may advance their interests. Otherwise there seems to be no escape from the necessity to determine first of all who are the lawful holders of the bonds.

The order is set aside.

In re GUTTERSON.

(District Court, D. Massachusetts. March 28, 1905.)

No. 8,228.

1. BANKRUPTS—INTEREST IN ESTATE—SALE.

Where a bankrupt's trustee applied to sell all the interest of the bankrupt in the estate of his father, and the referee found that there was a purchaser who was willing to give a substantial sum for the proposed transfer, and it did not plainly appear that the bankrupt had no right in his father's estate which passed to his trustee, the sale was authorized.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, §§ 356-360.]

2. SAME—OBJECTIONS—TIME.

A bankrupt was not entitled to object to a private sale of his interest in the estate before appraisalment, for the first time before the judge, but should raise such objections on an application to the referee for a modification of the original judgment.

In Bankruptcy.

H. L. Boutwell, for bankrupt.
Karl Adams, pro se.

LOWELL, District Judge. The bankrupt's father had died testate before the bankruptcy. The trustee filed a petition for leave to sell at public auction or private sale "all the right, title, and interest of said bankrupt in the estate of his father." The referee granted the petition, and the bankrupt has appealed to me on the ground that the bankrupt had no right in his father's estate which passed to his trustee. For the purpose of this case, I have assumed, without deciding, that the bankrupt is interested in the question presented, and may appeal from the referee's decision.

It is not necessary to determine in this proceeding precisely what right in the estate of the bankrupt's father passed to the trustee in bankruptcy. The trustee desires to sell this right for whatever a purchaser will pay for it, the purchaser taking the chances of the speculation. Thus to sell an uncertain claim may benefit the bankrupt estate by saving it from the expense of litigation. Doubtless the referee may refuse to order the sale of a speculative claim, where the sale is sought merely to annoy the bankrupt, and where the gain to the bankrupt estate will be merely nominal. In the case at bar, the referee has found that there is a purchaser who will give a substantial sum for the proposed transfer, and a hasty inspection of the will does not satisfy me beyond a doubt that the trustee's claim is unfounded, whether under the will or under intestate succession to property not disposed of thereby. Under these circum-

stances, neither the referee nor the judge is called upon to make further study of the will or of the law applicable thereto.

At the argument the bankrupt objected to a private sale and to sale before appraisal. It does not appear that these objections were made to the referee, and they cannot be made for the first time before the judge. If either objection is substantial, the bankrupt should apply to the referee for a modification of the original judgment.

Judgment affirmed, with leave to apply as stated above.

CHASE ELECTRIC CONST. CO. v. COLUMBIA CONST. CO. et al.

(Circuit Court, E. D. Pennsylvania. April 8, 1905.)

No. 51.

EQUITY—AMENDMENT OF BILL—AFFIDAVIT.

Under equity rule 28, entitling plaintiff to amend the bill, as matter of course, before answer, plea, or demurrer filed, the amendment need not be supported by affidavit.

In Equity. Overruling motion to strike amendment from record

Charles N. Butler, for complainant.

Walter C. Pusey, for respondent.

HOLLAND, District Judge. Before the defendant in this case had filed any answer, plea, or demurrer, the plaintiff, in a material matter, amended its bill, but before any costs had been occasioned to defendant. There was no affidavit attached to the amendment, and for this reason a motion was made to strike it from the record. Under equity rule 28, the plaintiff was entitled to amend, as a matter of course, before answer, plea, or demurrer filed, and it was not necessary that the amendment proposed should be supported by affidavit. It has not been the practice here to require bills in equity, or the amendments thereto, to be supported by affidavit, when neither is to be used as evidence upon an application for a provisional injunction or in any other way, and this seems to be so in the other districts. In the case of *Hughes v. Northern Pacific Railway Co.* (C. C.) 18 Fed. 110, the court said:

"The objection that the bill is not verified is immaterial. A bill in equity is not required to be sworn to unless it is sought to be used as evidence upon an application for a provisional injunction or the like."

The practice when an affidavit will be required in support of a bill in equity, or amendments thereto, is set forth in *Foster's Federal Practice* (3d Ed.) § 87. And in cases where an affidavit is required there seems to be no imperative rule requiring the verification at the time it is signed, even where an injunction is prayed for. *Black v. Allen Co.* (C. C.) 42 Fed. 622, 9 L. R. A. 433.

Motion to strike off amendment is overruled, and the defendant required to answer within 10 days from this date.

BROWN v. NEW YORK, N. H. & H. R. CO.

(Circuit Court, D. Vermont. March 11, 1905.)

WRONGFUL DEATH—ACTION FOR DAMAGES—SUFFICIENCY OF DECLARATION.

In a suit in the federal court in Vermont for wrongful death occurring in Connecticut, based on the statute of that state, which requires notice of the claim to be given within four months, the declaration is not demurrable because it fails to allege the giving of such notice, since, while such allegation is required by the Connecticut practice, it is not by that of Vermont, by which the court is governed.

At Law. On demurrer to declaration.

James L. Martin, for plaintiff.

Geo. A. Weston, for defendant.

WHEELER, District Judge. This suit was brought in a state court for an injury to the intestate in Connecticut, while employed by the defendant, resulting in death. The defendant removed it to this court, and has demurred to the declaration, and set down specially the want of allegation of notice within four months, under the Connecticut statutes. According to *Peck v. Fair Haven & W. Railroad Co.*, 77 Conn. 161, 58 Atl. 757, the want of such allegation may by the practice there be taken advantage of by demurrer in this manner. But by the statutes of the United States (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]) the forms and modes of procedure in the United States courts must conform to those of the state in which the court sits. Such a notice by similar language is required to be given in highway cases in this state (V. S. 3492); but in the procedure of the state courts it need not be alleged. *Kent v. Lincoln*, 32 Vt. 591; *Matthie v. Barton*, 40 Vt. 286. Therefore in the state court where this suit was brought, and in this court to which it has been removed, the allegation of notice is not necessary, and the want of it is not a good cause of demurrer.

The want of domicile of the intestate in Vermont is suggested in argument; but letters of administration from a proper probate court appear, which are prima facie sufficient.

It is also suggested that, as the injury was received by the intestate in the employment of the defendant about running trains, it must have been caused by the negligence of a fellow servant of the intestate, for which the defendant would not be liable. But the declaration alleges that the injury was done by the defendant itself, which implies a competent agency, however it may turn out to be on the proof.

As the case now stands upon the demurrer, which admits everything well pleaded, the declaration must be adjudged sufficient.

Demurrer overruled.

HILLS & CO., Limited, v. HOOVER et al.

(Circuit Court, E. D. Pennsylvania. March 30, 1905.)

No. 12.

1. COPYRIGHT—PICTURES—"PRINTS."

Pictures printed in successive colors from metal plates from which parts have been cut out so as to leave portions of the print in relief are entitled to copyright as "prints," under the general enumeration of Rev. St. § 4956 [U. S. Comp. St. 1901, p. 3407], and are not within the proviso requiring chromos or lithographs to be printed from "drawings on stone made within the limits of the United States, or from transfers made therefrom," to be entitled to copyright.

[Ed. Note.—Matter subject to copyright, see note to *Cleland v. Thayer*, 58 C. C. A. 273.]

2. SAME—COPYRIGHT NOTICE.

A notice of copyright on a picture, reading: "Copyright 1902. Published by Hills & Co., Ltd., London, England"—is sufficient.

In Equity. Suit for infringement of copyright. On final hearing.

J. Martin Rommel, Benno Loewy, and Hector T. Fenton, for complainant.

W. Horace Hepburn, for respondent.

HOLLAND, District Judge. I am not convinced from the evidence in this case that the copies from which defendants had their alleged infringing copies made contained the word "published" in the notice of the plaintiff's copyright; but, even if the notice did contain the word "published," the defendants were not misled or deceived. It was a deliberate act on their part to copy the plaintiff's paintings, and they did it with ample and legal notice of the fact that the paintings were copyrighted by the plaintiff,

For the reasons given in the case of *Hills & Co., Limited, v. Austrich* (C. C.) 120 Fed. 862, a perpetual injunction and an accounting will be awarded, as prayed for.

Let a decree be drawn accordingly.

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UNITED STATES v. LEE WING. SAME v. LOUIE YOU. SAME v. LOUIE HANG. SAME v. LEE YIN. SAME v. LEE JO YEN.
SAME v. CHIN HING. SAME v. CHAN KOW.
SAME v. LEE WON JEONG.

(District Court, D. Oregon. March 7, 1905.)

Nos. 4,770, 4,771, 4,775-4,778, 4,781, 4,782.

CHINESE EXCLUSION—PERSONS UNLAWFULLY IN UNITED STATES—SUFFICIENCY OF EVIDENCE.

Chinese testimony to the effect that defendants, arrested for deportation, were born in the United States, or that they are merchants, is sufficiently corroborated by the testimony of credible white witnesses, in the one case, that they have seen and known defendants since they were

young as the children of Chinamen resident in this country, or, in the second case, that defendants were for years employed in stores as merchants, and reputed to be partners therein.

Appeals from Orders of Commissioner for Deportation of Defendants.

D. J. Malarkey and P. B. Sinnott, for appellants Lee Wing, Chan Kow, and Chin Hing.

James Gleason, for appellants Louie You and Louie Hang.

T. N. Strong, for appellant Lee Yin.

Edwin Mays, for appellants Lee Jo Yen and Lee Won Jeong.

W. W. Banks, for the United States.

BELLINGER, District Judge. In the case of Lee Wing the Chinese testimony is to the effect that he was born in this country, in San Francisco, in 1874. When the boy was five years old, his father, Lee Yep, took him to China, where he remained five years. Returning by way of San Francisco, the father came to Portland, bringing the boy with him. The boy five years later, when he was fifteen years old, went to China, where he remained two years. He then returned to Portland, where he has since remained. J. Frank Watson, president of the Merchants' National Bank, testifies that he has known the father of the defendant and the son, the defendant, since about 1890; that he has done business with the father, and knows that he is a merchant; that he has done a good deal of business with the firm of the father, and understood that the defendant was the merchant's son; has seen the son around the store, and was informed by the merchant that the defendant was his son. T. W. Johnson, a plumber, testifies that he is very well acquainted with the defendant's father, and has known the defendant since about 1890; that he has done business for the firm, and understood at the time that the defendant was a son of Lee Yep; the boy was brought to the shop of witness several times by his uncle, Lee Moon. The Chinese testimony as to the defendants Chin Hing and Chan Kow is to the effect that both were born in the United States. A white witness—Mr. Hall, who is in the live stock business in the city—testifies that he has known Chin Hing 12 or 15 years (this defendant is about 18 years of age), and has known Chan Kow, with his father, since the former was a little boy; that he (the witness) has visited the Chinese gardens, and seen Chan Kow there, two or three times a year; that he has sold hogs to the man for whom Chin Hing works; that the two boys would come to witness' place two or three times a week to drive hogs; that they would come and play around like children. In the case of Lee Yin the Chinese testimony is to the effect that he is the son of Lee Foon Ming, of the drug firm of Wing Ching Lung, and that this firm began business 27 years ago; that the father, in going back to China, gave his interest in the business to defendant, who worked in the store, and kept the store; that defendant was born in China. Holman, a white witness, testifies that he has lived in the city 41 years, and has been in

the dray business 30 years. He knows the firm of Wing Ching Lung, and occasionally delivered goods there. Has seen this boy (the defendant) at the store several years ago, and was told by Lee Foon Ming that the boy was his son. He cannot positively identify the boy. Charles N. Scott, another white witness, testifies that he has known the defendant eight or nine years, and knew him down at the store of Wing Ching Lung Company, but hasn't been much around the store for two years; that he never did any business with the defendant; did business with Lee Foon Ming, and was told by him that defendant was his son and was a member of the firm. Louie You is, according to his own testimony, 33 years of age. He was born in China, and was working in a laundry when arrested. The Chinese testimony in his case is to the effect that the defendant has been a member of a Chinese drug firm since 1890. Al Wohlers, a white witness, testifies, in effect, that he was on the police force from 1890 for six years and seven months, since which time he has been a hackman; that he knows the defendant by sight, and the defendant knows the witness every time he meets him on the street; that the defendant filled prescriptions in the store. George W. Mosher, another white witness, an expressman for 12 years in the Chinese district, testifies, in effect, that he knew the defendant 10 or 12 years ago; that the defendant was in the building occupied by the firm to which defendant claims to belong until it was burned down in 1897; that the witness had a stand on Second and Pine streets, and could see the defendant going in and out of the store; that he was doing the kind of work done in such a store; that it was a merchant business. In the case of Louie Hang the Chinese testimony is to the effect that he was born in the United States, and has never been out of the country. George Mitchell, a white witness, testifies that he has lived in Portland 36 years, and since he was 1 year old; that he was raised around Second street, near where his father had a grocery store, and has been a fruit peddler in Chinatown for 15 years; that he knows the defendant; first saw him when he was 5 or 6 years of age, and has seen him grow up here. He positively identifies the defendant. He says that he has seen the old man (defendant's father) leading defendant around when he was a little boy, and has sold fruit to the old man.

I am satisfied of the substantial truth of the testimony respecting the several defendants named as I have summarized it. The testimony of the white witnesses tending to prove the place of birth of the defendants who claim to have been born here is as direct as the circumstances in such cases will permit. The presence of these defendants in the country since they were children, and the prior residence and statements made at the time of those in whose care they were, is as far as white testimony, as a rule, can go. While there is no legal presumption, at least of a conclusive character, from these circumstances, that such defendants were born in this country, yet these circumstances are in strong corroboration of the testimony of the defendants and of Chinese witnesses as to the place of defendants' birth. And so of the merchant character

of the defendants Lee Yin and Louie You. The testimony of white witnesses tends to prove that they belong to the merchant class, and it conclusively proves a long residence in this city. While, as just stated, such residence is not a conclusive fact in these cases, it is a circumstance in corroboration of the positive testimony offered in their behalf. The tendency of this testimony in the case of Louie You is to overcome any inference against him arising from the fact that he was working in a laundry at the time of his arrest. That circumstance is more consistent with the status of a laborer that is recent than it is with one that has continued during any considerable part of the time covered by this investigation. It is more probable that these defendants would have suffered arrest at the hands of the officers charged with the execution of the exclusion laws if they were laborers during all these years than that they would have had the immunity enjoyed by them. In these cases the orders of deportation made by the commissioner are set aside and the defendants discharged.

In the case of *United States v. Lee Jo Yen and Lee Won Jeong* the orders of deportation are affirmed. Whatever consideration I might otherwise be disposed to give to the testimony in behalf of these defendants, the unexplained fact admitted by them that they came from Seattle to Portland via Pasco, and upon their arrival at The Dalles got off the cars and came to Portland by boat, convinces me that they are unlawfully in the country, and that the consciousness of such fact prompted them to adopt this devious route and course to escape detection and arrest on their arrival in Portland.

In re RASMUSSEN'S ESTATE.

(District Court, D. Oregon. March 17, 1905.)

No. 872.

BANKRUPTCY—PROPERTY PASSING TO TRUSTEE—CONDITIONAL SALES.

Property which was delivered to a purchaser for the purpose of sale by him in the usual course of his business passes to his trustee in bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 70a (5), 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], notwithstanding a contract by which the seller reserved title until payment should be made, with the right to take possession at any time; such contract being fraudulent and void as against purchasers or creditors.

In Bankruptcy. On review of order of referee.

Bauer & Greene, for trustee.

R. L. Conner, Coovert & Stapleton, and Cake & Cake, for creditors.

BELLINGER, District Judge. Rasmussen, a merchant dealing in farm implements, etc., at Sheridan and at Dayton, in this state, became a voluntary bankrupt. The trustee in bankruptcy took possession of the merchandise, including machinery, implements, wagons, etc., in the two stores of the bankrupt. Thereafter the Syra-

cuse Chilled Plow Company; Reierson Machinery Company; International Harvester Company of America; Wallace, Corcoran & North, as agent for McSherry Manufacturing Company of Middletown, Ohio, and A. A. Cooper Wagon & Buggy Company of Dubuque, Iowa; the John Deere Plow Company; and Mitchell, Lewis & Staver Company—made demand on the trustee for the return of goods aggregating about \$4,000 in value, on the ground that such goods had been delivered to the bankrupt on contracts of conditional sale by which title was reserved until the full purchase price was paid. The merchandise claimed was all shipped to the bankrupt on contracts by which the shippers retained title until the goods were paid for. In some cases, if not in all, notes were given for the price of the articles shipped. The notes given to the Reierson Machinery Company are payable two months after date, and they provide that the title, ownership, and possession of the property for which they are given do not pass from the machinery company until the notes are paid, and the company is authorized to declare the notes due, and to take possession of the property whenever they deem themselves "insecure"; and it is provided that, if the property "reverts" to the company, it may sell the same, and, after deducting expenses, apply the residue on the notes, and that any balance that may remain due upon the notes the bankrupt is to pay. These conditions are much the same as those contained in the contract in the case of *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285, except that the notes in the present case contain a condition (not material from any legal standpoint) to the effect that if the bankrupt sells, loans, or pledges the property, etc., or permits it to pass into the possession of any other party than the Reierson Company, the latter is empowered to enter the premises where the property is, and take the same away. The transaction, as evidenced by these conditions, to have any effect, must vest some right in the bankrupt, which it does not do if he gets neither title nor possession.

The contract of the Syracuse Chilled Plow Company reserves the right to retake the property if at any time the company feels insecure, and it provides that "if sales are made before payment they shall be made only in the regular course of business," and the proceeds are to be held as the property of the company, "in trust as collateral security" for the obligations of the bankrupt arising on the contract, and the bankrupt obliges himself to give the company collateral notes to secure any indebtedness which has already accrued, when requested. The contract of the Wallace, Corcoran & North Company, as agent for the McSherry Manufacturing Company, is one of sale, by its terms, with an acceptance by the purchaser of delivery f. o. b. cars at Middletown, Ohio, with a condition that the title and right of possession of the property, and of its proceeds in case of sale, are to remain in the seller until the property is paid for; and so of the contract of the A. A. Cooper Wagon & Buggy Company, the Mitchell, Lewis & Staver Company, and that of the John Deere Plow Company, with the added condition

in the latter case that notes taken by John Deere Plow Company in settlement are "not accepted as payment but only as evidence of liability." The contract of the International Harvester Company in terms creates an agency in the bankrupt, by which the agent guaranties the sale of the property shipped at fixed prices; payments to be made in full upon a day named; title and ownership to remain in the company until payments are made.

The reservation of title in each of these contracts is inconsistent with the purpose for which the contract was made and the property delivered. In some of them there is not only a reservation of title, but of possession, with provisions for retaking the possession, which the vendor, by the terms of the writing, has never parted with. As a matter of fact, in all of these cases the property claimed was delivered to the vendee for sale in the usual course of his business as a merchant, and the various provisions relating to ownership and possession in the vendor are mere contrivances to secure the purchase price to the vendor, and are fraudulent in law, as against the other creditors of the vendee. "When the property is delivered to the vendee for consumption or sale, or to be dealt with in any way inconsistent with the ownership of the seller, or so as to destroy his lien or right of property, the transaction cannot be upheld as a conditional sale, and is a fraud upon the creditors of the vendee." In *re Garcewich*, 115 Fed. 87, 53 C. C. A. 510; In *re Carpenter* (D. C.) 125 Fed. 831; In *re Howland* (D. C.) 109 Fed. 869; In *re Rodgers*, 11 Am. Bankr. R. 93, 125 Fed. 169, 60 C. C. A. 567; In *re Butterwick* (D. C.) 131 Fed. 371. Such is the settled law, notwithstanding the principle that personal property may be sold and delivered under an agreement for the payment of the price at a future day, and the title remain in the vendor until the payment is made. And so in the state of New York, where agreements are upheld by which title does not vest until the price is paid, although there has been delivery of possession of the property sold, if the property is delivered for consumption, or for sale in the usual course of the vendee's business, the transaction is deemed fraudulent as against purchasers or creditors. In *re Garcewich*, *supra*.

In this state conditional sales have been upheld in several cases, but there is no case upholding such a sale where possession has been delivered for sale by the vendee, or other use inconsistent with the ownership of the seller. On the contrary, the law, as decided by the Supreme Court of the state, is against the validity of such a sale. In *Orton v. Orton*, 7 Or. 478, 33 Am. Rep. 717, a chattel mortgage duly registered was held void, as against creditors, where unlimited power was given the mortgagor to sell. In its opinion the court says, "Such an agreement was utterly inconsistent with his [the mortgagee's] claim under the mortgage, and annulled its provisions." In this decision the court merely enforced a rule of general application—that a possession that is inconsistent with the conveyance is a fraud in law. And the rule is necessarily the same whether the possession is retained by the vendor, or is transferred to the vendee, contrary to the conditions of the sale or inconsistently with its purpose.

The property claimed in the present case was delivered to the bankrupt with the intention that it should be sold by him in the course of his business as a merchant. The bankrupt's possession was in itself inconsistent with the express terms of some of the agreements of sale, and its purpose was inconsistent with all of them. If the provision of the bankrupt act which vests in the trustee property which prior to the filing of the petition the bankrupt "could by any means have transferred" is to have any application, it must operate to vest the property claimed in this case in the trustee.

The order of the referee directing the return of the property in question to the claimants is set aside, and the petition of the claimants is dismissed.

PEONAGE CASES.

(District Court, E. D. Arkansas, W. D. April 3, 1905.)

PEONAGE—DEFINITION.

Peonage, within Rev. St. §§ 1990, 5526 [U. S. Comp. St. 1901, pp. 1266, 3715], making it an offense for any person to hold, arrest, return, etc., any person to a condition of peonage, is the holding of any person to service or labor to pay a debt due from the laborer to the employer, when such employé desires to leave the employment before his debt is paid off; and it is immaterial whether the contract of employment was voluntarily made by the laborer or not, and whether it was made for a present or pre-existing consideration.

Charge to Grand Jury.

TRIEBER, District Judge (orally). The court has been advised that in some sections of this district there now exists a system of peonage, in violation of the Constitution and laws of the United States. As the District Attorney informs the court that evidence will be laid before you for the purpose of securing the indictment of persons who are alleged to have been guilty of violating the laws of the United States on that subject, it is but proper that the court should charge you specially on this subject, which is one that has never, to my knowledge, been brought before any of the courts in this state, and for this reason you are, no doubt, not familiar with it.

As you are aware, immediately after the late Civil War, an amendment to the Constitution of the United States was adopted, whereby it was provided that neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. It was found that, in a part of the territory acquired by the United States from Mexico as one of the results of the Mexican War, a system of peonage—a species of slavery—existed, whereby men were permitted to practically sell themselves, and place themselves in bondage for money advanced to them until the debt had been paid off. Congress recognized that in a government like ours—a republic—such a system of

peonage was more dangerous to the safety of our republican institutions than slavery was, for a slave was property, and possessed none of the rights of citizenship, could not vote, and had no voice in the administration of the affairs of the nation. On the other hand, the peon, although practically a slave as long as he was indebted to his master or employer, without the privilege of changing his vocation or leaving his master, no matter how small the debt, yet possessed all the rights of citizenship, including the right of franchise. To permit such a condition was deemed dangerous, as in the course of time it might happen that a very large number of people, compelled by their necessities, perhaps, or through ignorance or greed, might thus sell themselves to masters, and thereby come absolutely under their control, and yet, by reason of the privilege of the right to vote, in which they would probably be controlled by their masters, have a sufficient voice in the selection of the officials to determine the result of an election. In addition to that, such a condition might enable men of large wealth to obtain gradually a control of thousands of people—some by reason of their poverty, and others by reason of their ignorance—and thus establish a system in this country wholly incompatible with the principles upon which this government was founded.

Congress therefore enacted a law in 1867 (Rev. St. § 1990 [U. S. Comp. St. 1901, p. 1266]) declaring the holding of any person to service or labor under the system known as "peonage" to be abolished and forever prohibited in the United States, and all acts, laws, resolutions, orders, regulations, or usages of any territory or state wherein such system existed absolutely void, no matter whether such contracts were entered into between the master and laborer voluntarily or involuntarily. By another provision of that act (Rev. St. § 5526 [U. S. Comp. St. 1901, p. 3715]) it was made an offense against the laws of the United States for any person to hold, arrest, return, or cause to be held, arrested, or returned, or in any manner aiding in the arrest or return of, any person to a condition of peonage, punishable by fine or imprisonment.

Peonage, within the meaning of this law, is the holding of any person to service or labor for the purpose of paying or liquidating an indebtedness due from the laborer or employé to the employer, when such employé desires to leave or quit the employment before the debt is paid off. It is wholly immaterial whether the contract whereby the laborer is to work out an indebtedness due from him to the employer is entered into voluntarily or not. The laws of the United States declare all such contracts null and void, and they cannot be enforced. It is immaterial whether such a contract is made in consideration of a pre-existing indebtedness, or for a loan made at the time the contract is made. The law prohibits them, and, if made, declares the contract null and void; and any person who holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return of, any person to a condition of peonage, is, as I stated before, guilty of an offense against the laws of the United States, and subject to indictment by a grand jury of the district in which the acts are

committed. If a man enters into such a contract with another, the laws of the United States say that it is void, and he may at any time he desires leave his employment, although the debt is still unpaid; and any attempt on the part of the employer to prevent him from leaving, either by force, threats, or intimidation, or by guarding him and locking him up to prevent his escape, is, within the meaning of the laws of the United States, an offense. The fact even that the laborer entered into that contract voluntarily and with full knowledge of the conditions of his employment is no excuse, for the law says that no person shall enter into such a contract, and, if he does, it shall be null and void. If he violates his contract, he is liable in a civil action for the breach, but he cannot be forced to a performance or a continuance of the service.

As the Constitution and laws of the state of Arkansas prohibit a party from exacting usurious interest, and make any such contract, whether entered into voluntarily or involuntarily, null and void, so do the laws of the United States make this kind of a contract for labor null and void. To some extent, they are based upon the same principle, for in one instance the debtor is generally compelled to agree to the most exacting terms the money lender sees proper to impose, by reason of his poverty, or in some instances his ignorance, and therefore the lawmakers of this state have declared such a contract null and void. So, in the case of peonage, to protect the poor laborer against the exactions of the wealthy employer, compelling him to agree to work in many instances for a mere pittance for a loan made to relieve his most necessary wants, this law has been enacted.

If the evidence which is laid before you satisfies you that some men in this district have entered into contracts of that kind with some laborers, and that afterwards, before the debt was paid, the laborer wanted to quit, and he was prevented from doing so by force, threats, or intimidation, or if he has left, and was arrested either on some trumped-up criminal charge or without any warrant of law, and returned for the purpose of compelling him to carry out his contract and work until his debt was paid off, then it is your duty as grand jurors to find an indictment against such person or persons, and all others who have aided them in the commission of that offense.

This law is, no doubt, one of the most salutary statutes in existence, but it is wholly immaterial what your or my individual views as to the wisdom of the enactment of this law may be. The duty of the courts is to enforce all valid laws enacted by the lawmaking department of the state or government. If the people are dissatisfied with any law, they can change it by instructing their representatives in the Legislature or the halls of Congress to that effect, but until the law is repealed the courts are by their oaths bound to enforce it without fear or favor.

When I use the word "court," I do not mean merely the judge presiding, for he is only a part of the court. The word "court" in criminal proceedings includes grand juries and petit juries, as well as the presiding judges. Under the provisions of the Con-

stitution of the United States, no person can be held to answer for a crime, with the exception of a few petty misdemeanors, unless on a presentment or indictment of a grand jury. You will therefore readily see that judges are absolutely powerless to bring any person to trial for the commission of a crime unless the grand jurors of the district in which the offense was committed discharge their duty by returning an indictment against the alleged offender. You have been carefully selected from the many counties comprising this district to act as grand jurors on account of your high standing in the communities in which you reside, and your reputation as honorable citizens, who believe in the honest enforcement of the laws, and the court entertains no doubt but that you will discharge your duty in conformity with your oaths, without fear or favor, and without bias or prejudice.

COLUMBIA NAT. SAND DREDGING CO. v. WASHED BAR SAND
DREDGING CO. et al.

(Circuit Court, E. D. Pennsylvania. March 30, 1905.)

No. 40.

1. CORPORATIONS—SUIT BY STOCKHOLDER—NECESSITY OF PREVIOUS DEMAND ON DIRECTORS.

Where the bill of a stockholder shows that the directors of the corporation own a majority of the stock, and charges that it was issued to them without payment, and that they are mismanaging the corporation and diverting its funds and income to themselves, it is not necessary, to entitle complainant to relief, that it should be shown, as required by equity rule 94, that demand was made on them or the corporation before the suit was brought.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 792, 817.]

2. SAME—MISMANAGEMENT—EQUITY JURISDICTION TO APPOINT RECEIVER.

Where the majority stockholders of a corporation, who are also the directors, are clearly violating the charter rights of the minority, as by diverting all the earnings of the company to themselves, either directly or indirectly, a court of equity will appoint a receiver at suit of a minority stockholder, although the company is solvent; there being no complete, prompt, and efficient remedy at law.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 2206, 2207.]

In Equity. Suit for appointment of a receiver. On final hearing.

Thomas Cahall, George Fred'k Keene, and Charles C. Lister, for complainant.

Henry R. Edmunds and William A. Glasgow, Jr., for respondents.

HOLLAND, District Judge. This is a bill in equity filed asking for the appointment of a receiver. The plaintiff, on the 1st day of October, 1892, was the owner of a patent for a sand dredging machine, which had been issued to James H. Miller, and Joseph G. Patterson, of Philadelphia, entered into an agreement with it on the above-mentioned date, in which it was agreed that Patterson

would organize a corporation to operate in the Delaware River and Bay and tributaries thereto in dredging for sand, and that a machine for that purpose should be built, using the patent of Miller, for which the plaintiff, the owner of this patent, agreed to give the proposed corporation a perpetual license, upon the condition that one-fourth of the capital stock, which was to be \$25,000, full paid, should be delivered to the plaintiff corporation, and that the dredging machine should be built by Miller, at the expense of Patterson or the proposed corporation.

The proposed corporation was organized shortly after the date of the agreement, with a capital stock of \$25,000, one-fourth of which was subsequently issued to the plaintiff company, 125 shares to Robert Patterson, 100 shares to Joseph G. Patterson, 100 shares to Charles M. Patterson, 17 shares to John C. Grady, 17 shares to Robert F. Loper, and 16 shares to Isaac Doughton, for which none of these parties paid anything into the treasury of the company. The sand dredging machine was built by the defendant corporation, under the supervision of Miller, who was employed until May, 1893, at an expense of \$9,221.72. It, however, did not work satisfactorily, and \$8,598 was expended by the Pattersons to put it in working condition, and not until six months afterward did the machine dredge sand satisfactorily.

The stock certificate was issued to the plaintiff company for their one-fourth interest after Miller left the employ of the defendant company in 1893, and the license for the use of the patented machine was accepted by the defendant on October 17, 1894, and on January 1, 1898, the defendant company rendered to the plaintiff a statement of assets, receipts, and expenditures, showing a deficit of \$221.45. Up to this time there was no denial of the plaintiff's right to the stock and interest in the company. From 1893 to January 1, 1898, the defendant company was controlled and conducted alone by Robert Patterson, at the office of the Philadelphia Transportation & Lighterage Company, the stock of which belonged to Joseph G. Patterson and his two sons, and to which company the defendant corporation paid an annual sum of \$1,700 to manage and conduct its affairs. There was no management on the part of the board of directors, but its affairs were managed as though they were owned personally by Robert Patterson. The lighterage company purchased the entire product of the defendant company at a certain sum per ton. The money advanced by the Pattersons for building the machine was charged up as a loan against the defendant company in favor of the Philadelphia Transportation & Lighterage Company, upon which interest at 6 per cent. was paid since 1893. Neither Loper nor Grady took any interest in the management of the corporation, and in fact was not aware that they were the owners of any stock. From May, 1893, to January 1, 1898, the defendant company was conducted at a loss, while the Philadelphia Transportation & Lighterage Company was conducted at a profit.

It is not alleged that the defendant company is insolvent, but, upon the other hand, it is claimed that a payment to it of the amount actually due by the Pattersons and the Philadelphia Transportation

& Lighterage Company, together with the amount which should have been paid in as capital of the concern, would not only make the stock valuable, but show a surplus belonging to the defendant company. The plaintiff company is entitled to one-fourth of the capital stock, and it is evident, therefore, that the sum in controversy is more than \$2,000, and this court has jurisdiction. The bill does not allege that the plaintiff has made a demand on the corporation or its officers to collect the amount alleged to be due it from the Philadelphia Transportation & Lighterage Company, nor for the collection of the amount due upon the capital stock, nor has it made any other demands upon the corporation, or any of its officers, to correct the mismanagement of the defendant company, nor do we think that it was necessary for it to do so in this case, as required by rule 94, as it is evident that where the officers of the corporation are managing the concern entirely for their own profit, and the benefits derived from the corporation find their way, either directly or through contracts with other concerns of which they are the owners, into the pockets of the officers, it is not necessary that the plaintiff should make demand upon them before filing its bill, as it is manifest that such a demand would be unavailing. *Hawes v. Oakland*, 104 U. S. 460, 26 L. Ed. 827; *Weir v. Bay State Gas Co.* (C. C.) 91 Fed. 940; *Wolf v. Penna. Railroad Co.*, 195 Pa. 91, 45 Atl. 936; *Treat v. Ins. Co.*, 203 Pa. 21, 52 Atl. 60.

Courts will not take the property of a corporation out of the possession of its owners at the suit of a minority stockholder, without there is a very grave necessity therefor; but where the facts recited in a bill charging mismanagement show that the board of directors who are responsible for the mismanagement are the majority stockholders, and that they are managing the corporation for their own benefit, and diverting its funds and income to themselves, the minority stockholders, or any of them, would be entitled to relief, either by injunction, where that remedy could correct the evil, or, if necessary, the appointment of a receiver, and the majority stockholders who violated their trust would have no just cause of complaint. A receiver will be appointed where the majority stockholders are clearly violating the chartered rights of the minority and putting their interest in imminent danger, or where the holders of the majority of the stock neglect to elect officers. *Smith on Receivers*, § 225 (j); *State of Montana, etc., v. Second Judicial District* (Mont.) 39 Pac. 316, 27 L. R. A. 392, 48 Am. St. Rep. 682; *Dodge v. Woolsey*, 59 U. S. 331, 15 L. Ed. 401; *Pond v. Railroad Company*, Fed. Cas. No. 11,265; *Ervin v. Railroad Co.* (C. C.) 27 Fed. 626; *Aiken v. Colorado, etc., Co.* (C. C.) 72 Fed. 591. And this last case was referred to and affirmed in the case of *Leary v. Columbia River, etc., Co.* (C. C.) 82 Fed. 777.

Such temporary receivership may be created where the corporation is entirely solvent, yet the corporate officers, by mismanagement or fraud, are jeopardizing the property. This gives stockholders and creditors a right to complain and ask for a receivership. *Cowan v. Plate Glass Co.*, 184 Pa. 9, 38 Atl. 1075. And it is not enough to defeat jurisdiction in equity that there is a remedy at

law. The remedy must be complete, prompt, and efficient. Gluck & Becker on Receivers of Corporation, § 19, for which many authorities are cited in the notes.

Let a decree be drawn in accordance with this opinion.

In re HERSKOVITZ.

(District Court, N. D. Ohio, W. D. February 13, 1901.)

No. 1,164.

1. EXTRADITION—TREATY WITH GREAT BRITAIN—SUFFICIENCY OF COMPLAINT.

Under article 10 of the extradition treaty with Great Britain of 1842, a complaint for the arrest and examination of an alleged offender is not required to set out the offense with the particularity of an indictment, but is sufficient if it conforms to the requirements of a preliminary complaint under the local law where the accused is found.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Extradition, § 12.]

2. SAME—PROCEEDINGS BEFORE COMMISSIONER—COLLATERAL ATTACK.

Under Rev. St. § 5270 [U. S. Comp. St. 1901, p. 3591], which vests justices of the Supreme Court, Circuit and District Judges and commissioners with concurrent jurisdiction to issue warrants and make examinations and commitments in extradition proceedings, the judgment of a commissioner in such a proceeding cannot be reviewed for error by a District Court on a writ of habeas corpus.

[Ed. Note.—Scope of review on habeas corpus to procure release of person sought to be extradited, see note to *Bruce v. Rayner*, 62 C. C. A. 506.]

3. SAME.

Evidence of malice on an ulterior purpose on the part of the prosecuting witness at whose instance a criminal prosecution was instituted in a foreign country will not invalidate a commitment of the accused for extradition from this country.

On Petition for Writ of Habeas Corpus.

Kohn & Northrup, Southard & Love, and John A. Dunn, for petitioner.

King & Tracy, for respondents.

WING, District Judge. It appears from the record of the commissioner, which is before this court on certiorari, that a complaint was filed before the commissioner, sworn to by Joseph E. Rogers, who therein states that he has been instructed and authorized by the Attorney General of the province of Ontario to prosecute extradition proceedings against George W. Herskovitz, and that he is informed and believes that on a certain date the said Herskovitz did commit the crime of perjury within the jurisdiction and government of Great Britain. Then follows what purports to be a more particular specification of the offense. It is by virtue of article 10 of the treaty between Great Britain and the United States of 1842, commonly known as the "Ashburton Treaty," and section 5270 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3591], that this complaint is required to be filed. The sec-

tion referred to provides that either justices of the Supreme Court, a Circuit Judge, a District Judge, or an authorized commissioner may issue a warrant for the apprehension of a person charged with having committed within the foreign jurisdiction any of the offenses provided for by treaty or convention. Warrant was issued by the commissioner, based upon this complaint, and examination had.

The first objection made by counsel for the petitioner to the legality of his detention is that the complaint does not sufficiently describe the offense of perjury, in that it omits to state before what officer the oath was taken, the name of the officer, and that he had authority, by the laws of Canada, to administer an oath. The complaint in extradition cases is not required to be drawn with the certainty and definiteness of an indictment, and the rule which applies to complaints before our local magistrates is the one which ought to govern in deciding whether or not the complaint is so vague and indefinite in its terms as not sufficiently to apprise the person arrested of the offense with respect of which he is to be examined. I do not find that the complaint in question is of such character as to be insufficient to give jurisdiction to make the examination which is contemplated by the treaty.

Article 10 of the treaty of 1842 between the United States and Great Britain provides as the prerequisite of extradition that "this shall be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed." By the article of the treaty referred to it is provided that "upon complaint made under oath" warrant may issue. The commitment is the direct result of the examination, not of the complaint.

In examining the records of the proceedings before the commissioner, I find that Joseph E. Rogers testified to his official connection with the demanding government, and to his instructions received from the Attorney General, and attaches a written authority from the Attorney General; so that there can be no question that the demand for the petitioner is actually made under the authority of the province of Ontario. Alfred H. Clark, Esq., testifies that he is county crown attorney for the county of Essex, in the province of Ontario, and, under oath, furnishes a copy of the Criminal Code, which he says is published by the authority of the Parliament of Canada. Referring to these statutes, he testifies as to what the statutory law of Canada is with respect to the crime of perjury, and the necessity of a person applying for a license to marry making oath as to the age of the person whom he is licensed to marry. James Oliver testifies to the fact that the petitioner took an oath before him, and signed an affidavit, which is produced, and made part of the record. He further testifies that he is an issuer of licenses; that under the law a person is required to make affidavit of the character referred to before a license is granted by him; and that such was the requirement of the law at the time of

the execution of the affidavit by the petitioner. He identifies the paper as the affidavit of George W. Herskovitz. The signature to this paper as being that of George W. Herskovitz is otherwise testified to in the examination by those claiming to be familiar with his signature. The affidavit referred to shows that the affiant thereto stated upon his oath that Clara Raymond was over the age of 18. It is testified by Andrew S. Raymond, father of Clara Raymond, that she was only of the age of about 15 years, and that he had made the fact known to Herskovitz prior to the time when he took the oath complained of. The testimony of John P. Hincks is to the effect that he was clergyman and rector of All Saints Church in Windsor, and authorized to solemnize marriages; that he solemnized the marriage between the petitioner and Clara Raymond, and that he did so upon the strength of the license procured to be issued by Herskovitz by the affidavit in which he is claimed to have committed perjury. On page 52 Mr. Raymond testifies that he made affidavit or a complaint against the petitioner in Canada after consultation with the chief of police and the chief magistrate, Mr. Bartlett. Upon cross-examination Mr. Raymond testifies that as a result of his complaint filed in Canada a warrant was issued and inclosed to him, which warrant and the envelope inclosing it were found in the record, marked "Exhibit No. 8W," with the letter of inclosure from G. Wills, chief of police.

By section 5270, already referred to, concurrent jurisdiction is given to the several officers named in the statute to issue warrants, hear examinations, and to commit in extradition proceedings. This, then, is a collateral attack upon the judgment of a concurrent court. It is too well settled to require the citation of authority that the writ of habeas corpus cannot be used as a method of reviewing proceedings as if upon error, and that judgments or findings of courts of competent jurisdiction cannot be set aside or avoided by this procedure because of error. Under the provisions of the statute the commissioner had full jurisdiction of the subject-matter, and there is no question but what he had jurisdiction of the person of the petitioner. I think the disclosures made at the examination have, however, cured any defect in the complaint.

The question raised by counsel for the petitioner with respect to the testimony of Alfred H. Clark on the subject of the laws of Canada is one which could only properly be raised upon error.

If these proceedings had been with respect to an offense charged to have been committed in Lucas county, and held before a justice of the peace at that county, and had resulted in a commitment, I do not think it would be seriously claimed that the petitioner should be released by writ of habeas corpus. The commitment, then, is not a nullity for the reason that it was the result of an examination before an officer having jurisdiction, and founded upon testimony tending to show the guilt of the person charged.

It is further urged by counsel for the petitioner that, because there is evidence in the record that this proceeding was instigated by Andrew S. Raymond for some ulterior purpose connected with

a suit for accounting brought by the petitioner against Raymond and a suit for divorce brought by the wife of the petitioner, the petitioner should be discharged. I do not think that the existence of either a malicious or other ulterior purpose can have the effect to nullify extradition proceedings otherwise valid. In the cases cited, to support the contention it will be found that other reasons than the existence of malice were the foundations of the action of the court.

For the reasons already given, I have not deemed it important to consider any questions or error raised.

It is ordered that the writ be discharged, and the petitioner remanded.

DARLINGTON, RUNK & CO. v. UNITED STATES.

(Circuit Court, E. D. Pennsylvania. March 7, 1905.)

No. 50.

1. CUSTOMS DUTIES—CLASSIFICATION—DRESS SHIELDS—WEARING APPAREL OF RUBBER.

Held, that certain wearing apparel, consisting of dress shields, and composed in chief value of rubber, and in part of cotton, are dutiable as manufactures in chief value of india rubber, under paragraph 460, Tariff Act Oct. 1, 1890, c. 1244, § 1, Schedule N, 26 Stat. 602, and not under paragraph 349 of said act (section 1, Schedule I, 26 Stat. 592), relating to wearing apparel composed of cotton, or in chief value thereof, and to such wearing apparel "having india-rubber as a component material."

2. SAME—WEARING APPAREL.

Held, that dress shields, which are articles for women's wear, intended to be worn under the arms to protect the dress from perspiration, are "wearing apparel," within the meaning of paragraph 413, Tariff Act Oct. 1, 1890, c. 1244, § 1, Schedule L, 26 Stat. 598.

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision in question affirmed the assessment of duty by the collector of customs at the port of Philadelphia on merchandise imported by Darlington, Runk & Co.

Thomas S. Gates and Frank P. Prichard, for petitioners.

Wm. M. Stewart, Jr., and J. Whitaker Thompson, for the United States.

J. B. McPHERSON, District Judge. The merchandise involved in this controversy is dress shields—an article for women's wear, intended to be worn under the arms to protect the dress from perspiration. Some are made of cotton, and the rest are made of silk thinly lined with rubber. They were imported in October, 1891, and duties were imposed by the collector upon the cotton and rubber shields under paragraph 349 of the act of October 1, 1890, c. 1244, § 1, Schedule I, 26 Stat. 592, which reads as follows:

"Clothing ready made, and articles of wearing apparel of every description, handkerchiefs, and neckties or neck wear, composed of cotton or other vegeta-

ble fiber, or of which cotton or other vegetable fiber is the component material of chief value, made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer, all of the foregoing not specially provided for in this act, fifty per centum ad valorem: provided, that all such clothing ready made and articles of wearing apparel having india rubber as a component material (not including gloves or elastic articles that are specially provided for in this act), shall be subject to a duty of fifty cents per pound, and in addition thereto fifty per centum ad valorem."

Duty was imposed upon the silk and rubber shields under paragraph 413, Schedule L, 26 Stat. 598:

"Laces and embroideries, handkerchiefs, neck ruffings and ruchings, clothing ready-made, and articles of wearing apparel of every description, including knit goods, made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer, composed of silk, or of which silk is the component material of chief value, not specifically provided for in this act, sixty per centum ad valorem: provided, that all such clothing ready made and articles of wearing apparel when composed in part of india rubber (not including gloves or elastic articles that are specially provided for in this act), shall be subject to a duty of eight cents per ounce, and in addition thereto sixty per centum ad valorem."

The importer protested, claiming that the cotton and rubber shields should be classified either under paragraph 355 (Schedule I, 26 Stat. 593), which provides for a duty of 40 per cent. ad valorem upon "cotton damask in the piece or otherwise, and all manufactures of cotton not specially provided for in this act," or under paragraph 460 (Schedule N, 26 Stat. 602), which provides for a duty of 30 per cent. ad valorem upon "manufactures of * * * india rubber * * * or of which these substances or either of them is the component material of chief value, not specially provided for in this act." The silk and rubber shields, it was claimed, should be classified either under paragraph 414 (Schedule L, 26 Stat. 598) which fixes a duty of 50 per cent. ad valorem upon "all manufactures of silk, or of which silk is the component material of chief value, not specially provided for in this act," or under paragraph 460, as a manufacture of india rubber.

The board of general appraisers sustained the collector's classification upon the evidence afforded by the papers, no testimony having been taken. The material part of their decision is as follows:

"Directly and by implication, the pleadings admit that silk is the component material of chief value in the shields composed of silk and india rubber, and that cotton is the component material of chief value in the shields composed of cotton and india rubber. Hence the only question at issue is whether dress shields are wearing apparel? This question is considered fully in a former decision of this board—G. A. 557—to which decision we refer."

Upon the present proceeding for review several witnesses were examined, and their testimony establishes the fact to my satisfaction that india rubber is the material of chief value in the cotton and rubber shields, and that silk is the material of chief value in the silk and rubber shields. This being so, the ruling of the board upon the cotton and rubber shields must be reversed, upon the authority of *Riley v. United States* (C. C.) 66 Fed. 741, where it was

decided by Judge Cox that precisely similar shields should be classified under paragraph 460 as manufactures of india rubber, and not under paragraph 349.

The importers concede that silk has been proved to be the component material of chief value in the silk and rubber shields, and therefore the only question concerning them is whether they should be classified under paragraph 413, as an article of wearing apparel of which silk is the component material of chief value, or under paragraph 414, as manufactures of silk, or of which silk is the material of chief value, not specially provided for. If they are properly included in the class "articles of wearing apparel of every description," this language is more specific than "manufactures of silk, or of which silk is the component material of chief value," and the decision of the appraisers was right. In my opinion, they are properly included in such class, and the duty was correctly imposed under paragraph 413. They are complete and independent articles, manufactured for the express purpose of being worn upon the person as a part of the dress. They are not adapted to any other purpose, and they are in very general use as part of a woman's dress. Since "apparel" is not confined to outer clothing, but "is used in an inclusive sense, as embracing all articles which are ordinarily worn—dress in general" (*Arnold v. United States*, 147 U. S. 496, 13 Sup. Ct. 406, 37 L. Ed. 253), it seems to me to be clear that shields are embraced within the meaning of that word. The facts that shields are sold in the notion department of some large stores, and are described by some merchants as dressmakers' trimmings or findings, are not important. The testimony fell far below the standard of proof required to establish a commercial meaning for a word, and, in the absence of such proof, the ordinary meaning of the statutory language must prevail: *Maillard v. Lawrence*, 57 U. S. 261, 14 L. Ed. 925; *Arthur v. Morrison*, 96 U. S. 108, 24 L. Ed. 764. Indeed, under the ruling in *Maillard v. Lawrence*, it may be doubted whether a commercial meaning could be proved for words of such well-known import as "wearing apparel."

The decision of the board must therefore be affirmed as to the silk and rubber shields, but reversed as to the shields of rubber and cotton.

SMITH v. GOULD et al.

(District Court, S. D. New York. March 22, 1905.)

WHARVES—INJURY OF VESSEL ON SUNKEN ROCK—LIABILITY OF WHARF OWNER.

Respondent, as owner of a wharf, *held* liable for the sinking of a steam canal boat which struck a rock under water in moving to a place alongside the wharf designated by respondent's authorized agent for the purpose of unloading a cargo for respondent.

In Admiralty. Action for injury to vessel at wharf.

Martin A. Ryan, for libellant.

Nathaniel Cohen and Charles M. Hough, for Howard Gould.

Robinson, Biddle & Ward, for John C. Udall and the Abbot-Gamble Contracting Company.

ADAMS, District Judge. This action was brought by John A. Smith, the owner of the steam canal boat William Spencer, to recover the damages he sustained through the sinking of the boat in the vicinity of a wharf belonging to Howard Gould, at Sands Point, Long Island. The respondents John C. Udall and the Abbot-Gamble Contracting Company, were doing some work for Gould at his place there and the boat went to the wharf to deliver to them some 1000 barrels of cement, to be used in the work. The boat arrived at the wharf on the 22nd day of April, 1902, and was placed at one end thereof and discharged some of her cargo, but that being a dangerous place, owing to a load of brick having been dumped at that point, she was moved to the easterly side of the wharf, near the end.

The contention on the part of the libellant is, that the dock master, employed by Gould, directed him where to go and he was endeavoring to reach the place indicated when his boat struck a rock, receiving the injury complained of. The respondent Gould contends that no such instructions were given but, on the contrary, the orders were for the boat to go to an offing, about 600 feet from the end of the wharf. There is no evidence to implicate the respondents Udall or the Abbot-Gamble Company and the controversy turns upon the credence to be given to the witnesses concerning the claim against Gould.

The libellant, the master of the boat, testified that the wharf was T shaped and he first went to the outer end. There were some other boats lying at the wharf, one, a schooner loaded with brick, at the eastern end of the T. After the libellant had removed some of his load at the first place, he was ordered by the respondent Gould's dock master, to the eastern side, back of the T, and assured by him that although there were some rocks on that side, there was room enough for his boat, about 100 feet long, at the place indicated. The master then asked the dock master where the rocks were, and had their locations pointed out to him. He marked the places on the wharf, and finding there was room enough for his boat, he started her around the schooner to the designated berth, the dock master assisting, but had not gone far inside of the T when his boat brought up on the port side of the bow upon a rock from which he was unable to move her and she there received the

injuries. The rock was about 85 or 90 feet from the shore side of the T and about 15 to 18 feet from the side of the wharf. The tide was ebbing at the time and fell about 2 feet after the boat struck. There were about $2\frac{1}{2}$ feet of water over the rock when the boat first struck. At high tide, the boat was nearly covered with water when she sank.

The libellant's testimony is opposed by the testimony of the dock master only. He testified that he directed the master of the Spencer to haul to the offing mentioned and anchor there before low tide in order to avoid the bricks dumped at the end of the wharf; that she was at the wharf at 12 o'clock, when he, the dock master, left for his dinner; that when he came back at 1 o'clock, she was still there and started to move to the east side at a quarter before 2 o'clock; that when the Spencer commenced to move around the wharf, it was obvious to the witness that she was going to a dangerous place and he told the master that he went there at his own risk; that he never advised nor directed the master of the Spencer to go to the east side of the wharf, nor assisted him by taking a line; that he did not notice the master of the Spencer making any chalk marks on the wharf; he also denies that he, the witness, was ever notified that there were rocks on the east side of the wharf but that one of the other persons on the wharf said it would be advisable for the Spencer to haul to the place the boat was injured.

If the determination of the question of the responsibility of the respondent Gould turned upon the testimony of these two witnesses, it might be difficult to decide whether there should be a recovery, although it appears that the testimony of the libellant, apart from his interest, was the more reliable. Whatever doubt there may have been, however, is removed by the testimony of several other witnesses produced by the libellant, who sustain his contention. His own engineer testified in support of the libellant and three other witnesses said they heard the dock master give directions for the Spencer to go to the place on the east side of the wharf where she was injured. One of these men warned the dock master that it was not a safe place for the boat to go to but the dock master said it was all right there.

It appears that this dock master had only been there a few days and actually knew nothing about the rock but he assumed to know and the injury followed. He was there in authority over the vessels going to the wharf and they were justified in obeying his instructions. The testimony seems to make a clear case against the respondent Gould but suggests no negligence by the other parties to the action.

There is a question whether the libellant exercised due diligence in endeavoring to minimize the extent of his damages but that can be determined by the commissioner.

Decree against the respondent Gould, with an order of reference. The libel is dismissed as to the respondents Udall and the Abbot-Gamble Company.

CITY OF SIOUX FALLS et al. v. FARMERS' LOAN & TRUST CO. et al.
FARMERS' LOAN & TRUST CO. et al. v. CITY OF SIOUX FALLS et al.

(Circuit Court of Appeals, Eighth Circuit. March 31, 1905.)

Nos. 2,128, 2,130.

1. MUNICIPAL CORPORATIONS—WATERWORKS FRANCHISE—COMPETITION—IMPLIED CONTRACT.

The grant of a franchise by a municipal corporation to a water company to furnish water does not of itself raise an implied contract that the city will never do any act by which the value of the franchise granted may in fact be reduced.

2. SAME—EXCLUSIVE GRANT—CONSTRUCTION.

A contract by a city, granting "the exclusive privilege" of laying water pipes for public use in the highways of the city to K., and containing a provision that it was agreed that the contract should remain in full force for 20 years from a specified date, with the privilege to the city of purchasing the waterworks from K., his successors or assigns, after the expiration of 10 years, etc., did not constitute an implied renunciation of the city's power to construct and maintain waterworks itself, after the expiration of the 20-year period.

3. SAME—VESTED RIGHTS—CONTRACTS—STATE STATUTES—CONSTRUCTION—FEDERAL COURTS—INDEPENDENT JUDGMENT.

Where, in a suit to restrain a city from constructing and operating waterworks, complainant's rights were acquired under a municipal contract, and not by virtue of any constitutional or statutory provision, complainant was not entitled to the independent judgment of the federal court on the construction of a constitutional provision of the statute of the state with reference to the power of the city to increase its indebtedness for the purpose of constructing such waterworks.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 43.]

4. SAME.

It was immaterial that a decision of the highest court of the state construing such Constitution and statutes to authorize the city to construct and maintain such waterworks was filed pending the suit in the federal court.

5. SAME—GENUINE CONTROVERSY—REVIEW.

Where a decision of the highest court in the state, construing the state Constitution and laws with reference to a municipal corporation's power to incur indebtedness for waterworks, was urged as conclusive on the federal courts, the latter would not review an objection that the state action did not involve a genuine controversy, but was a friendly suit to obtain a favorable interpretation of the Constitution to permit the issuance of water bonds.

[Ed. Note.—State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.

6. SAME—OBJECTIONS.

Where the validity of an alternative submission of the question whether a city should issue bonds for the "construction or purchase" of a system of waterworks was in issue in a suit brought in the state courts to restrain the city from proceeding under such election, and a final judgment in favor of the city was affirmed on appeal to the state Supreme Court, such decision was conclusive on the federal courts against the validity of an objection there to the alternative submission of such question.

Appeal from the Circuit Court of the United States for the District of South Dakota.

For opinion below, see 131 Fed. 890.

Hosmer H. Keith and R. H. Warren, for city of Sioux Falls et al.

J. H. Gates, Park Davis, C. O. Bailey, and Bartlett Tripp (W. H. Lyon, D. T. Watson, J. H. Voorhees, and R. F. Wendel, on the brief), for Farmers' Loan & Trust Company et al.

Before VAN DEVANTER, Circuit Judge, and PHILIPS and RINER, District Judges.

RINER, District Judge. These cases are cross-appeals from a decree entered by the Circuit Court of the United States, for the District of South Dakota. A bill in equity was filed in the Circuit Court November 30, 1901, by the Farmers' Loan & Trust Company, to enjoin the city of Sioux Falls and its officers from proceeding to construct a system of waterworks in pursuance of an ordinance of the city to that effect, and from issuing bonds for the purpose of enabling the city to construct such waterworks. One W. S. Kuhn, a citizen of the state of Pennsylvania, and the Sioux Falls Water Company, a corporation organized under the laws of the territory of Dakota, and the South Dakota Water Company, a corporation organized under the laws of the state of South Dakota, were also made parties defendant. To this bill the South Dakota Water Company, the Sioux Falls Water Company, and W. S. Kuhn, on the 31st of December, 1901, filed their joint and several answer, admitting the allegations of the bill, and also filed a cross-bill against the city of Sioux Falls, and its officers, their codefendants. March 25, 1902, the cross-bill was amended by making the complainant a party defendant thereto. The city and its officers filed demurrers to the original bill and to the cross-bill. The demurrers were subsequently overruled by the court, and the city and its officers then answered the original bill and cross-bill. October 16, 1903, the South Dakota Water Company, the Sioux Falls Water Company, and W. S. Kuhn, by leave of court, filed an amended and supplemental cross-bill, making the defendants named in the original cross-bill parties defendant. The complainant, the trust company, filed its answer to both the original and amended and supplemental cross-bills, admitting to be true all of the allegations and facts therein alleged. The city and its officers demurred to the amended and supplemental cross-bill. A motion for a temporary injunction, based upon the pleadings in the case, was filed, and the demurrer to the amended and supplemental cross-bill and the motion were argued and submitted at the same time. The demurrer was overruled and the motion for a temporary injunction was sustained. The city and its officers thereupon answered the amended and supplemental cross-bill, testimony was taken, and the case subsequently went to final hearing upon the pleadings and proofs, resulting in a decree perpetuating the injunction. From this decree the city and its officers appealed to this court; the

Farmers' Loan & Trust Company, the South Dakota Water Company, the Sioux Falls Water Company, and W. S. Kuhn filing a cross-appeal.

On the 9th of April, 1884, the city of Sioux Falls, then being a municipal corporation acting under a special charter granted by the Legislature of the territory of Dakota, empowering it to construct and maintain waterworks and make all needful rules and regulations concerning the distribution and use of water supplied by such waterworks, and to make all contracts necessary to the exercise of its corporate powers, entered into a contract in writing with one W. S. Kuhn, of Pittsburg, Pa., his associates, successors, and assigns, for the construction of a system of waterworks, within the city of Sioux Falls, for the purpose of supplying the city and its inhabitants with water. The contract granted to Kuhn "the exclusive privilege of laying water pipes for public use beneath the surface of the highways of said city, with all necessary facilities and privileges for laying and repairing said water pipes, from time to time, as may become necessary." In consideration of this privilege, Kuhn agreed, for himself and his associates, successors, and assigns, under the penalty of forfeiting all rights under this agreement, to repair all damages accruing to the surface of the highways by reason of laying and repairing water pipes, and "to furnish to every citizen requiring it, within the limits of their occupancy of said highways, a constant and sufficient supply of pure water for ordinary house use, upon condition of such citizen or citizens paying to him, the said party of the second part, his associates, successors, and assigns, quarterly in advance, of the yearly charges for water privileges at rates not exceeding those at present charged in Kansas City, Mo., Council Bluffs, Iowa, Quincy, Ill., and Lincoln, Neb.," and also to erect, at once, a line of water pipes to be placed in the streets of the city, and to maintain in good repair 40 fire hydrants, of the kind known as "double delivery," to have the capacity specified in the contract. Paragraph 9 of the contract contained the following provision:

"It is further understood and agreed by the parties to this contract that the same shall continue in full force and effect for and during the period of twenty years from April 9, 1884, with the privilege, for the party of the first part, to purchase this waterworks from the party of the second part, his successors and assigns, on the expiration of ten years, by appraisement by disinterested parties, of three persons, one elected by the party of the first part, another by the party of the second part, and the third chosen by the two thus named, and, if not purchased then, the same privilege is granted at each successive five years."

Kuhn, his associates, successors, and assigns, so far as this record discloses, and as was found by the Circuit Court, have complied with all the obligations of the contract on their part, and the city has received its supply of water for public purposes and for the use of its inhabitants, as provided in the contract. The record shows that this system of waterworks had been enlarged from time to time, since the date of the contract, until, at the date of the decree, it represented an expenditure of approximately \$181,000. On the 22d of July, 1885, Kuhn assigned and transferred his

contract and the waterworks plant constructed by him thereunder to the Sioux Falls Water Company, and on the 30th of June, 1890, the last-named company sold and assigned the contract and waterworks plant to the South Dakota Water Company, since which date the South Dakota Water Company has been in possession of and has been operating the plant. On the 1st of July, 1890, the South Dakota Water Company executed and delivered to the Farmers' Loan & Trust Company its trust deed to secure the bonds of said water company, which were issued and certified by the trustee under the trust deed, and sold, as the record tends to show, in an amount approximating \$290,000, which bonds were payable on the 1st of July, 1910. The city of Sioux Falls, since March 6, 1890, has been a municipal corporation, organized and existing, under the general law of the state of South Dakota for the incorporation of cities, as a city of the first class. The act of March 6, 1890, authorized a city of the first class to levy and collect taxes for general and special purposes on real and personal property, to borrow money on the credit of the corporation for corporate purposes, and to issue bonds therefor in such amounts and forms and on such conditions as it shall prescribe, not to exceed in the aggregate 5 per centum of the value of the taxable property therein; the valuation to be ascertained by the last assessment for state and county taxes previous to incurring the indebtedness. It further provides that no bonds shall be issued, either for general or special purposes, unless at an election after 20 days' notice in a newspaper published in the city, stating the purpose for which the bonds are to be issued and the amount thereof, and then only when the legal voters of the city by a majority shall determine in favor of issuing the bonds. It also authorized the city to construct and maintain waterworks, and make all needful rules and regulations concerning the distribution and use of water; to purchase, erect, lease, rent, manage, and maintain a system, or part of a system, of waterworks and hydrants for the supply of water or fire apparatus that may be used in the prevention or extinguishment of fire, and to pass all ordinances, penal or otherwise, as shall be necessary for the full protection, maintenance, management, and control of the property so leased, purchased, or erected; to pass all ordinances and rules, and to make all regulations, proper or necessary to carry into effect the powers granted to the cities.

Section 4 of article 13 of the Constitution of the state of South Dakota, as originally adopted, contains this provision:

"The debt of any county, city, town, school district or other subdivision shall never exceed five per centum upon the assessed value of the taxable property therein. In estimating the amount of indebtedness which a municipality or subdivision may incur, the amount of indebtedness contracted prior to the adoption of this Constitution shall be included."

At the general election in November, 1896, this section of the Constitution was amended by adding thereto the following proviso:

"Provided, that any county, municipal corporation, civil township, district or other subdivision may incur an additional indebtedness not exceeding ten per centum upon the assessed value of the taxable property therein for the

purpose of providing water for irrigation and domestic uses. Provided, further, that no county, municipal corporation or civil township shall be included within any such district or subdivision without a majority vote in favor thereof of the electors of the county, municipal corporation or civil township, as the case may be, which is proposed to be included therein, and no such debt shall ever be incurred for any of the purposes in this section provided, unless authorized by a vote in favor thereof of a majority of the electors of such county, municipal corporation, civil township, district or subdivision incurring the same."

In 1902 the same section of the Constitution was again amended to read as follows:

"Sec. 4. The debt of any county, city, town, school district, civil township or other subdivision shall never exceed five (5) per centum upon the assessed valuation of the taxable property therein for the year preceding that in which said indebtedness is incurred. In estimating the amount of the indebtedness which a municipality or subdivision may incur, the amount of indebtedness contracted prior to the adoption of the Constitution shall be included. Provided, that any county, municipal corporation, civil township, district or other subdivision may incur an additional indebtedness not exceeding ten per centum upon the assessed valuation of the taxable property therein for the year preceding that in which said indebtedness is incurred, for the purpose of providing water and sewerage for irrigation, domestic uses, sewerage and other purposes; and provided, further, that no county, municipal corporation, civil township, district or subdivision shall be included within such district or subdivision, without a majority vote in favor thereof of the electors of the county, municipal corporation, civil township, district or other subdivision, as the case may be, which is proposed to be included therein, and no such debt shall ever be incurred for any of the purposes in this section provided, unless authorized by a vote in favor thereof by a majority of the electors of such county, municipal corporation, civil township, district or subdivision incurring the same."

An act of the Legislature, approved March 6, 1899 (Laws 1899, p. 62, c. 53), provided as follows:

"Section 1. That there is hereby granted to cities of the first class the right and power to issue bonds for the purpose of constructing, equipping, maintaining and operating or purchasing a system of waterworks for the purpose of providing water for domestic purposes; provided, that no such city shall be authorized to issue bonds or to incur any indebtedness or liability of any kind for any such purpose in excess of ten per centum upon the assessed value of the taxable property of such city, according to the last preceding assessment before the issuance of such bonds.

"Sec. 2. The city council of any such city may, by resolution passed by a majority of the aldermen elect at any regular meeting of such city council, or special meeting called for that purpose, call a special election and submit the question of the issuance of such bonds to the electors thereof. Such resolutions shall set forth: The amount of bonds to be issued, the maximum rate of interest they shall bear, the length of time they shall run, and the purpose for which they are to be issued. Such election shall be advertised as now provided by law for the calling of special elections in such cities. The ballots to be voted at all elections under this act shall read as follows: 'In favor of the proposition of issuing bonds to the extent of _____ dollars, for the purpose of providing water for domestic uses.' 'Against the proposition of issuing bonds to the extent of _____ dollars, for the purpose of providing water for domestic uses.' Such elections shall be conducted and the votes cast thereat shall be counted, returned and canvassed in such manner as is now provided by law for elections in such cities; provided, that a majority of the electors of such city shall be determined by the vote cast for mayor of the city at the last preceding election for such officer. If a majority of the electors of such city shall cast their vote in favor of the issuance of such bonds, the city shall, through its proper officers, without further act, be

authorized to issue such bonds to the amount voted, and to sell and negotiate the same.

"Sec. 3. All bonds authorized by this act shall run not more than twenty years from the date of their issuance and shall bear interest at not to exceed five per cent. per annum, payable annually or semi-annually as the city council may provide, and principal and interest shall be payable at such place as may be fixed by the city council; such bonds shall be signed by the mayor and attested by the city auditor and sealed with the seal of such city, and shall be sold at not less than the par value and accrued interest to the highest bidder after notice of such sale has been published once in each week for three successive weeks in a daily newspaper, if there be one published in such city, and if not, then in a weekly newspaper published in the city where such bonds shall be issued, and in such other newspapers and places as the council may deem advisable.

"Sec. 4. All acts and parts of acts in conflict with the provisions of this act are hereby repealed."

In October, 1901, the mayor and city council of the city of Sioux Falls passed the following ordinance and resolution:

"An Ordinance declaring it necessary to call a special election for the purpose of submitting to the legal voters of the city of Sioux Falls the question whether bonds shall be issued for the purpose of constructing, equipping, maintaining and operating or purchasing a system of waterworks and the mode of conducting the same.

"Be it resolved by the city council of the city of Sioux Falls:

"Section 1. That a special election be held on Tuesday, November 5, A. D. 1901, for the purpose of submitting to the legal voters of the city of Sioux Falls, South Dakota, the question whether the said city of Sioux Falls shall issue its bonds to the amount of \$210,000 for the purpose of constructing, equipping, maintaining and operating or purchasing a system of waterworks for the use and benefit of said city for providing water for domestic uses.

"Sec. 2. The question submitted to the legal voters of said city as provided in section 1 shall be as follows: Shall the city of Sioux Falls issue its bonds to the amount of \$210,000 for the purpose of constructing, equipping, maintaining and operating or purchasing a system of waterworks for the uses and purposes of said city and for providing water for domestic uses.

"Sec. 3. Said election shall be conducted and the ballots therefor prepared and the voting for or against said proposition shall be in the same manner as in the case of regular annual elections in said city, and the votes shall be canvassed and counted and the result declared in the same manner as for said elections so held at the regular annual election in said city and all rules and regulations prescribed by statute relative to the manner of voting and declaring the result and canvassing the vote shall be in the same manner as prescribed by statute in the case of regular annual election.

"Sec. 4. This ordinance shall be in force and take effect from and after its approval and publication."

The resolution is as follows:

"Be it resolved by the city council of the city of Sioux Falls: That a special election be held on the fifth (5th) day of November, A. D. 1901, for the purpose of submitting to the legal voters of the city of Sioux Falls, South Dakota, the question whether the said city of Sioux Falls shall issue its bonds for the purpose of constructing, equipping, maintaining and operating or purchasing a system of waterworks to provide water for domestic uses.

"Also resolved, that the amount of bonds to be issued shall be two hundred and ten thousand (\$210,000) dollars, to run twenty (20) years from the date of their issuance, and shall bear interest not to exceed five per cent. per annum, and the purpose for which said bonds are to be issued is to construct, equip, maintain and operate or purchase a system of waterworks to provide water for domestic uses.

"Also resolved, that the question to be submitted at said special election and the ballots to be voted at said special election shall read as follows: 'In

favor of the proposition of issuing bonds to the extent of two hundred and ten thousand (\$210,000) dollars for the purpose of providing water for domestic uses.' 'Against the proposition of issuing bonds to the extent of two hundred and ten thousand (\$210,000) dollars for the purpose of providing water for domestic uses.'

"Also resolved, that said special election shall be conducted, and the votes cast thereat shall be counted, returned and canvassed, in such manner as is now provided by law in the case of regular annual elections."

Pursuant to the provisions of the resolution just quoted, notice of a special election was given, which, so far as it is material to the determination of this case, is in the following language:

"Be it resolved by the city council of the city of Sioux Falls: That notice is hereby given that a special election will be held on Tuesday, November 5th, A. D. 1901, for the purpose of submitting to the legal voters of the city of Sioux Falls, South Dakota, the question whether the said city of Sioux Falls shall issue its bonds to the amount of two hundred and ten thousand (\$210,000) dollars to run twenty (20) years from the date of their issuance and to bear interest not to exceed five (5) per cent. per annum, said bonds to be issued for the purpose of constructing, equipping, maintaining and operating or purchasing a system of waterworks to provide water for domestic uses. The question to be submitted at said special election and the ballots to be voted at said special election shall be as follows: 'In favor of the proposition of issuing bonds to the extent of two hundred and ten thousand (\$210,000) dollars for the purpose of providing water for domestic uses.' 'Against the proposition of issuing bonds to the extent of two hundred and ten thousand (\$210,000) dollars for the purpose of providing water for domestic uses.'"

As provided in the notice, a special election was held in the city of Sioux Falls on November 5, 1901, at which election 1,184 votes were cast in favor of the proposition of issuing bonds to the extent of \$210,000 for the purpose of providing water for domestic uses, and 313 votes were cast against said proposition; and in June, 1903, \$210,000 of the bonds of the city were issued and sold to one Joe Kirby, who subsequently sold them, or some of them, to other parties. At the date of the decree the city had expended in the construction of the proposed water plant for itself approximately \$150,000. The record shows, and the Circuit Court found, that the assessed valuation of property subject to taxation in the city of Sioux Falls for the year 1901, was \$2,510,671; for the year 1902, \$2,739,598; and for the year 1903, \$3,481,988—and that the indebtedness of the city in the year 1903, and at the time the bonds were issued by the city, was \$391,000.

It is alleged in the bill that the effect of the proceedings taken by the city for the purpose of acquiring and building a water system of its own would be to impair the obligation of the contract entered into between the city and Kuhn, in violation of the provisions of section 10 of article 1 of the Constitution of the United States, and that the proceedings taken by the city in this behalf would amount to taking the property of the complainant, the South Dakota Water Company, without due process of law, in contravention of the provisions of article 14 of the Constitution of the United States, and would damage its property for public use without just compensation, in violation of section 13, art. 6, of the Constitution of South Dakota. It is also averred that the city had no power, under the constitution of South Dakota, to issue bonds and build

waterworks, and was by the Constitution prohibited from so doing by reason of the fact that the assessed valuation of the taxable property of the city was less than \$2,408,328, and that the total aggregate indebtedness of the city was in excess of \$361,000, or in excess of 15 per cent. of the total assessed value of the taxable property of the city, and by reason thereof the city was without power to issue the bonds. It is further averred that a majority of the electors of the city did not vote in favor of the proposition to issue bonds in the sum of \$210,000 to provide water for domestic uses; that the number of electors in said city on November 5, A. D. 1901, was greatly in excess of the number of qualified electors who voted for mayor at the last preceding election, and in excess of 2,370; that the act of the Legislature, in providing that a majority of the electors of the city shall be determined by the votes cast for mayor of the city at the last preceding election, was in violation of section 4 of article 13 of the Constitution of the state of South Dakota, and void; and that by reason thereof the action of the city in calling and holding the election, and the ordinance and resolution in relation thereto, were null and void.

The amended and supplemental cross-bill, in addition to the matters alleged in the original cross-bill, set out the proceedings of the city in advertising and selling the bonds to Kirby, and the resale and delivery of the bonds by Kirby to parties named in the cross-bill, and charged that the sale and delivery of the bonds were fraudulent and colorable only. Kirby and the other purchasers of the bonds were not, however, made parties. The supplemental cross-bill also set out, as matter arising since the original cross-bill was filed, the amendment to section 4 of article 13 of the Constitution of South Dakota, adopted at the general election held in November, A. D. 1902.

That the grant of a franchise by a municipal corporation to a water company to furnish water does not of itself raise an implied contract that the grantor will never do any act by which the value of the franchise granted may, in the future, be reduced, is too well settled to require any extended discussion. *Long Island Water Supply Company v. Brooklyn*, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165; *City of Joplin v. Southwestern Missouri Lighting Company*, 191 U. S. 150, 24 Sup. Ct. 43, 48 L. Ed. 127; *Helena Water Company v. Helena*, 195 U. S. 383, 25 Sup. Ct. 40, 49 L. Ed. —; *Bienville Water Supply Company v. Mobile*, 175 U. S. 109, 20 Sup. Ct. 40, 44 L. Ed. 92; *Id.*, 186 U. S. 212, 22 Sup. Ct. 820, 46 L. Ed. 1132. In *Skaneateles Water Company v. Skaneateles*, 184 U. S. 354, 22 Sup. Ct. 400, 46 L. Ed. 585, it is said:

"Such a contract would be altogether too far-reaching and important in its possible consequence in the way of limitation of the powers of the municipality, even in matters not immediately connected with water, to be left to implication."

While it is conceded in this case that the city had no power to grant a perpetual exclusive franchise for the privilege of laying water pipes for public use beneath the surface of the highways of the city, yet it is insisted that the word "exclusive," used in the con-

tract, must be construed as having the effect of an agreement on the part of the city not to construct and maintain a system of waterworks in competition with the water company. In discussing this branch of the case, the Circuit Court said:

"The word 'exclusive' in the contract between the city and W. S. Kuhn is insufficient to raise the implication that the city, by the use of said word, thereby agreed to renounce its power to construct waterworks itself; because (1) such is not the ordinary meaning of the word; (2) because it is conceded that under the law the word 'exclusive,' if given its usual interpretation, would render the exclusive feature of the contract void; (3) because the express provision of the contract of the city to take water for a term of years raises the contrary implication that after the expiration of that 20 years both parties intended that the city should be free to exercise its power to construct and maintain waterworks, or to obtain its water in any other lawful way."

We concur in this view. It is difficult to see the force of the contention that, on account of once making a contract with the plaintiff for 20 years, the city irrevocably bound itself by an implied contract never to construct and maintain a waterworks system of its own. While it is doubtless true that the erection of such plant by the city will render the property of the water company less valuable, yet the city was not bound by the contract to refrain from exercising its power to construct and maintain waterworks after the expiration of the 20-year period provided in the contract. The contract by its terms ceased to have effect after April 9, 1904, and the subsequent construction and operation of waterworks by the city for its own benefit and the benefit of its citizens would not, we think, be a violation of any of the express or implied provisions of the contract. The city undoubtedly had the power, by an express contract, to renounce its authority to construct and maintain waterworks itself during the time which it would be proper and lawful to grant the privilege to a third party. *Walla Walla City v. Walla Walla Water Company*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341.

Recognizing this rule, the city treated the contract as a binding contract upon it for 20 years. In its answers, both to the bill and cross-bill, it is alleged that the city had no intention of operating the system of waterworks which it proposed to build until after the expiration of the contract between the city and Kuhn; and for the full term of 20 years both the city and the water company have performed their several obligations under the contract. The Circuit Court, however, held that, as the city had an existing indebtedness, at the time it issued its bonds for the construction of waterworks, of nearly 15 per cent. of the assessed valuation of taxable property in the city for the year 1902, it had no power to incur this additional indebtedness, and therefore no power to construct and maintain a system of waterworks. This conclusion seems to have been based: (1) Upon the construction of the Constitution of the state of South Dakota to the effect that the 10 per cent. allowed for water purposes was to be computed in addition to the 5 per cent. allowed for general purposes only, and not in addition to all other indebtedness; (2) upon the view that the adoption of the amend-

ment to the Constitution operated to nullify the election held in November, 1901, under the same section of the Constitution as amended in 1896, and that the amendment of 1902 operated to repeal the statute of 1899 authorizing the issuance of bonds and providing for holding the election, and, further, that after the adoption of the amendment of 1902 additional legislation and a new election were necessary before the bonds could be issued; (3) upon the view that at the election held in November, 1901, the proposition for the issuance of bonds was submitted to the electors in the alternative—that is to say, as to whether bonds should be issued for the purpose of constructing, equipping, maintaining, and operating, “or” purchasing, a system of waterworks.

These propositions, we think, simply invite a consideration of the Constitution and laws of the state of South Dakota, and fall within the general rule that the construction adopted by the highest court of the state of the provisions of its Constitution and laws is binding upon the federal court as a decision upon a matter of purely local law and not presenting a federal question. *Randall v. Bringham*, 74 U. S. 523, 19 L. Ed. 285; *Elmwood v. Marcy*, 92 U. S. 289, 23 L. Ed. 710; *Wade v. Travis*, 81 Fed. 742, 26 C. C. A. 589; *Adams Express Co. v. Ohio*, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683. That the Circuit Court considered these questions as questions of local law is apparent, for in the course of its opinion, found in the record, it is said:

“Our conclusion is that, if the city was lawfully authorized under the Constitution and statutes of the state of South Dakota to construct and maintain its own waterworks in the way it threatens and was proceeding to accomplish this end, then neither the franchise or privilege granted to Kuhn and his assigns, nor any of the provisions of the city’s contract with him, nor the investment made thereunder and its threatened loss, furnish any tenable ground to invoke the aid of a court of equity to prohibit the city from constructing and operating its own waterworks.”

In the case of *Wells v. City of Sioux Falls*, 94 N. W. 425, decided April 7, 1903, the Supreme Court of South Dakota had before it the questions now under consideration, and, in construing section 4 of article 13 of the Constitution of the state, held, in substance, that the power to incur a 10 per cent. indebtedness for providing water, when authorized by a majority of the electors, was conferred, regardless of existing indebtedness for other purposes, and that the bonds of the city would, if sold, not be invalidated because of the constitutional limitation upon municipal indebtedness; and it was further decided in that case that this section of the Constitution, as amended in 1902, was not amended in any respect which affected the questions so determined. This decision must, we think, be held to be controlling in this court.

The Circuit Court, while admitting the general rule, refused to follow this decision of the Supreme Court of South Dakota, for the reason, as stated in its opinion:

“In the case at bar, the rights of the complainant and the water company became vested long prior to the decision in the *Wells Case*, and the original bill and original cross-bill were filed long prior to the commencement of, or decision in, the *Wells Case*; and we are bound in this proceeding to exer-

cise our own independent judgment as to the meaning of the constitutional provisions in question."

We are unable to concur in this conclusion. The water company acquired its rights under the Kuhn contract, and not by virtue of the section of the Constitution construed by the Supreme Court of the state, limiting the indebtedness of municipal corporations. A vested right, as we understand it, which will entitle the holder of such right to the independent judgment of the federal court upon the construction of a constitutional provision or the statute of a state, must be a right acquired under and by virtue of the Constitution or the statute. In other words, the Constitution or statute must have entered into the contract or transaction and be necessary to the support of the right. No question is here made in regard to the organization of the city or its powers as a municipal corporation; neither is any question raised or to be decided with reference to the right of the water company to be a corporation. If the decision of the Supreme Court of South Dakota had been made with reference to the special statute passed by the Legislature organizing the city of Sioux Falls, pursuant to which the Kuhn contract was made and while that contract was in force, then the distinction which the Circuit Court sought to draw might be well founded; but here the only contract between the city and the water company expired before the decision by the Circuit Court, and the contract was not entered into with reference to the constitutional provision in question, nor did the water company acquire its property with reference to such provision. We think there is no necessary connection between the constitutional provision and the transactions relied upon by the Circuit Court to establish a vested right which would entitle the water company to the independent judgment of the federal court upon the construction of the statutes of the state. Neither do we think that the fact that this suit was pending at the time the decision of the Supreme Court was rendered takes the case out of the general rule that the decision of the highest court of the state is binding upon the federal court upon questions of local law. The decision of the state court was rendered before the amended pleadings were filed and long prior to the hearing and decree in this case.

In the case of *Western Union Telegraph Company v. Poe* (C. C.) 64 Fed. 9, Judge Taft said:

"The case before the court, though the court has overruled a demurrer to the bill, on the ground that the Nichols law is invalid, is nevertheless still pending in court, and no final decree has been entered therein. It seems to me manifest that it is the duty of this court to reverse its former ruling, and make it harmonious with that of the tribunal which has ultimate authority on the subject."

Judge Taft, in a former decision in that case, had overruled a demurrer to a bill in equity, upon the ground that the state statute, authorizing an assessment, was void because in conflict with the Constitution of the state of Ohio. When this decision was announced, the statute had not been construed by the Supreme Court of the state. Subsequent to that decision, and before the answers

were filed in the case, the validity of the statute under the Constitution of Ohio was sustained by the Supreme Court of that state. Judge Taft thereupon granted a rehearing and sustained the demurrers of the defendants to the bill, upon the ground that the decision of the Supreme Court as to the construction of the state statute and its validity under the Constitution of Ohio was conclusive upon the federal courts.

It was suggested at the argument that the case of *Wells v. City of Sioux Falls* might be characterized as a friendly litigation for the purpose of obtaining the opinion of the Supreme Court as to the proper interpretation to be placed upon section 4, and also for the purpose of having an interpretation placed upon it which would be favorable to the issuance of the bonds. Whether or not that be true, it is not within the province of this court to determine. In the case of *Adams Express Co. v. Ohio*, 165 U. S. 219, 17 Sup. Ct. 308, 41 L. Ed. 683, in discussing a similar question, the Chief Justice said:

"It is suggested that the decision of the Supreme Court of Ohio should not have been followed, because the case in which it was announced did not involve a genuine controversy, but was prepared for the purpose of obtaining an adjudication, and, under the circumstances, ought not to have been considered by that court. But it was for that tribunal to pass on this question, and, as it entertained jurisdiction and delivered a considered opinion, which appears in the official reports of the court, as its judgment of the validity of the *Nichols* law under the Constitution of the state of Ohio, it is not within our province to review its determination in that regard."

It was also insisted at the argument that the election authorizing the issuance of the bonds by the city was void, because two separate and distinct propositions were submitted to the voters as one. We do not so understand this record. The city council had the power, under the general incorporation act, to construct or purchase waterworks in its discretion, without submitting the question to the electors, provided it could do so within the 5 per cent. limit of indebtedness fixed by the Constitution and general incorporation act. Because the city was indebted in excess of the 5 per cent. limit would not, in our judgment, destroy the power of the council to purchase or construct waterworks. Its only effect would be to render the power inoperative for want of means. The amendment to the Constitution of 1896 provided a method of securing the amount necessary by permitting additional indebtedness to be incurred for the special purpose of "providing water for domestic use." It does not in any way limit the discretion or power of the city council as to the choice of means by which the water supply should be provided. By the statute of 1899 cities of the first class are given power to incur such additional indebtedness in the form of negotiable bonds for the purpose of providing water for domestic use, either by the construction or purchase of a system of waterworks. The question was submitted in the exact language of the statute, and the sole proposition submitted to be voted upon was whether or not the city should issue bonds to the amount of \$210,000 for the purpose of providing wa-

ter for domestic use. Nothing is said in the statute about submitting to the electors the proposition whether the city shall construct or purchase a system of waterworks. That was a matter to be determined by the city council, under the powers conferred upon it, and with which the electors had nothing to do. However this may be, we think this question was necessarily involved in the decision of the Supreme Court of South Dakota in the case of *Wells v. City of Sioux Falls*, and, like the other propositions noticed, falls within the rule that the decision of the highest court of the state upon questions of local law is binding upon the federal court.

In paragraph 6 of the complaint in the *Wells Case* it is alleged:

"That on the 15th day of October, 1901, the city council of the city of Sioux Falls passed a resolution and ordinance providing for a special election to be held on Tuesday, November 5, 1901, for the purpose of submitting to the legal voters of the city of Sioux Falls the question whether the city of Sioux Falls should issue its bonds to the amount of two hundred and ten thousand dollars (\$210,000) to run twenty years and to bear interest not exceeding five per cent. for the purpose of constructing, equipping, maintaining, and operating, or purchasing, a system of waterworks to provide water for domestic uses, and at said election so to be held it was provided that the question submitted and the ballots voted on should be in the following form, to wit: 'In favor of the proposition of issuing bonds to the extent of \$210,000 for the purpose of providing water for domestic uses.' 'Against the proposition of issuing bonds to the extent of \$210,000 for the purpose of providing water for domestic uses.' That pursuant to said ordinance a special election was held on Tuesday, November 5, 1901, at which said election the said city of Sioux Falls avers that the vote of the qualified electors of the said city was in favor of the proposition of issuing bonds to the extent of two hundred and ten thousand dollars for the purpose of providing water for domestic uses."

It was alleged in the answer of the city in that action that under the laws and Constitution of the state of South Dakota the city of Sioux Falls had the legal right to issue bonds to the amount of \$210,000 for the purpose of constructing, equipping, maintaining, and operating, or purchasing, a system of waterworks to provide the city with water for domestic uses, and that it claimed this right under the election of November 5, 1901. The plaintiff in that case demurred to the answer, and the demurrer was overruled. The plaintiff elected to stand upon his demurrer, and a judgment was entered in favor of the defendant. The case was then taken to the Supreme Court of the state, where the judgment of the trial court was affirmed.

The other assignments of error were argued with distinguished ability by counsel, and have all been carefully considered by the court; but, in the view we have taken of this case, it becomes unnecessary to discuss them here.

The decree of the Circuit Court must be reversed, with directions to dissolve the injunction and to dismiss the original bill, the amended bill, the cross-bill, and amended and supplemental cross-bill, at complainant's and cross-complainants' cost.

PEARSON et al. v. WILLIAMS, Com'r.

(Circuit Court of Appeals, Second Circuit. February 24, 1905.)

No. 129.

IMMIGRANTS—RIGHT TO LAND—BOARD OF INQUIRY—DETERMINATION—CONCLUSIVENESS.

Act Cong. March 3, 1903, c. 1012, § 21, 32 Stat. 1218 [U. S. Comp. St. Supp. 1903, p. 180], provides that, if the Secretary of the Treasury shall be satisfied that an alien has been found in the United States in violation of the act, he may cause such alien, within three years after landing, to be taken in custody and deported. Section 24 (32 Stat. 1219 [U. S. Comp. St. Supp. 1903, p. 181]) declares that any alien who may appear to the examining immigrant inspector at the port of arrival not to be entitled to land shall be detained for examination by a board of special inquiry. Section 25 (32 Stat. 1220 [U. S. Comp. St. Supp. 1903, p. 182]) provides that such board shall consist of three immigrant inspectors selected with the approval of the Secretary of the Treasury, and that the decision of any two members of the board shall be final, but that the alien or any dissenting member of the board may appeal to the Secretary of the Treasury, whose decision shall be final. *Held*, that a decision of a board of inquiry that an alien was not a contract laborer and was entitled to land was not *res adjudicata* of such question, and did not prevent the Secretary of Commerce and Labor, on whom the powers formally vested in the Secretary of the Treasury were conferred by Act Cong. Feb. 14, 1903, c. 552, 32 Stat. 825 [U. S. Comp. St. Supp. 1903, p. 41], from instituting new proceedings within a year thereafter for a retrial of such question.

Coxe, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Southern District of New York.

W. M. Byrne, for appellant.

Eugene Treadwell, for appellees.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal by the commissioner of immigration at the port of New York from an order in habeas corpus discharging the appellees from his custody. The appellees were aliens in the custody of the commissioner under a warrant of the Secretary of Commerce and Labor. They arrived at the port of New York about February 1, 1904, and were detained for examination before a board of special inquiry to ascertain whether they had come to this country in violation of law. The board, after hearing evidence, decided in their favor, and they were by its unanimous decision allowed to land. Thereafter, and on or about March 21, 1904, the Secretary of Commerce and Labor issued a warrant under which they were held in custody by the appellant, pending an inquiry to ascertain whether they were here in violation of law, as alien laborers who had come here under a previous contract to perform service. All the proceedings were had pursuant to Act Cong. March 3, 1903, c. 1012, 32 Stat. 1213 [U. S. Comp. St. Supp. 1903, p. 170], entitled "An act to regulate the immigration of aliens into the United States." The pertinent provisions of this act are these: Section 21 (32 Stat. 1218 [U. S. Comp.

St. Supp. 1903, p. 180]) provides that, in case the Secretary of the Treasury shall be satisfied that an alien has been found in the United States in violation of the act, he may cause such alien, within a period of three years after landing, to be taken into custody and deported. Section 24 (32 Stat. 1219 [U. S. Comp. St. Supp. 1903, p. 181]) provides that any alien who may appear to the examining immigrant inspector at the port of arrival not to be clearly and beyond doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry. Section 25 (32 Stat. 1220 [U. S. Comp. St. Supp. 1903, p. 182]) provides that such board shall consist of three persons to be selected by the Commissioner General of Immigration from the immigrant inspectors in his service, with the approval of the Secretary of the Treasury, and shall have authority to determine whether an alien who has been duly held shall be allowed to land or be deported, and that the decision of any two members of the board shall prevail and be final, but that either the alien or any dissenting member of said board may appeal to the Secretary of the Treasury, whose decision shall be final.

The powers conferred by these provisions upon the Secretary of the Treasury were subsequently vested in the Secretary of Commerce and Labor. Act Feb. 14, 1903, c. 552, 32 Stat. 825 [U. S. Comp. St. Supp. 1903, p. 41].

It is insisted for the appellees, and this contention prevailed in the court below, that the decision of the board of special inquiry, no appeal from it having been taken, was final. The examination before that board was addressed to the inquiry whether the aliens had come to this country, in violation of law, as contract laborers; and it is urged that the decision of the board is *res adjudicata* upon that question, and conclusive of their right to enter and remain.

We are of the opinion that the decision of the board has no other effect than a determination that the alien shall be permitted to land; that its functions are confined to this initial inquiry; and that it is competent for the Secretary of Commerce and Labor at any subsequent time during the three years, upon becoming satisfied that the alien who has been allowed to enter is notwithstanding here in violation of law, to exercise the power of deportation. The board is a subordinate tribunal whose powers extend merely to the decision of the particular inquiry committed to it, and any adjudication beyond this, even if it were to be regarded as a judicial decision, would be *coram non iudice*.

The existing provisions of law are substitutes for provisions of the earlier acts regulating the immigration of aliens. By section 8 of the act of March 3, 1891 (26 Stat. 1085, c. 551 [U. S. Comp. St. 1901, p. 1298]), it was committed to the inspection officers at every place of arrival to detain alien immigrants for examination. They were authorized to administer oaths and take and consider testimony touching the right of such aliens to enter the United States, and it was provided that all decisions made by them "or their assistants" touching the right of any alien to land, when adverse to such right, should be final, unless an appeal should be

taken to the superintendent of immigration, and that his action should be subject to review by the Secretary of the Treasury. By section 11 (26 Stat. 1086 [U. S. Comp. St. 1901, p. 1299]) of that act it was provided that any alien who should come into the United States in violation of law might be returned, as by law provided, at any time within one year thereafter. By an act of October 19, 1888 (25 Stat. 565, c. 1210), the Secretary of the Treasury had been authorized, in case he should be satisfied that an immigrant had been allowed to land contrary to the law prohibiting the immigration of laborers under previous contract, to cause the immigrant, within the period of one year after landing or entering, to be taken into custody and returned to the country whence he came. Speaking of these enactments in Japanese Immigrant Case, 189 U. S. 99, 23 Sup. Ct. 611, 47 L. Ed. 721, the Supreme Court used this language:

"Taking all its enactments together, it is clear that Congress did not intend that the mere admission of an alien, or his mere entering the country, should place him at all times thereafter entirely beyond the control or authority of the executive officers of the government. On the contrary, if the Secretary of the Treasury became satisfied that the immigrant had been allowed to land contrary to the prohibition of that law, then he could, at any time within a year after the landing, cause the immigrant to be taken into custody and deported. The immigrant must be taken to have entered subject to the condition that he might be sent out of the country by order of the proper executive officers if within a year he was found to have been wrongfully admitted into it, or illegally entered the United States."

By the present act the time within which this power could be exercised by the Secretary of the Treasury was extended to the period of three years after the landing or entering of the immigrant, and was subsequently transferred to the Secretary of Commerce and Labor. It is the plain purpose of the drastic legislation embodied in the immigrant exclusion acts to provide every possible safeguard against the abuse by aliens of the prohibited classes of the privilege of coming to or remaining within this country. There is no repugnance between the power conferred upon the board of special inquiry and that conferred upon the Secretary. The former is to be exercised summarily, and while the immigrant is under detention awaiting the result of the inquiry. The board has no authority to compel the attendance of witnesses, and must decide upon such evidence as is at hand or is readily accessible. Of necessity, its decisions do not have the quality of even approximate infallibility. It is hardly conceivable that Congress should have intended that such a decision should be a final determination of the status of the alien. Manifestly Congress intended not only that the Secretary might review the question whether he should be allowed to enter upon an appeal from the decision, but also that at any time within three years the Secretary should have the power to reconsider the broader question of the right of the alien to remain, and, upon reaching an adverse conclusion, to order his deportation. This is not a power to be exercised arbitrarily, and deportation is to be ordered only after giving the alien an opportunity to be heard upon the questions involving his privilege. In the present case, before deporta-

tion of the aliens had been ordered, they were heard; and it is to be presumed that the power of deportation would not have been exercised unless, after a fair hearing, the Secretary had become convinced that they were here in violation of law.

The order is reversed, with instructions to remand petitioners to the custody of the respondent.

COXE, Circuit Judge, dissents.

UNITED STATES v. BRENDDEL, et al.

(Circuit Court of Appeals, Second Circuit. February 22, 1905.)

No. 120.

1. CUSTOMS DUTIES—COLLECTORS—LIABILITY FOR MONEY LOST IN TRANSMISSION.

Under Rev. St. § 3639 [U. S. Comp. St. 1901, p. 2422], which requires all collectors of customs to retain the sums collected till the same are ordered by the proper department or officer transferred or paid out, and to then make the transfer or payment as directed, and the regulations of the Treasury Department made pursuant thereto, requiring collectors to deposit customs dues collected with the Treasurer or an Assistant Treasurer, using therefor a designated express company and forms of vouchers and waybills provided by the department, a collector who has followed such directions in making up a package, and in taking the receipt for the same from the express company, cannot be held liable on his bond for the loss of any part of the contents of such package before it reaches the Assistant Treasurer, to whom it is properly addressed.

2. ERROR—ADMISSION OF INCOMPETENT EVIDENCE—HARMLESS ERROR.

The admission of incompetent evidence is not ground for the reversal of a judgment which is fully supported by uncontradicted evidence properly admitted.

In Error to the District Court of the United States for the Western District of New York.

This cause comes here upon writ of error to review a judgment of the District Court which dismissed the complaint of the plaintiff below upon the verdict of a jury that there was no cause of action.

Chas. H. Brown, for the United States.

Frank W. Standart, for defendants in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The action was brought against the principal and surety upon a bond to indemnify the United States against any loss it might sustain by or through any act or omission of defendant Brendel as collector of customs for the district of Buffalo Creek, in the state of New York. The only item in controversy was a shortage of \$5,250 in a remittance of customs duties purporting to contain \$7,700. The testimony introduced by the defendants showed that on September 7, 1901, a package of United States bills and currency amounting to \$7,700 was made

up in the collector's office, wrapped in manilla paper, properly sealed, and addressed to the "Assistant Treasurer U. S., N. Y.," and that it was on the same day delivered to the United States Express Company at Buffalo, which issued the following receipt therefor; the italicized parts being in writing, and the remainder of the receipt a printed form:

"No. 61.

Buffalo N. Y. Sept. 7, 1901.

"Received, in good order, from *Henry W. Brendel*, Collector of Customs one sealed package, said to contain *Seven Thousand seven hundred Dollars*, to be transported under the existing contract between the United States Express Company and the Secretary of the Treasury; and to be delivered to *Assistant Treasurer U. S. N. Y.*

Morgan

"Agent for U. S. Express Company.

"The above receipt will be retained by the Consignor.

"Received for the above Certificate of Deposit No. _____ dated _____ 190-, which I have forwarded with my accounts to the Treasury Department, Washington."

Diagonally across the face of the receipt are printed the words, "Inclose in each package a letter of advice indicating how the money is to be deposited."

The package was transmitted to the Assistant Treasurer, and it is claimed that when it reached his office it contained only \$2,450.

The court charged the jury that if they believed that a theft was committed in the Buffalo office, or if the money was lost because of the neglect of Brendel or those in his employ, they should find a verdict for the amount claimed in the complaint, but that if they believed that this money was carefully placed in the bundle, and delivered to the office of the United States Express Company at Buffalo for transmission to the subtreasury at New York City, they should find a verdict for the defendants.

The counsel for the government contends that theft or loss during transmission without his fault could not relieve Brendel from the obligation actually to deposit the money in the treasury, or with an Assistant Treasurer or a United States depository; also that, even if it were conceded that he might make use of an express company to forward the money, he failed to carry out his instructions when he took from the express company a receipt for a "sealed package said to contain" the sum specified. In support of these propositions, reliance is had on sections 3617, 3621, Rev. St. [U. S. Comp. St. 1901, pp. 2413, 2416]. The first of these sections provides that:

"The gross amount of all moneys received from whatever source for the use of the United States * * * shall be paid by the officer or agent receiving the same into the treasury, at as early a day as practicable."

Section 3621 provides that:

"Every person who shall have moneys of the United States in his hands or possession shall pay the same to the Treasurer, an Assistant Treasurer, or some public depository of the United States, and take his receipt for the same in duplicate and forward one of them forthwith to the Secretary of the Treasury."

It is suggested that there was a "public depository of the United States" in the city of Buffalo, and that, under the section last

above quoted, it was Brenden's duty to place the money there and take duplicate receipts. The difficulty with this argument is that the language of section 3621 is general. Undoubtedly it covers every person not otherwise provided for, but it cannot apply to public officers as to whom Congress has specifically provided some other and different method of disposing of moneys of the United States which may come to their hands. Section 3639, Rev. St. [U. S. Comp. St. 1901, p. 2422], which is not cited in the briefs of either side, is controlling of the question raised here. It reads:

"Sec. 3639. * * * All collectors of the customs * * * are required to keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as specially allowed by law, all the public money collected by them * * * till the same is ordered by the proper department or officer of the government, to be transferred or paid out; and when such orders for transfer or payment are received, faithfully and promptly to make the same as directed, and to do and perform all other duties as fiscal agents of the government which may be imposed by any law, or by any regulation of the Treasury Department made in conformity to law."

The general treasury regulations as to customs provide:

"Art. 1582. All sums received for customs duties shall be deposited with the Treasurer or such Assistant Treasurer of the United States as may be designated in each case; but receipts for tonnage, official fees, and other dues and charges, and the moneys received for disbursement may be deposited in the national bank depositories specially designated for such purpose.

"Whenever the nearest depositories are too remote to admit of daily deposits, collectors will deposit their receipts of duties as often as they amount to \$1,000, and at least once a month, even if less than that sum be collected.

"All such moneys shall be transmitted to the place of deposit in such manner and by such routes as may be prescribed from time to time, the charges for transportation being paid by the Secretary of the Treasury."

It will be perceived that this regulation requires customs dues to be deposited with the Treasurer or an Assistant Treasurer. It is not disputed that the proper Assistant Treasurer was the one in New York City. In furtherance of the last paragraph of the regulation above quoted, the Secretary of the Treasury on March 12, 1889, issued the following circular:

"To All Collectors, Officers, or Agents of the Treasury Department Engaged Either in the Collection or Transfer of the Revenue of the United States."

No subsequent modification of its provisions is suggested. It provides as follows:

"You are hereby notified that the contract between the United States and the Adams Express Company for the transportation of public moneys and securities, dated Feb. 1, 1879, will terminate March 31, 1889, and that a contract has been entered into to take effect March 31, 1889, between the Government and the United States Express Company for the transportation over the lines of the said United States Express Company * * * of all moneys under the control of the Treasury Department.

"You are, therefore, hereby directed to employ said companies for the necessary transportation of all moneys and securities of the Treasury Department; said means of transportation being provided for the purpose of depositing with the Treasurer, an Assistant Treasurer, or National Bank Depository of the United States moneys collected on account of sales of public lands, internal revenue, or customs, * * * and for special purposes and under special circumstances in accordance with instructions from the Department.

* * * Forms of vouchers and waybills, to be used by all United States

officers and express companies or their agents, in the transportation of moneys or securities under this contract, have been prepared by the Treasury Department, and their use to the exclusion of all others is imperatively enjoined. They are furnished in book form by the Secretary of the Treasury, on whom requisition for them should be made. * * * All officers and agents are cautioned to carefully count and pack their money * * * to be transported, securing in strong packages, sealed with their own private seals in at least four places, and with the amount of each kind of money, their own names and titles, and the names and titles of the consignees plainly marked on the wrapper, taking receipts in the established forms from the express companies for all sums transferred."

No question is raised here as to the form of package, sealing, marking, etc.

The regulation and the circular above set forth are such as the Secretary of the Treasury was authorized to make and issue under section 251, Rev. St. U. S. [U. S. Comp. St. 1901, p. 138], and are not inconsistent with any provision of law to which our attention has been called. The objections to their admission in evidence (their authentication being conceded) are unsound. They made it the duty of the collector to transmit the money to the Assistant Treasurer by the United States Express Company, and in such transmission to use the forms of voucher and waybills prepared by the Treasury Department. The form of receipt which is objected to by plaintiff is the one issued to the defendant by the department, and he cannot be held in fault because it uses the phrase "a sealed package, said to contain," provided that when such package was delivered to the express company it was made up in conformity to the requirements of the department, and did in fact contain the \$7,700.

The only other assignments of error which need be considered are such as challenge the competence of certain testimony given by one Moran, chief clerk of the secret service division, Treasury Department. Against objection, he was allowed to testify to conversations which he had with certain clerks in the subtreasury in New York as to the circumstances under which the package received from Buffalo was received, opened, and examined. It was hearsay and should have been excluded, but we are satisfied that the error was not harmful to the plaintiff, because, if all such testimony had been excluded, the record was one on which the defendant was entitled to the direction of a verdict in his favor. Two witnesses testified specifically and positively to counting the money, putting it up in a package with the proper wrapper, etc., and that it contained \$7,700. This testimony was uncontradicted. If it had been shown on behalf of the government that at some time it had been discovered by somebody that the package did not contain \$7,700, that would be a circumstance from which it might be argued that these two witnesses were mistaken or untruthful, and there would have been an issue of fact which should have gone to the jury. But no such proof was given, and the plaintiff rested on the certification under section 886, Rev. St. U. S. [U. S. Comp. St. 1901, p. 670], that Brendel's account with the Treasury Department showed a balance due the United States of \$5,250. This left

the testimony of the Buffalo clerks as to the package in controversy uncontradicted, and the defendant entitled to a verdict. Under these circumstances, it seems unnecessary to reverse the judgment because some additional evidence, improperly admitted, was persuasive to the same result.

The judgment is affirmed.

UNITED STATES V. REISS & BRADY.

(Circuit Court of Appeals, Second Circuit. January 4, 1905.)

No. 31.

CUSTOMS DUTIES—CLASSIFICATION—PRESERVED FIGS.

Held, that the "fruits preserved in sugar, molasses, spirits, or in their own juices," enumerated in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651], are known commercially as a class by themselves, of which the use and form constitute the distinctive characteristics, and that certain figs preserved whole are within that provision, rather than the provision for "figs" in paragraph 264 of said act, c. 11, § 1, Schedule G, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651].

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon an appeal from a decision of the Circuit Court, Southern District of New York (126 Fed. 578), reversing a decision of the Board of General Appraisers (G. A. 4,946, T. D. 23,130), which sustained the action of the collector of the port of New York in assessing duty on certain merchandise imported under the tariff act of 1897.

Note *Brennan v. United States* (C. C. A.) 136 Fed. 743.

D. Frank Lloyd, for appellant.

A. H. Washburn, for appellees.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The articles in question were imported under different names, viz., "Figues vertes à l'eau de vie," "Figues au jus," "Figues vertes au jus," "Figues au marasquin," which appropriately describe them. They are figs—whole figs, sometimes green, sometimes ripe—which have been preserved, some in spirits, some in sugar or molasses, some in their own juice, some in juice flavored with maraschino. The relevant paragraphs are:

"263. Confits, sweetmeats and fruits preserved in sugar, molasses, spirits or in their own juices, not specially provided for in this act, one cent per pound and 35 per cent. ad valorem; if containing over ten per centum of alcohol and not specially provided for in this act, thirty-five per centum ad valorem; and in addition two dollars and fifty cents per proof gallon on the alcohol contained therein in excess of ten per centum."

"264. Figs, plums, prunes, and prunelles, 2 cents per pound; raisins and other dried grapes, two and one-half cents per pound; dates, one-half of one cent per pound; currants, Zante or other, two cents per pound; olives, green

or prepared, in bottles, jars, or similar packages, twenty-five cents per gallon; in casks or otherwise than in bottles, jars, or similar packages, fifteen cents per gallon."

Chapter 11, § 1, Schedule G, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651].

The question presented is, in which of these paragraphs are the importations included? It may be said that of the very large number of fruits—peaches, pears, plums, berries of all sorts, oranges, pineapples, etc.—variously preserved in sugar, spirits, molasses, or their own juice, "figs" would be a special class. It may also be said that of the comprehensive group of articles covered by the general word "figs," viz., figs, green, ripe, dried, glacé (sugared), pickled, preserved as jam or in spirits, or in juice, etc., the three classes figs preserved in sugar, in spirits, in juice, would be special varieties. The Circuit Judge determined the question as to the relative specificness of the two paragraphs by the consideration that paragraph 263 in terms excluded from its provisions fruits preserved, etc., not specially provided for, whereas paragraph 264 contains no such excepting clause. The test on which he relied has been frequently applied by this court, but we agree with the Board of General Appraisers in the conclusion that the present cause is more in accord with the one presented in *Rich v. United States*, 61 Fed. 501, 9 C. C. A. 596, which arose under the act of 1890. In that cause, by paragraphs 50 to 60, inclusive, duties were respectively imposed upon various colors, such as "Prussian blue," "satin white," "chrome yellow," "vermillion red," etc.; some colors being subject to a specific and others to an ad valorem duty. By paragraph 61 of the same schedule duty was imposed upon "artists' colors of all kinds in tubes or otherwise." The evidence showed that artists' colors are the colors specifically mentioned by their respective names (as above quoted) in the paragraphs preceding 61, when of a fine grade, specially prepared and put up for the use of artists in tubes, bottles, cakes, or pans, and include also some other specially prepared colors. It was contended that a color mentioned eo nomine in one of the earlier paragraphs could not be retained within the general class mentioned in paragraph 61. After stating the rule that in tariff act construction general terms must give way to particular, this court said:

"We think the rule has no application to the present case. The case is not one where an article is described by different provisions of the act, one general and the other more specific; but is one where the different provisions describe different articles for duty. While the term 'artists' colors in tubes or otherwise' describes a class comprehending many colors, it does not describe a class in which the colors of the earlier paragraphs are included. They do not belong to the class because they are not of the special variety which it embraces until they are prepared for a particular use and put up in a particular form. Each paragraph has its appropriate operation without impinging upon the other. The colors which have undergone the preparation necessary to bring them within the category commercially known as 'artists' colors' are made dutiable by paragraph 61. The colors mentioned in the earlier paragraphs, which have not been advanced so as to bring them within that category, are dutiable under their respective paragraphs."

We are satisfied that fruits preserved in sugar, in spirits, in juice, etc., are known commercially as a class by themselves, the various

fruits which that class includes being prepared for the particular use and put up in the particular form, which use and form constitute the distinctive characteristics of the category for which those fruits are prepared. Upon that class, as a class well known commercially, Congress has imposed duty by paragraph 263. We are further of opinion that the term "figs," when used without qualifying descriptive terms, in commercial significance means the dried figs, commonly imported and sold in baskets or boxes, which, like the other dried fruits mentioned *eo nomine* in paragraph 264—"plums, prunes, prunelles," "raisins," "dates," and "currants"—are not the preserved fruits of paragraph 263. The two paragraphs therefore describe different articles, and there is no conflict between them, and therefore there is no occasion to consider whether the term "figs" of paragraph 264 is a more specific designation for the imported articles than the term "fruits preserved in sugar, molasses, spirits, or their own juices."

The decision of the Circuit Court is reversed, and that of the Board of General Appraisers is affirmed.

BRENNAN v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. April 12, 1905.)

No. 546.

1. CUSTOMS DUTIES—CLASSIFICATION—LIMES IN BRINE.

Limes in brine *held* not to be dutiable as "limes" under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263, 30 Stat. 172 [U. S. Comp. St. 1901, p. 1651], but to be free of duty under section 2, Free List, par. 556, of said act, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1683], as "fruits in brine, not specially provided for."

2. SAME—SPECIFIC ENUMERATION—DESIGNATION BY CLASS.

Under some circumstances language describing a class may be more specific than that containing a designation *eo nomine*, and an article literally included within such a designation in one paragraph of the customs laws may, on account of its relations to a peculiar class, be referred to some other paragraph.

3. SAME—IMPLIED STATUTORY DEFINITIONS.

Wherever in the history of customs laws it is found that a certain expression has received, in effect, a statutory construction, or a long and uniform use by Congress or by the departments, that construction is controlling, unless some other is necessary. This rule is of the highest authority, and masters all others.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

The decision below (129 Fed. 837, T. D. 25,274), affirmed a decision of the Board of General Appraisers (G. A. 5,307, T. D. 24,320), which had affirmed the assessment of duty by the collector of customs at the port of Boston on merchandise imported by William F. Brennan.

William A. Keener (J. Stuart Tompkins, on the brief), for appellant.

William H. Garland, Asst. U. S. Atty.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, J. This is an appeal from the Circuit Court for the District of Massachusetts, involving the question of the proper classification of "limes in brine" under the customs act approved July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 172 [U. S. Comp. St. 1901, p. 1651]. Duty was assessed under paragraph 266, as follows:

"266. Oranges, lemons, limes, grape fruit, shaddocks, or pomelos, one cent per pound."

This classification was sustained by the Board of General Appraisers. Thereupon the importer petitioned the Circuit Court as provided by law. He made alternative claims that the importation should have been classified as "fruits in brine," in accordance with paragraph 559 (chapter 11, § 2, Free List, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1683]), forming a part of the free list, or else in accordance with paragraph 241 (chapter 11, § 1, Schedule G, 30 Stat. 170 [U. S. Comp. St. 1901, 1649]). It is so clear that the latter does not now touch this topic that we do not find it necessary to quote it. In estimating the dutiable weight under paragraph 266 the brine was included. Whether the brine should be so included is in issue; but, of course, this becomes unimportant if the importation should have been classified under the free list.

It is contended by the United States that under the well-known rule that articles are not dutiable under general terms when a duty is imposed in specific language, all limes are dutiable under paragraph 266, because specifically named therein, while not specifically named in paragraph 559; and that this is true particularly in view of the expression in the latter paragraph, "not specially provided for in this act." On the other hand, it is contended by the importer that this rule does not apply, because, under the other well-known rule, which frequently requires customs statutes to be construed in the light of mercantile designations, the single word "limes" does not commercially include "limes in brine." The Circuit Court found in favor of the contention of the United States.

The record contains evidence from importers that commercially limes are fruits. The vocabularies agree with this testimony. It also appears that fresh limes are imported to a considerable extent, and are used almost exclusively, if not exclusively, for concocting "drinks," to adopt the expression found in the record. The evidence also shows, and as to this there is no dispute, that the submerging of fresh limes in brine results in a physical change to such an extent that, while limes, before being thus submerged, are not edible, they are afterwards in large demand as edibles in the New England States. The record lacks scientific evidence whether the change produced by the brine is anything more than what is described in the case as physical. At any rate, the change is so substantial that fresh limes and limes in brine cannot be used one

for the other, and each is applied to its own special use, quite the same as though each had been originally a different product.

The record also shows by uncontradicted evidence that the expressions "limes in brine" and "pickled limes" are, in mercantile uses, synonymous and interchangeable, and that there has always been in trade a distinction between limes and limes in brine to the extent that, if one asked a merchant for limes, he would be given fresh limes. It also appears that limes in brine have a uniform and standard price, varying only within very small margins, while fresh limes vary from \$15 to \$20 per barrel of flour-barrel size, according to the varying demand and supply.

Since this case was decided by the Circuit Court on April 23, 1904, the Circuit Court of Appeals for the Second Circuit, on January 4, 1905, in *United States v. Reiss*, 136 Fed. 741, passed down an opinion disposing of sundry paragraphs of the same statute in relation to figs, which run on apparently parallel lines with the two paragraphs in question here. There the United States invoked the same rules of law invoked by the importer on this appeal, and the decision was in their favor. Paragraph 263 of the act before us reads as follows:

"263. Comfits, sweetmeats, and fruits preserved in sugar, molasses, spirits, or in their own juices, not specially provided for in this act, one cent per pound and thirty-five per centum ad valorem." 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651].

Paragraph 264 reads as follows:

"264. Figs, plums, prunes and prunelles, two cents per pound; raisins and other dried grapes, two and one half cents per pound; dates, one half of one cent per pound; currants, Zante or other, two cents per pound; olives, green or prepared, in bottles, jars, or similar packages, twenty-five cents per gallon; in casks, or otherwise than in bottles, jars, or similar packages, fifteen cents per gallon."

In paragraph 264 figs are specified, so far as we can perceive, in exactly the same way, and subject to the same rules of construction, as limes in paragraph 266; while paragraph 263 fails to expressly name figs, using the word "fruits," as does paragraph 559; and also in the same way it uses the expression "not specially provided for in this act." The opinion of the Circuit Court of Appeals observes as follows:

"The Circuit Judge determined the question as to the relative specificness of the two paragraphs by the consideration that paragraph 263 in terms excluded from its provisions fruits preserved, etc., not specially provided for, whereas paragraph 264 contains no such excepting clause."

It also observes:

"We are satisfied that fruits preserved in sugar, in spirits, in juice, etc., are known commercially as a class by themselves, the various fruits which that class includes being prepared for the particular use and put up in the particular form, which use and form constitute the distinctive characteristics of the category for which those fruits are prepared. Upon that class, as a class well known commercially, Congress has imposed duty by paragraph 263."

This is a very just and pertinent application of the common rule of the commercial interpretation of statutes relative to customs

duties, and it has direct application to the case at bar. Paralleling what was there said, "limes in brine" have "the distinctive characteristics" of a special category of merchandise to which fresh limes and other fresh fruits have no strict relation; and there is a strong presumption that the whole category or class is to be treated for all commercial purposes, including customs duties, by uniform rules. It is difficult to conceive any reasonable support for the proposition that some fruits submerged in brine, and thus substantially changed, are in a different category from others.

Fink v. United States, 170 U. S. 584, 587, 18 Sup. Ct. 770, 42 L. Ed. 1153, supports the underlying observations made in the case last cited, in that muriate of cocaine, although a salt, was held not to be classified under a paragraph of the customs statute which specifically included salts; but, on the other hand, as a medicinal preparation, it was held to fall into a class with other medicinal preparations. So, in *Magone v. Heller*, 150 U. S. 70, 14 Sup. Ct. 18, 37 L. Ed. 1001, it was held that, although a specific duty was laid on sulphate of potash *eo nomine*, a certain kind of sulphate of potash, the only common use of which was for manure, was free under a paragraph exempting from duty all substances "expressly used for manure." This case was used for illustration in *Chew Hing Lung v. Wise*, 176 U. S. 156, 161, 20 Sup. Ct. 320, 44 L. Ed. 412. Such decisions tend more or less to sustain the proposition that, notwithstanding an article may be literally included within a designation *eo nomine* contained in a certain paragraph of the customs laws, yet, on account of its relations to a peculiar class, it should be referred to some other paragraph. Therefore it is that sometimes the ordinary rule that articles are not dutiable under general terms when a duty is imposed in specific language leaves it to be determined what is specific language, and whether it is that which contains a designation *eo nomine* or that which describes a class. Evidently, language referring to the latter may be, under some circumstances, the more specific; and such apparently is the case at bar.

However, notwithstanding the great weight given in customs cases to the two rules of interpretation, which, as we have said, are relied on on the one side by the United States, and on the other by the importer, there is another rule which masters them both. Wherever, in the history of customs laws, it is found that a certain expression has received, in effect, a statutory construction, or a long and uniform use by Congress or by the departments, that construction is controlling, unless some other is necessary. The rule as to implied statutory definition of expressions in customs acts was fully stated as follows in *De Forest v. Lawrence*, 13 How. 274, 281, 282, 14 L. Ed. 143:

"The article has never been classed in any of the tariff acts under the designation of skins, but has been charged always, since it came under the notice of these acts, with a specific duty. It has been thus charged since the act of 1828 (4 Stat. 271) down to the present act, a period of some eighteen years. And although it has been invoiced and is known in trade and commerce by the designation of sheepskin, raw and dried, and may, generally speaking, be properly ranged under the denomination of skins as a class, yet, having a

known designation in the revenue acts, distinct from the general class to which it might otherwise be assigned, we must regard the article in the light in which it is viewed by these acts, rather than in trade and commerce. For when Congress, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not. It must be taken as thus known in the sense of the revenue laws, by reason of the legal designation given to it, and by which it has been known and practiced on at the custom house."

This rule has been ever since recognized by the Supreme Court; but, as it was so fully stated in *De Forest v. Lawrence*, we need refer only in a brief manner to some subsequent decisions. In *Homer v. The Collector*, 1 Wall. 486, 490, 17 L. Ed. 688, Mr. Justice Nelson, speaking in behalf of the court, referred to the fact that evidence was offered to show the commercial sense of the word in question, but said:

"But this inquiry had nothing to do with the question, and, indeed, it is difficult to see how any such inquiry could take place except as matter of curiosity and speculation; for certainly such proof could not exist or be found in the sense of commercial usage under any of the tariff acts, as a duty has been imposed on almonds *eo nomine* almost immemorially, at least since the duty act of 1804, and continued in the duty acts of 1816, 1832, 1842, 1846."

Further applications or statements of the same rule appear in *Saxonville Mills v. Russell*, 116 U. S. 13, 21, 6 Sup. Ct. 237, 29 L. Ed. 554; *The Conqueror*, 166 U. S. 110, 118, 17 Sup. Ct. 510, 41 L. Ed. 937; *United States v. Morrison*, 179 U. S. 456, 461, 21 Sup. Ct. 195, 45 L. Ed. 275; and *Benziger v. United States*, 192 U. S. 38, 44 to 47, 24 Sup. Ct. 189, 48 L. Ed. 331. Numerous other cases can be found, but we have cited enough to explain the rule and to show that it has been uniformly recognized by the Supreme Court, and is thoroughly settled.

In applying this rule of construction, it is more convenient to run backwards over the customs legislation. Paragraph 216 of the act of August 18, 1894 (28 Stat. 524, c. 349) laid a duty on oranges, lemons, and limes. The context showed clearly that only fresh fruit was intended. This is the paragraph which was carried into paragraph 266 of the act under discussion, but the change in the method of assessing the duty rendered the context unnecessary. Likewise, under paragraph 301 of the act of October 1, 1890 (26 Stat. 587, c. 1244), oranges, lemons, and limes were classified *eo nomine*, as under the act of 1894, and, as in that act, the context indicated that only fresh fruits were intended. Under the act of 1890, however, by a treasury decision (11,555), G. A. 730, July 6, 1891, it was held that importations of citrons in brine should be classified as fruits, green or ripe. It was found as a fact, however, that the packing was not a necessary part of the process of manufacture for which they were intended, and that citrons so packed are not commercially known as pickles. The conclusion was that incidental packing in brine for the purpose of preserving from decay during transportation, being the method usually practiced,

would not so change the character of the citron as to exclude it from the denomination "fruits." The care with which the Board of General Appraisers distinguished the use for which the brine was applied in this instance fortifies the construction which we will see has been uniformly given with reference to the classification of limes in brine until lately, inasmuch as limes are immersed in brine, not merely for preservation, but to bring about a physical change which renders them edible, as we have seen.

Under Schedule G of the act of March 3, 1883 (22 Stat. 504, c. 121), oranges and lemons were clearly limited by the context to fresh fruit though limes and grapes, being in a separate paragraph, were not thus clearly limited. Under the act of July 14, 1870 (16 Stat. 265, c. 255), oranges, lemons, limes, and other like importations were classified *eo nomine*, without any context indicating whether or not limited to fresh fruit. By T. D. 5,190, April 10, 1882, however, limes in brine were classified, under the act of 1870, as pickles, there being no specific assessment on limes or any fruits in brine. So far as we can ascertain, including what we gathered from answers to our inquiries at bar, limes in brine have ever since been classified in accordance with that treasury decision until the issue arose under the statute now before us. The United States could easily have shown otherwise if such is not the fact. Therefore we have here a practical interpretation by the department, running for 25 years, by virtue of which limes in brine are not classified under the word "limes," used *eo nomine* in connection with the words "oranges" and "lemons." Moreover, Congress, as we have shown, meanwhile several times re-enacted the same form of expression, "oranges, lemons, and limes," and thus, by the well-settled rules of construction, adopted the classification of treasury decision 5,190. It is true that under the same act of 1883 the Treasury Department, by its decision of April 7, 1884 (6,290), held that unripe walnuts preserved in brine should be classified under the provision for walnuts *eo nomine*; but there the issue was as between walnuts *eo nomine* and "vegetables in salt or brine." The treasury simply held that walnuts were not vegetables, and gave the topic no further consideration. So with regard to peanuts boiled in brine, the treasury, by decision 3,240, May 16, 1877, as against the claim that they were "prepared vegetables," held that they were to be classified as "peanuts not shelled." Each of these cases seems to have been on the mere issue as between walnuts and peanuts *eo nomine* on the one hand and vegetables on the other, and each decision was to the effect that they were not vegetables, without further consideration.

On the other hand, under section 22 of the act of March 2, 1861 (12 Stat. 191, c. 68) and section 13 of the act of July 14, 1862 (12 Stat. 555, c. 163), S. S. 708, a letter from the treasury to the collector at New York of July 20, 1870, it was held that limes in brine should be classified as pickles. By those acts oranges, lemons, and limes were classified *eo nomine*, and so were pickles. 12 Stat. 182, 191, c. 68. But there was no classification *eo nomine* of limes in brine or fruits in brine; so that, as under treasury decision 5,190, the

question was between limes *eo nomine* and pickles, with the decision in favor of the latter, thus by an unmistakable ruling carrying back departmental construction 12 years further than did the treasury decision of April 10, 1882, already cited.

That we correctly understand the treasury decisions to which we refer is shown by Morgan's U. S. Tariff, 1883, page 262; also by the same work (7th Ed. 1891) page 435, and by the same (8th Ed. 1895), page 447, and by Heyl's U. S. Import Duties, 1874, part II, page 37. No suggestions of any variation from the rulings of S. S. 708 and T. D. 1,590 are made by either of those authoritative digests; nor is any such suggestion found in that very useful compilation made under the directing hand of Senator Morrill of Vermont, whose practical knowledge of these topics was unrivaled, which compilation is entitled "The Existing Tariff on Imports Into the United States, etc., and the Free List," and was published at the government printing office in 1884.

As oranges, lemons, limes, and pickles have appeared in our tariff legislation beginning with the act of August 10, 1790, c. 39, 1 Stat. 181, and ever since, while fruits in brine never appeared prior to the legislation which we have cited in reference thereto, it would avail nothing to pursue further this particular branch of this topic. Our examination demonstrates, however, that wherever Congress has used with the words "oranges, lemons, and limes," a context which enables us to determine the limitations the expression clearly covered only fresh fruit, and it also demonstrates that pending the treasury decisions in 1870 and 1882, holding that limes in brine were not to be classified under limes *eo nomine*, and subsequently, until the present issue arose, there has been a settled practice of the department in reference thereto, and Congress has many times reenacted the various expressions involved without discrediting the treasury interpretation thereof. All this amounts, in several aspects, to a statutory construction to the effect that the word "limes" does not include limes in brine. As we have said, this statutory construction is of the highest authority, and masters all the other rules.

Hills v. United States, 123 Fed. 477, 59 C. C. A. 412, decided by the Circuit Court of Appeals for the Second Circuit on May 23, 1903, might perhaps be considered as holding in favor of the importer the precise issue we have before us. Apparently, the Board of General Appraisers (T. D. 24,567, G. A. 5,379, July 11, 1903) so regarded it. Nevertheless, the precise point now before us was not there made; and especially, also, as Judge Lacombe concurred in that opinion, and had previously decided in the Circuit Court in Roche v. United States, 116 Fed. 911, favorably to the United States, the present issue, while no reference thereto was made in Hills v. United States, we deemed it advisable to investigate the question *de novo* as we have done.

It is to be observed that the earlier treasury decisions, to which we have referred as calling for our conclusion, classified limes in brine as pickles. These were all before there was any description in any customs act of fruits in brine *eo nomine*. Limes in brine,

like other fruits in brine of a similar type, are, of course, a peculiar species of pickles; so that when "fruits in brine" were later named in the customs acts, limes in brine came within the general rule relied on by the District Court, and so well understood, to the effect that articles are not dutiable under more general terms when a duty is imposed specifically. Consequently, although limes in brine have passed from "pickles" to "fruits in brine," the treasury decisions which we have cited are all through in point, because they relate to the only question here—whether importations having the peculiarities of that in issue were or should be classified under the general term "limes." Our conclusion is that the importation in issue should be classified as "fruits in brine," in accordance with paragraph 559 of the act of July 24, 1897, c. 11, § 2, Free List, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1683].

The judgment of the Circuit Court is reversed, and the case is remanded to that court, with directions to enter judgment in favor of the petitioner, now the appellant, in accordance with the opinion passed down this day.

DONNER v. ALFORD.

(Circuit Court of Appeals, Third Circuit. January 18, 1905.)

No. 11.

CONTRACTS—CONSTRUCTION—WHEN QUESTION FOR JURY.

Where the question in issue was as to whether a written contract, by its terms to be performed in case a consolidation was effected between two corporations, was in fact limited to a consolidation resulting from then pending negotiations, or whether it became effective and enforceable on the effecting of a consolidation as a result of a renewal of negotiations a year later, the writing being silent on the subject, extrinsic evidence of the circumstances and the acts and declarations of the parties was admissible, and, where that was conflicting, the question of the construction of the contract as a whole was properly submitted to the jury as one of fact.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 767-770; vol. 20, Cent. Dig. Evidence, §§ 1874-1899.]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

The following is the opinion of the trial court on motion for new trial (Buffington, District Judge):

This is a motion for a new trial. If the court was justified in submitting the case to the jury, we are of opinion it was fairly and impartially done. After careful consideration, we fail to see how the case could have been withdrawn and binding instructions given. In view of the fact that the alleged verbal agreement was reduced to writing in correspondence subsequent to the termination of the Holland House negotiations and of the subsequent acts and conduct of both parties, we think the court would not have been justified in itself deciding and instructing the jury that the agreement was confined to the first negotiation, which fell through. What the parties meant to cover and what was embraced within the terms of their verbal agreement, reduced to writing in their correspondence, was a question, in the determination of which the acts, conduct, and declarations of the parties were admissible in evidence, and, if admissible, the effect of such evidence was a question for the jury. *Etting v. The Bank of the United States*, 11 Wheat. 59, 6 L. Ed.

419; *Harper v. Kean*, 11 S. & R. 280; *Barreda v. Silsbee*, 21 How. 168, 16 L. Ed. 86; *Carroll v. Miner*, 1 Pa. Super. Ct. 439. As we read these cases, it would have been an unwarranted usurpation of the province of the jury by the court had it undertaken to decide this cause itself, and given peremptory instructions for the defendant. The cause was peculiarly one a jury should pass upon. Being, then, of opinion the case was one for a jury, and it having been fully discussed by counsel, and fairly and properly submitted to that body by the court, its verdict should not be disturbed. The motion for a new trial is accordingly refused.

J. H. Beal, for plaintiff in error.

J. W. Kinnear, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. The suit in the court below, in which the defendant in error was plaintiff, was brought to recover damages upon two distinct claims, both for the violation of contract on the part of the defendant, the plaintiff in error. For reasons appearing in the record, we are not here concerned with the first of these claims. The other claim, as set forth in the declaration, is substantially as follows: In 1901, Donner, the defendant below, was president of the Union Steel Company, a corporation organized under the laws of Pennsylvania, and in the fall of 1901, a movement was entered upon for the consolidation of the Union Steel Company with the Sharon Steel Company, another corporation existing under the laws of Pennsylvania. In November, 1901, the officers of the two companies held a meeting in New York, with a view of consolidating the two companies. After the meeting had practically ended, without a prospect of bringing about a consolidation of the two companies, the defendant below, Donner, met Alford, the plaintiff below, who owned 280 shares of the Sharon Steel Company stock, but was not an officer of said company. It appears that Donner and Alford were well acquainted with each other, and the declaration alleges that Donner, in order to secure the assistance of Alford, in bringing about the consolidation of said companies, and upon condition that he use his influence and lend his assistance to secure such consolidation, offered to furnish him, in case said companies were consolidated, sufficient stock in the consolidated company, to make his holdings equivalent to the amount he would receive in the proposed consolidated company, if he owned 1,000 shares of Sharon Steel Company stock, and the said Alford was to pay defendant for such stock at the rate of \$175 per share for the 720 shares requisite to accomplish this result. The declaration alleges that the plaintiff accepted this proposition, and, in order to have the offer confirmed in writing, wrote defendant, on November 26, 1901, a letter which was produced and proved at the trial, as follows:

"W. H. Donner, Esq.—My Dear Friend Donner: I have been thinking about your deal since I have talked to you. There are some parties back of Sharon Steel and liable to come to the front at any time and which I am not at liberty to mention. I know that it is the thing to do to join the two companies. It is the opportunity of a young man's life, and you can bring this whole thing around if you will. I have talked with Mr. Darr, and I know that he is willing to do what is fair and right if he can be made to see it. When I

left him I told him if I was wanted to telegraph me, and I say the same to you, if I can be of any service telegraph me. My understanding of your proposition or offer to me is that if a consolidation is formed of the Union Steel Company and the Sharon Steel Company, that you will furnish me stock in the Consolidated Co. equal to what Sharon Steel Co. stock per share would get whatever that may be on the basis of \$175. per share for Sharon Steel Co. stock, to an amount of 720 shares of Sharon Steel stock. Or in other words, I now hold 280 shares of Sharon Steel Co. stock costing \$175. per share, and if the consolidation goes you will see that I get stock in the Consolidated Company to an amount equal or as though I held 1,000 shares of Sharon Steel Co. stock and I pay you for same \$175. per share (720 shares at \$175. will be \$126,000.00). Of course this is strictly confidential. I have not even given it to the stenographer. Please acknowledge if this be your understanding. I will send you those lists if you want. Now if there is anything you want me to do let me know and I'll be glad to do it. There are great advantages to be gained in this consolidation which you can never realize until you have felt and seen the benefits. I hope to become associated with you and think that I can become a benefit to you with what little experience I have had.

"Yours sincerely,

[Signed] W. J. Alford."

In due course of mail, the following answer was received from the defendant:

"Pittsburgh, Pa, 11—27, '01.

"W. J. Alford, Anderson, Ind.—Dear Sir: Your letter of the 26th to hand. Will state that your understanding of offer I made you on stock is O. K. and is strictly between ourselves.

"Yours, etc.

[Signed] W. H. Donner."

The plaintiff alleges in his declaration that, from that time forward, he lent his aid and influence in every possible way, to bring about the consolidation of said companies, and the proofs disclosed in the record show that plaintiff recommended the consolidation to the Sharon Steel Company, and to that end had frequent interviews with Darr, the president of the Sharon Steel Company, in whose office he had for a time a desk. There were no official meetings, between the officers of the two companies, between November, 1901, and November, 1902. In August or September, 1902, plaintiff sailed for Europe in company with Darr. He testifies that during that trip across the ocean, they discussed the question of consolidation. Upon his return from Europe, in the fall of 1902, Darr, the president of the Sharon Steel Company, took up the question with the officials of the Union Steel Company, and spent sometime in going over their properties, and finally laid before the directors a plan for the consolidation of the two companies. On the 7th of November, 1902, plaintiff testifies that, in company with Darr, he went to Pittsburgh, for the purpose of assisting in bringing about the consolidation of the two companies, and offered his services to that end. On the 21st day of November, 1902, an agreement of consolidation was entered into between the two companies.

It was proved by the defendant, that in the interval between November, 1901, when the negotiations for consolidation were attempted and failed, and November, 1902, when a consolidation was effected, a great change had taken place in the situation of both companies. The Sharon Steel Company had increased its capital stock from five to six millions. It had sold \$1,250,000 bonds of the Sharon Coke Company, one of its constituent companies; it had added largely to its plants; it had increased its net earnings about

\$1,500,000; it had thoroughly explored its ore property, and, without buying any additional property, had demonstrated that there was sufficient ore in the property to make it worth \$5,000,000, although the property cost them but \$250,000, and in November, 1901, they only asked \$2,000,000 for it. The Union Steel Company had also greatly expanded; had acquired large amounts of coal lands, and developed and purchased ore properties worth more than \$5,000,000; had acquired two ore vessels, at a cost of \$600,000, and was building a railroad, so as to transport its coal and coke from its property to its plants. It also had acquired very valuable harbor terminal property on Lake Erie, with the right to build an independent line of railroad from Lake Erie to the location of their plants.

The contention of Donner, the defendant below, was that this agreement with Alford was confined wholly and exclusively to the effort that was then being made by the parties at the 1901 conference, and that it had no reference to any future deal. That the deal of November, 1902, was a new one taken up on different lines, and with reference to conditions of the two companies entirely different from those obtaining at the time of the former attempted negotiation; that having no contract with plaintiff as to this later deal, the defendant could not be held responsible for his promise with reference to the former deal. Donner also contended, and so testified, that his promise to furnish the plaintiff with a certain number of shares of the stock of the consolidated company, at \$175 a share, in case consolidation of the two companies should result from the negotiations in the first deal, was without any good or valuable consideration, and was made solely on account of the kindness and good will he entertained for the plaintiff. He specifically denies that he solicited the plaintiff's good offices in that or any subsequent deal, or that his said offer was made upon the consideration or condition that plaintiff should use his influence or do anything in connection with the deal. It is to be observed that the written memorandum of the alleged contract contained in the correspondence, fails to state what the consideration for Donner's promise was, and it clearly was not the \$175 a share, as, confessedly, the shares in the consolidated company would be worth much more than that amount. The plaintiff's contention, on the other hand, was that the agreement was not confined to the specific deal in progress in 1901, but was meant by the parties to cover efforts in the future to consolidate, and that he rendered the services in effecting the consolidation, which was the consideration for the contract on which suit was brought. The court below declined to instruct the jury to render a verdict for the defendant, and charged the jury that, whether the agreement in writing, as set forth in the correspondence between Alford and Donner, was confined wholly and exclusively to the negotiation that was attempted for the consolidation of the two companies, or was meant by the parties to cover efforts in the future to consolidate, was a question of fact for them to determine upon the evidence in the case.

The question raised by the assignments of error is, whether the court was right in referring this question of fact to the jury. The contention of plaintiff in error is, that the alleged verbal agreement was reduced to writing in the correspondence hereinbefore referred to; that the contract was therefore a written contract, the terms of which were completely and fully set forth in the writing itself, and that, inasmuch as it was silent in respect to any discrimination between the negotiations of November, 1901, and those resulting in the consolidation of November, 1902, no evidence in regard to the same should have been submitted to the consideration of the jury. While it is true that the construction of all written instruments belongs to the court alone, and questions as to the interpretation and scope of a written contract are for the court, and not for the jury, nevertheless, a question as to what a written contract, complete on its face and in its terms, actually covers, or as to what conditions or subject-matter it applies, may be raised at the trial, and as such, is for the determination of the jury. In the case at bar, the meaning of the written contract in these respects is not obvious from an inspection of the writing itself, and the question, whether the agreement and promise of the defendant was confined to the first negotiation which fell through, or had reference to any consolidation of the two companies which might thereafter take place, depended upon extrinsic facts to be found by the jury, and as to the determination of which the acts, conduct and declarations of the parties were admissible in evidence. We do not think the evidence as to such facts was so clear and indisputable as to devolve upon the court the construction of the contract as a whole. On the contrary, we think the record discloses a real conflict of testimony, such as would have made improper the giving by the court of binding instructions in favor of defendant.

The judgment below is therefore affirmed.

In re GRISSLER et al.

(Circuit Court of Appeals, Second Circuit. March 24, 1905.)

No. 197.

1. FEDERAL COURTS—MECHANIC'S LIEN LAW—CONSTRUCTION BY STATE COURT.

The construction of the New York mechanic's lien law (Laws 1897, p. 514, c. 418) by the New York Court of Appeals, to the effect that during the time a laborer, mechanic, materialman, or subcontractor is entitled to file his lien, he has a preferential statutory claim, in the nature of a nonperfected equitable lien, which cannot be defeated by the party against whom it might be asserted by a general assignment for the benefit of creditors, will be followed in the federal courts.

[Ed. Note.—State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

2. SAME—TRUSTEE IN BANKRUPTCY—RIGHTS.

A contractor's trustee in bankruptcy stands in no better position with reference to the lien claim of the materialman than would the contractor's general assignee for the benefit of creditors.

3. SAME—LIENS.

The liens enumerated in Bankr. Act July 1, 1898, c. 541, § 67, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], in respect to which the bankrupt's trustee acquires a better title than the bankrupt, do not include a mechanic's lien, when a notice of the lien has been filed within the statutory period, although not until within four months of the institution of bankruptcy proceedings.

4. SAME—BANKRUPT'S RIGHT OF LIEN—ENFORCEMENT—COURTS.

Where a bankrupt contractor was entitled to a mechanic's lien at the date of his adjudication in bankruptcy, such right cannot be enforced by the trustee in a court of bankruptcy, but must be enforced in the state courts, unless the adverse parties consent to be sued in the United States Circuit Court, as provided by Bankr. Act July 1, 1898, c. 541, § 23, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431].

5. SAME—STAY.

Where a materialman filed a notice of lien within the time prescribed, and thereafter the contractors were adjudged bankrupts, and a trustee appointed, who was made a party to an action to foreclose the materialman's lien, such trustee could not have the action stayed pending the bankruptcy proceedings, to the injury of the owner and other lienors appearing in such action.

Petition for Revision of Proceeding of the District Court of the United States for the Southern District of New York.

L. W. Thompson, for petitioner.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. The order under review stays the prosecution of an action in the state court to enforce a mechanic's lien of the Van Kannel Revolving Door Company against the real estate known as the "St. Regis Hotel Property." The Van Kannel Revolving Door Company furnished materials used in constructing the building to Grissler & Son; the latter being subcontractors under W. & J. Sloane, who were the contractors with the owner. December 8, 1903, creditors filed a petition to have Grissler & Son adjudicated bankrupts. December 10, 1903, the Van Kannel Revolving Door Company filed its notice of lien in the office of the clerk of the county of New York; the same having been filed within 90 days of the furnishing of the materials. January 4, 1904, Grissler & Son were adjudicated bankrupts. Subsequently, and after a trustee had been appointed in the bankruptcy proceeding, the Van Kannel Revolving Door Company was required, by written notice from the contractors, to commence an action to enforce its lien, and thereupon brought the action, the prosecution of which has been stayed, making the owner, the contractors, and various other parties appearing of record as lienors upon the property, defendants, including the bankrupts and their trustee in bankruptcy. The trustee, after appearing in the action and obtaining several extensions of time to answer, applied to the bankruptcy court, and obtained the order under review, staying all proceedings in the action. The application of the trustee was opposed by the plaintiff in the action and by various defendants in the action. As no opinion was

delivered by the court, we are not advised of the reasons which influenced the granting of the application.

The trustee, in making the application, seems to have acted upon the theory that he obtained a priority over the Van Kannel Revolving Door Company because the latter's notice of lien was not filed until after the filing of the petition for adjudication of bankruptcy. The decision of this court in *Re Roeber*, 9 Am. Bankr. Rep. 303, 121 Fed. 449, 57 C. C. A. 565, that a trustee in bankruptcy of a contractor was entitled to priority over a materialman who had not filed his notice of lien until after the institution of the bankruptcy proceeding, was based upon the consideration that the trustee succeeded to the same title which would have vested in an assignee of the contractor for the benefit of creditors, and adopted the construction of the mechanic's lien law (Laws 1897, p. 514, c. 418) which at that time was supposed to prevail in the courts of New York. It had been held by the state courts that the statute did not preclude the contractor from paying his creditors out of the moneys due or to become due to him from the owner, to the exclusion of the materialmen who had not filed liens, and that, until the materialman had filed his notice of lien, he was merely a creditor at large of the contractor. *McCorkle v. Hermann*, 117 N. Y. 297, 22 N. E. 948; *Mack v. Colleran*, 136 N. Y. 617, 32 N. E. 604; *Stevens v. Ogden*, 130 N. Y. 182, 29 N. E. 229. Some of the state courts had also held that, the materialman being merely a creditor at large until the filing of his notice of lien, he could not obtain priority over a general assignee of the contractor for the benefit of creditors by filing the notice subsequent to the making of the general assignment. This court, in *Re Roeber*, approved the reasoning of these decisions, and, following their construction of the statute, held that the materialman who had not filed his notice of lien could not acquire priority over a trustee in bankruptcy of the contractor by filing his notice subsequent to the time when the title of the trustee accrued. Since that decision, however, the New York Court of Appeals, in *John P. Kane Company v. Kinney*, 174 N. Y. 69, 66 N. E. 619, has overruled the decisions of the state courts which were followed by this court; and, as this is a decision in the construction of a state statute by the highest court of the state, this court should follow it. In the latter case the court, in its opinion, said:

"A certain time is allowed in which the lien may be asserted or lost. During that time there is a preferential statutory right, in the nature of a non-perfected equitable lien, in favor of the laborer, mechanic, materialman, or subcontractors. And when a notice of lien is filed, that right is perfected. But until the ninety days allowed by the statute within which the lien may be filed have elapsed, the right cannot be defeated by the voluntary act of the party against whom it might be asserted, such as a general assignment for the benefit of creditors."

The court distinctly decided that the inchoate right acquired by the materialman, when perfected by the filing of his notice of lien, though filed subsequent to a general assignment of the contractor for the benefit of creditors, was superior to the rights ac-

quired by the assignee. A trustee in bankruptcy of the contractor or subcontractor stands in no better position than would the general assignee. This court said in *Re Emslie*, 102 Fed. 291, 42 C. C. A. 350:

"A trustee in bankruptcy cannot acquire a better title than the bankrupt had, except as to property which has been transferred contrary to the provisions of the bankrupt act, and takes the estate subject to all liens and incumbrances other than those enumerated in section 67 (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449])."

This court also decided in that case that the liens enumerated in section 67, in respect to which the trustee acquired a better title than the bankrupt, did not include a mechanic's lien, when the notice of the lien had been filed within the statutory period, although not filed until within four months of the institution of proceedings in bankruptcy. If the trustee only acquires such title as the bankrupt had at the date of the adjudication of bankruptcy, and if that title is subject to an inchoate or equitable lien, which may subsequently, without contravening any provision of the bankrupt act, be perfected by the claimant, if he sees fit to do so within the statutory time, it would seem plain that the trustee's title is impressed with the priority which the claimant is thus at any time within the 90 days prescribed by the statute for filing his notice of lien at liberty to secure. In the recent case of *Crane v. Pneumatic Signaling Company*, in the Appellate Division of the Supreme Court of New York (87 N. Y. Supp. 917), it was directly adjudged that the trustee in bankruptcy of the contractor or subcontractor stands in no better position than would the general assignee, and that, although the notice of lien is not filed until subsequent to the proceeding in bankruptcy, if filed within the three months the materialman has priority over the trustee. It would be most unfortunate to have a conflict of decision between the state courts and the courts of bankruptcy in respect to the meaning and effect of a statute affecting the titles to real estate, and, if this situation can be averted by following the decision of the highest court of the state which settles the previously doubtful question of statutory construction, this court ought not to refuse even though that decision may seem to us to be illogical and inconsistent with the previous decisions of that court.

There is no good reason why the action brought in the appropriate state court to determine the rights of the various lien claimants upon the property which is not in the custody of the bankruptcy court should be stayed because the bankrupts and their trustees have been made parties to that action in order to determine whether the bankrupts also had a lien to which the trustee has succeeded, and there is no provision in the bankrupt act which authorizes the court to stay such an action. The trustee is, of course, vested with any right to a chose in action which belonged to the bankrupts at the date of the adjudication in bankruptcy; but that right is merely one to enforce a statutory lien, and cannot be enforced by the trustee in a court of bankruptcy. In order to reduce the chose in action to his possession, he must resort to the state court in

which the subcontractors might have sued if the bankruptcy proceeding against them had not been instituted, unless the adverse parties consent to be sued in the United States Circuit Court. Bankr. Act July 1, 1898, c. 541, § 23, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]. In *Re Russell*, 101 Fed. 249, 41 C. C. A. 323, this court pointed out the distinction between the propriety of staying suits brought by parties seeking to recover property in the custody of the bankrupt court, and those brought to establish a right of action against the trustee; and we said in that case that if the action had been in trespass or trover, instead of replevin, we should have entertained no doubt that it was properly brought against the trustee in the state court. The effect of staying the action in the state court would be injurious to many parties who have not the remotest connection with the bankruptcy proceeding, the owners of the real estate, the contractors, and other lienors, whose title cannot be adjudged until the controversy between the subcontractors or their trustee and the materialmen has been adjudicated; and courts of bankruptcy should be slow, even in matters within their jurisdiction, to exercise such a power.

The order is reversed.

RUSSELL v. UNITED STATES TRUST CO. OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. February 24, 1905.)

No. 115.

WILLS—CONSTRUCTION—WORDS CREATING TRUST.

A testator willed and bequeathed two-thirds of all his property to his wife, and one-third to his daughter. The will then contained the following: "And it is my wish and expectation that when my wife J. shall make her will disposing of the property left by me that she will generously remember the children of my deceased brother W." *Held* that, in the absence of any evidence of circumstances which might affect its construction, such clause did not create a trust in favor of the children of the deceased brother.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 1587-1589.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree of the Circuit Court, Southern District of New York, sustaining a demurrer to the bill on the ground that it does not state facts sufficient to constitute a cause of action. The suit was brought to impress property held by defendant with a trust alleged to have been created by the will of one Isaac D. Russell. The opinion of the Circuit Judge will be found in 127 Fed. 445.

A. L. Livermore, for appellant.

E. W. Sheldon, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The will of Isaac D. Russell gave to his wife Jane C. Russell "two-thirds of all [his] property real and personal which shall also include or be in lieu of dower." He gave to his daughter the remaining one-third. The will then proceeds as follows:

"At this date my mother is living very aged and feeble and who may survive me, and dependent upon her children for support, I therefore request my dear wife Jane in whose affection and generosity I have full confidence to pay to her or her caretaker such sum or sums of money as may be requisite for her every comfort, or otherwise to pay to my brother Henry one half the sum expended by him for our dear mother's support and the same request and conditions are intended to be applicable to my sister Catherine C. Johnson so long as she remains in America; and it is my wish and expectation that when my wife Jane shall make her will disposing of the property left by me that she will generously remember the children of my deceased brother William and such others as she may choose."

The plaintiff is a child of the "deceased brother William," and in the will of the wife, Jane C. Russell, no provision was made for him. He contends that the executor and trustee under the will of Jane C. holds all the property belonging to her estate in trust, and impressed with a charge to pay to him such sums as the court shall determine to be required to be paid by the terms of Isaac D. Russell's will.

We fully concur in the opinion of the Circuit Judge. "It is a trite saying that no will has a brother, and it may also be said that the citation of numerous authorities, in most instances, is of little assistance to the court, as each will must be construed in the light of peculiar surrounding circumstances, the scheme disclosed, the language employed, and the intention of the testator, gathered from the general situation." *Collister v. Fassitt*, 163 N. Y. 286, 57 N. E. 490, 79 Am. St. Rep. 586. There are some words, such as "give, devise, and bequeath," that have a fixed and definite meaning, which no amount of testimony as to surrounding circumstances could in any wise modify. But there are numerous other phrases, which, when used in a will, may be interpreted one way or another, according to what the whole case may show to have been the "will" of the testator when he executed the instrument. In *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138, the Supreme Court, citing many authorities, indicated that the meaning of the words used by a testator is to be deduced from a consideration of the whole instrument, and a comparison of its various parts in the light of the situation and circumstances which surrounded the testator when the instrument was framed. It adds:

"The construction put upon the words in one will has been supposed to furnish a rule for construing the same words in other wills. * * * We cannot say that this principle ought to be totally disregarded. It should never be carried so far as to defeat the plain intent, if that intent may be carried into execution without violating the rules of law. It has been said truly (3 Wils. 141) 'that cases on wills may guide us to general rules of construction; but, unless a case cited be in every respect directly in point, and agree in every circumstance, it will have little or no weight with the court, who always look upon the intention of the testator as the polar star to direct them in the construction of wills.'"

The words used in this Colton Case were:

"I recommend to her the care and protection of my mother and sister and request her to make such gift and provision for them as in her judgment will be best."

Upon a consideration of the surrounding circumstances, which were fully set forth, the court held that the ambiguity which resided in the word "request" was to be resolved in favor of a construction which gave the mother and sister a beneficial interest in the estate.

Decisions in other cases where the surrounding circumstances are fully disclosed are of little weight here, where the bill makes no averments as to such circumstances, and where the cause comes up on demurrer, no proofs being taken. The phrase "it is my wish and expectation" is, to say the least, as ambiguous as the words "I recommend and request"; and we have nothing to help resolve the ambiguity except the text of the will itself. When the whole instrument is considered, it is apparent that the testator has chosen different forms of expression for different objects, and it is fair to assume that his choice was intelligent. To his wife and daughter he wills and bequeaths two-thirds and one-third, respectively, of his real and personal property. When he is providing for the support of his mother and sister—an obligation to be immediately assumed—he, with full confidence, requests. When he refers to generous remembrance of the children of his brother and others, such remembrance to find expression at some time in the future, which may be remote, he says "it is my wish and expectation." Why did he change the form of expression? Why did he not with full confidence request that such remembrance be made? "Wish and expectation" import hope, and "hope" presupposes the possibility of disappointment. If the change of language was made with an intelligent purpose, it would seem that such purpose contemplated that over the wished-for remembrance of the nephews the sound discretion of the wife was to be more fully exercised than over the provision for the support of mother and sister. It may be that a disclosure of all the surrounding circumstances might induce a court to construe the words "wish and expectation" as complainant contends they should be, but with nothing but the will before us they cannot be given such meaning. We concur with the Circuit Judge in the conclusion that the testator's expression is one of hope and confidence rather than of command.

No application was made in the Circuit Court for leave to amend the bill so as to set forth surrounding circumstances, and therefore no such leave was granted. There is no assignment of error for failing to grant such leave, and upon the argument in this court the appellant took his stand strictly upon the text of the will.

The decree of the Circuit Court dismissing the bill is affirmed, with costs.

RUSSELL v. UNITED STATES TRUST CO. OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. February 24, 1905.)

No. 116.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Arthur L. Livermore (William F. Henney, of counsel), for appellant.

E. W. Sheldon, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The facts and questions of law presented in this appeal are the same as those in *William C. Russell v. The U. S. Trust Company* (opinion in which is handed down to-day) 136 Fed. 758.

The decree of the Circuit Court is affirmed, with costs.

TIMES-DEMOCRAT PUB. CO. v. MOZEE et al.

(Circuit Court of Appeals, Fifth Circuit. April 4, 1905.)

No. 1,377.

1. HUSBAND AND WIFE—RIGHT OF WIFE TO SUE FOR LIBEL—"PERSONAL INJURIES" UNDER LOUISIANA STATUTE.

Injuries to character and mental suffering resulting from a libelous publication are "personal injuries," within the meaning of Act La. No. 68, p. 95, of 1902, amendatory of Rev. Civ. Code La. 1870, art. 2402, which provides, *inter alia*, that "damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone," and under such provision a wife may maintain an action to recover damages for a libel affecting herself.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 771.]

2. ERROR—PENALTY FOR SUING OUT WRIT FOR DELAY—ENFORCEMENT OF RULE.

A writ of error will not be held to have been sued out for delay, so as to authorize the imposition of the penalty of 10 per cent. on affirmance of a judgment provided for by rule 30 of the Circuit Court of Appeals (90 Fed. clxviii, 31 C. C. A. clxviii), where the question presented is one of statutory construction, which has not been passed on by the state court and is fairly in doubt under the authorities.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Lawrence O'Donnell and Branch K. Miller, for plaintiff in error.
Wilhelm Mynderse, E. H. Farrar, E. B. Kruttschnitt, and B. F. Jonas, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This is an action to recover damages for libel, brought by a married woman, in her own right; her husband join-

ing in the petition. No exceptions were filed to the sufficiency of the petition, and no objections made on the trial as to the admission of evidence or as to the charge of the trial judge to the jury. The verdict of the jury was as follows:

"We, the jury, find in favor of plaintiff in suit, Mrs. Annie Oakley Mozee, wife of Frank E. Butler, in the sum of \$7,500."

On the motion for a new trial, remittitur of \$2,500 was entered, and thereupon judgment was entered in favor of Annie Oakley Mozee, wife of Frank E. Butler, against the defendant, the Times-Democrat Publishing Company, for the sum of \$5,000.

The only question raised on this writ of error open for consideration is whether the plaintiff below had a right to sue and recover in her own name the damages complained of, the plaintiff in error contending that "the shame, disgrace, and mental suffering brought upon her by the publication complained of are not personal injuries in the sense of the act of the General Assembly of Louisiana (No. 68, p. 95, of the Session of 1902), nor were they the result of or caused by any bodily physical or personal injuries suffered or sustained by her"; and the contention is that "the damages caused by the injuries described in the petition fall into and form part of the community of acquets and gains existing between the said Annie Oakley Mozee Butler and her husband, Frank E. Butler, and that she is without any right or authority in law to claim such damages or to prosecute any suit therefor." Other questions suggested by the assignment of errors or argued by counsel are not open for review, because no predicate was laid in the court below.

It is unquestioned that prior to the act of 1902, above referred to, damages for injuries to the wife fell into and formed part of the community of acquets and gains presumed to exist between husband and wife, and that the husband, as head and master of the community, could alone sue for and recover the same. See *Meyerson v. Alter* (C. C.) 11 Fed. 688, and *McClure v. Martin*, 104 La. 496, 29 South. 227, and cases there cited. Act No. 68, p. 95 of 1902, is as follows:

"Be it enacted by the General Assembly of the state of Louisiana, that article 2402 of the Revised Civil Code of 1870 be amended and re-enacted so as to read as follows: 'Art. 2402. This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase. But damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone; provided where the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws.'"

The question in this case, narrowed down, then, is whether the injuries to character and mental suffering resulting from a libelous publication are personal injuries in the true sense and meaning of

the act above quoted. We are advised of no decision of the Supreme Court of Louisiana on the point, and we are therefore remitted to our own construction of the statute.

1. We can find no reason, and counsel suggests none, for the discrimination contended for. The mischief to be remedied by the act covers cases of injuries to the character and reputation, as well as bodily or physical injuries.

2. At common law, libel and slander were classified as injuries to the person, or personal injuries. 3 Blackstone, 119; Cooley on Torts (2d Ed.) 23, 24; Bouvier, Law Dictionary, verbo "Injury."

3. In the construction of the statutes of the United States and of the several states, where the terms "injury to the person" and "personal injuries" have been construed, the great majority of the decisions of the higher courts, and nearly all of the intelligent reasons given, have been to the effect that libel is a personal injury. See *McDonald v. Brown*, 23 R. I. 546, 51 Atl. 213, 58 L. R. A. 768, 91 Am. St. Rep. 659, and *Johnson v. Bradstreet Co.*, 87 Ga. 79, 80, 13 S. E. 250, and cases cited in both; also *Sanderson v. Hunt* (Ky.) 76 S. W. 179. Many other citations on the same line could be given. The adjudicated cases cited by counsel for plaintiff in error as holding that libel is not a personal injury within the meaning of statutes similar to Act 68 of 1902—to wit, *Fay v. Parker*, 53 N. H. 342, 359, 16 Am. Rep. 270; *Ott v. Great Northern R. Co.*, 70 Minn. 50, 54, 72 N. W. 833; *Calloway v. Laydon*, 47 Iowa, 458, 29 Am. Rep. 489; *Smith v. Sherman*, 4 Cush. (Mass.) 408; *State v. Clayborne* (Wash.) 45 Pac. 303—are not directly in point, nor abounding in reason useful to us.

4. Judge Lumpkin, in *Johnson v. Bradstreet Co.*, supra, said, and we agree:

"'Person' is a broad term, and legally includes, not only the physical body and members, but also every bodily sense and personal attribute, among which is the reputation a man has acquired. Reputation is a sort of right to enjoy the good opinion of others, and is capable of growth and real existence, as an arm or a leg. If it is not to be classed as a personal right, where does it belong? No provision has been made for any middle class of injuries between those to person and those to property, and the great body of wrongs arrange themselves under the one head or the other. Whether viewed from the artificial arrangement of law writers, or the standpoint of common sense, an injury to reputation is an injury to person; and oftentimes an injury of this sort causes far more pain and unhappiness, to say nothing of actual loss in money or property, than any physical injury could possibly occasion."

Counsel for defendant in error contends that this writ is based on frivolous grounds and was sued out for delay, and urges that, under paragraph 2 of rule 30 of this court (90 Fed. clxviii, 31 C. C. A. clxviii), 10 per cent. damages, in addition to interest, should be awarded on the amount of the judgment; but as Act 68 of 1902 has never been construed by the Supreme Court of Louisiana, and there is some conflict of authorities on the question, we are not disposed to hold that the writ was sued out for delay. Further than this, we say that as malice is the gist of the action of libel, and as the record shows that a full retraction of the publication complained of, so far as the defendant was concerned, was made the next day

after publication, and as no suggestion is made in the record or in the argument of any other malice than that inferred by law from the publication itself, we are more inclined, if it were within our jurisdiction, to cut down the damages than to enhance them.

The judgment of the Circuit Court is affirmed.

UNITED STATES v. GEORGE MEIER & CO.

(Circuit Court of Appeals, Second Circuit. January 6, 1905.)

No. 76.

1. CUSTOMS DUTIES—CLASSIFICATION—FLITTERS—COMPOSITION METAL.

The article commercially known as "flitters," produced from the thin sheets which constitute the composition metal of commerce, by a process of manufacture that makes it no longer available for the uses to which composition metal of trade is put, but adapts it for other uses, is not free of duty as "composition metal," under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 533, 30 Stat. 197 [U. S. Comp. St. 1901, p. 1682], but is dutiable as manufactures of metal under paragraph 193, § 1, Schedule C, of said act (30 Stat. 167 [U. S. Comp. St. 1901, p. 1645]).

2. SAME—"MANUFACTURE."

Held, that an article which has been advanced through one or more processes into a completed commercial article, known and recognized in trade by a specific and distinctive name other than the name of the material from which it is made, and is put into a completed shape, designed and adapted for a particular use to which the material in its original form is not adapted, is to be deemed a manufacture, although its component materials are unchanged.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the Circuit Court, Southern District of New York (128 Fed. 472), reversing a decision of the Board of General Appraisers (G. A. 5150; T. D. 23,752), which had affirmed the collector of the port of New York in the assessment of certain customs duties.

Note *Baer v. United States* (C. C.) 130 Fed. 391.

D. Frank Lloyd, for the United States.

A. H. Washburn, for appellees.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

LACOMBE, Circuit Judge. The importations were under Tariff Act July 24, 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626], the relevant paragraphs of which act read as follows:

"Par. 193. Articles or wares not specially provided for in this act, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum, or other metal, and whether partly or wholly manufactured, 45 per centum ad valorem." 30 Stat. 167, c. 11, § 1, Schedule C [U. S. Comp. St. 1901, p. 1645].

"Free List, par. 533. Old copper, fit only for manufacture, clipping from new copper, and all composition metal of which copper is a component material of

chief value, not specially provided for in this act." 30 Stat. 197, c. 11, § 1 [U. S. Comp. St. 1901, p. 1682].

From the undisputed testimony it appears that ingots of composition metal are put through rollers, and further thinned down under a hammer, until they become thin sheets, the "composition metal" of trade; the importer himself testifying that in trade composition metal appears only in fine sheets or leaves. These thin sheets are cut into desired sizes, and from the shearings left over the merchandise in suit is produced. These shearings are first cut into small pieces with the scissors or a machine, and are then placed in a steel box, in which a stamp goes up and down, still further reducing the size of the pieces, although not to the condition of powder. By such process, although scientifically it still remains a composition of copper (chief value) with some other metal or metals, the merchandise is no longer available for the uses to which the composition metal of trade in thin sheets or leaves was put; but it has become adapted to other uses, being employed to sprinkle over the face of surfaces where it is desired to produce a glittering metallic effect. Moreover, it has its own distinctive trade name, being universally known as "flitters."

In *Erhardt v. Hahn*, 55 Fed. 273, 5 C. C. A. 99, this court referred to the authorities holding that, under the tariff acts, where an article has been advanced through one or more processes into a completed commercial article, known and recognized in trade by a specific and distinctive name other than the name of the material, and is put into a completed shape designed and adapted for a particular use, it is deemed to be a manufacture. The application of this principle is determinative of the case at bar, for, although its component materials are unchanged, processes of manufacture have produced a completed commercial article, known and recognized in trade, not as composition metal, but as flitters, and which is designed and adapted for a particular use, to which the composition metal of trade could not be put until it had first been subjected to such additional processes of manufacture.

The cases cited by the counsel for the importer are not persuasive to a different conclusion. In *Dejonge v. Magone*, 159 U. S. 562, 16 Sup. Ct. 119, 40 L. Ed. 260, the importations were of two kinds of paper—one coated, colored, and embossed to imitate leather; the other coated with flock, to imitate velvet. Both kinds were known to the trade when the tariff act was passed as "fancy papers," and were held to be included in the paragraph providing for "paper hangings and paper for screens, * * * paper antiquarian, demy, drawing, * * * note and all other paper." In *Grempler v. United States*, 107 Fed. 687, 46 C. C. A. 557, this court sustained the Circuit Court in holding that large sheets of composition metal, not available for any purpose until they had been beaten to one-sixth of their present thickness and then cut into pieces, had not been transformed into a different article of manufacture from the original ingot of composition metal. In the same case there seems to have been some question as to "clippings," which were also held

to be composition metal. Apparently these are the shearings referred to supra, but before they have been cut up and beaten into flitters, thus completing the process of manufacture. In *United States v. Binney*, 82 Fed. 992, 27 C. C. A. 347, this court again affirmed the Circuit Court as to certain steel produced by crushing steel ingots into kernels or grains of different degrees of fineness, and used by stone sawyers. It was known to trade as "Diamond Steel," and was held to be included in a paragraph providing for a long enumeration of steel articles, and concluding with the phrase "steel in all forms and shapes." In *Boker v. United States*, 97 Fed. 205, 38 C. C. A. 114, the importation comprised certain nickel alloy in the form of rods, sheets, and wire. This court affirmed the Circuit Court, holding the merchandise to be covered by the paragraph providing for "nickel or alloy of any kind in which nickel is the material of chief value," saying:

"It seems clear that the rods and plates are not advanced from the condition of nickel alloy. They are incapable of practical use without being subjected to further manipulation and manufacture. * * * Congress, by the provision for nickel alloy, itself a manufacture, must be presumed to have intended to provide for such alloy in its ordinary commercial forms as known at the passage of the act. The wire, however, is a manufacture of metal, a complete merchantable article, * * * to be used in the construction of rheostats, and dealt in commercially in various sizes adapted to the purposes for which it is wanted."

United States v. Leonard, 108 Fed. 42, 47 C. C. A. 181, presents no question of an advance by manufacturing processes beyond first conditions into a new and different article having a distinctive trade-name. The opinion of the Circuit Court in *Marsching v. U. S.*, 113 Fed. 1006, contains no indication that the "lame" cut up into minute scales was known commercially as something different from "lame." That decision therefore has no application here.

The decision of the Circuit Court is reversed, and that of the Board of Appraisers is affirmed.

In re HERRMAN.

(Circuit Court of Appeals, Second Circuit. November 21, 1904.)

No. 43.

BANKRUPTCY—CONCEALMENT OF ASSETS—FALSE OATH—DISCHARGE—EVIDENCE.

A bankrupt's wife acquired \$10,000 from her father, which constituted her sole estate. In bankruptcy proceedings of a firm of which her husband was a member an indebtedness for \$6,000 loaned by the wife to the firm was scheduled. Nothing was paid to the creditors of the firm, but almost immediately thereafter the husband again commenced business in the name of his brother, and testified that his wife contributed \$10,000 of this business and the brother \$2,000. This business was extraordinarily successful, the profits being invested in real estate, etc.; the bankrupt testifying that he managed the business for his wife without charge, drew such funds from the business as he wanted, and, though for the last 30 years he lived in a large and expensive house, he paid nothing to his creditors. He was never discharged under the former bankruptcy proceedings, and thereafter individually filed another petition, in which he scheduled no assets, and old debts amounting to nearly \$9,000. *Held*, that such facts were sufficient to show that the bankrupt owned a substantial interest in the partnership, and that he was guilty of a false oath, precluding a discharge, by swearing to a schedule stating that he had no such property.

Appeal from the District Court of the United States for the Southern District of New York.

The following is the opinion of the court below:

HOLT, District Judge. This is a motion to confirm a referee's report recommending the discharge of the bankrupt. Two of the objections filed to the discharge are, in substance, that the bankrupt omitted from his schedules of assets an interest in various pieces of real estate and in the stock of the Morris S. Herrman Company. The bankrupt claims that his wife owns this property, and the question is whether he owns it or she. In June, 1869, the bankrupt was married. His wife's father gave to Mrs. Herrman on the day of the wedding \$10,000. The bankrupt at that time was a member of the firm of A. B. Herrman & Co., composed of his brother, Adolph B. Herrman, and himself. In February, 1870, the firm of A. B. Herrman & Co. failed, and were adjudicated bankrupts in this court. Their schedules showed debts amounting to about \$130,000. Most of these were for merchandise purchased immediately before the failure. Deborah Herrman, the bankrupt's wife, was inserted in the schedules as a creditor for \$6,000 for money loaned to the debtors during the year 1869. The assets scheduled amounted nominally to about \$15,000, of which a stock in trade at Philadelphia was put in at \$8,000, and the remainder was substantially uncollected notes and accounts. The evidence shows that no dividend was declared in the bankrupt's proceedings, and nothing was ever paid to the creditors. A petition for discharge was filed, but it appears never to have been acted on. In 1870, some few months after the adjudication in bankruptcy, a business was begun in New York City under the name of Morris S. Herrman. Morris S. Herrman was a younger brother of the bankrupt, being at that time about 21 years old. The bankrupt claims that Morris S. Herrman and Deborah Herrman, the bankrupt's wife, were partners in the business carried on under the style of Morris S. Herrman, and that he, the bankrupt, Herman Herrman, had no interest in the business. He testifies that Mrs. Herrman put into the business \$10,000, and that Morris S. Herrman put originally into the business about \$2,000 and subsequently other money, making his contribution about equal to Mrs. Herrman's, and that Morris S. Herrman and Mrs. Herrman thereupon continued to be equal partners. Mrs. Herrman had little knowledge of

business and took little part in the business. Herman Herrman, her husband, was the active manager of the business. He asserts that he never was paid any salary, but drew from the business at all times whatever money he saw fit to take. This business was conducted in this manner until about 1892, when a stock company was formed to continue the business, under the style of the Morris S. Herrman Company; the stock being equally divided between Morris S. Herrman and Mrs. Deborah Herrman. The business of the firm and of the company appears to have been extraordinarily successful. From the profits of the business investments were made in real estate, the title being taken in the name of Morris S. Herrman, but it being asserted by all the Herrmans that Morris S. Herrman held the title for himself and Deborah Herrman, each owning an undivided half interest. The real estate so purchased was speculated with and added to until the present value of the real estate so held in common is admitted to amount to about \$1,000,000. In 1899 Herman Herrman filed another petition in bankruptcy and was adjudicated a bankrupt in this court. His schedules showed no assets. Three debts are scheduled, amounting in the aggregate to \$8,943, two of which, amounting to over \$8,500, are judgments which have been renewed, and which were originally based on debts existing in 1869. The practical object of this bankruptcy is to obtain a discharge from these debts, all of which the bankrupt could have easily paid at any time during the last 30 years. The referee found that the undivided half of the real estate standing in the name of Morris S. Herrman and half of the stock of the Morris S. Herrman Company belonged in fact to Mrs. Deborah Herrman, and not to the bankrupt, and recommended that the bankrupt be discharged.

It is undoubtedly true that a debtor is not bound to work for his creditors. He can work for his wife, and render her services, however valuable, for nothing, if he sees fit to do so. But, if he has property, that must be applied to the payment of his debts, before it can be given to his wife or to any one. The question in this case is whether the bankrupt contributed any capital to the business carried on under the name of Morris S. Herrman. If he did, he has an interest in the business, and the real estate bought with the profits of the business. The evidence shows that Mrs. Herrman's father gave her on the day of her marriage \$10,000. The bankrupt claims that the \$10,000 was contributed as capital by Mrs. Deborah Herrman to the business carried on under the name of Morris S. Herrman, and that he (the bankrupt) did not contribute any part of said \$10,000. The evidence of Mrs. Herrman and of her husband is explicit that she never received any other property from her father or from any other source during the first 10 years of her married life, except the \$10,000 given her by her father the day she was married. The schedules in bankruptcy of the old firm of A. B. Herrman & Co., which are signed and sworn to by the bankrupt in this case, state that that firm was indebted to Deborah Herrman for \$6,000 for money loaned in the year 1869. If that money was loaned by Mrs. Deborah Herrman to the old firm, it was loaned out of the \$10,000 given to her by her father, for she had no other money at that time, leaving but \$4,000 in the possession of Mrs. Herrman. The only way in which that \$6,000 could get back to Mrs. Herrman, to be contributed by her to the new firm carried on under the style of Morris S. Herrman, would be for the old firm of A. B. Herrman & Co. to pay her that amount after they went into bankruptcy. If they paid her that amount, and that amount was then put into a new business in which she was alleged to be a partner, the transaction was in substance nothing but a concealment by the bankrupt Herman Herrman of money which belonged to his creditors in bankruptcy with which to start in business for himself again. It is probable that all of the substantial capital of the new business carried on under the style of Morris S. Herrman was contributed by the bankrupt Herman Herrman from assets which belonged to the creditors of his old firm, but which he fraudulently concealed and appropriated to his own use; but at all events the evidence in this case shows that to the extent of \$6,000 at least that was the case. The facts that the bankrupt had the new business carried on in the name of his brother, and had the title to the real estate taken in the name of his brother, there being nothing to indicate

that even his wife had any interest in the business or in the real estate, are extremely suspicious. The entire transaction has every mark of fraud. The only witnesses called, or who apparently could have been called, in the case, are the bankrupt and his wife and his brother, Morris S. Herriman. The wife's evidence shows that she substantially knows nothing about the business, and leaves it all to her husband. The testimony both of the bankrupt and his brother is extremely unsatisfactory. Its general tone is improbable, contradictory, and untrustworthy. The bankrupt admits, in substance, that during the last 30 years he and his family have lived in a large and expensive house, on a liberal scale, and that he has had whatever money he wanted from the business; but his claim all these years has been that, as everything belongs to his wife, he is not bound to pay his creditors anything. I think his claim that his wife contributed all the capital to the business, and that therefore she is the sole owner of the half interest in the real estate and of the stock of the Morris S. Herriman Company standing in her name, is invalid; that the bankrupt has always owned and now owns a substantial interest in the business and in the real estate bought with the profits of it; and that he made a false oath by swearing to schedules stating that he had no such property.

My conclusion is that the referee's report should not be confirmed, and that the discharge of the bankrupt should be refused.

Claud V. Pallister, for appellant.

F. Werner, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. Decree refusing discharge is affirmed, on opinion of District Judge.

THE NEW HAMPSHIRE.

(Circuit Court of Appeals, Second Circuit. March 8, 1905.)

No. 112.

1. COLLISION—STEAMBOAT AND TUG WITH TOW CROSSING—STARBOARD-HAND RULE.

Evidence held to sustain the finding of the trial court that at the time of a collision between a steamboat passing down East river and a car float in tow alongside of a tug crossing to Brooklyn there was not such fog as to render the starboard-hand rule inapplicable, and that the collision was due to the fault of the steamboat in failing to observe such rule and keep out of the way by stopping and reversing until the tug and tow had passed in accordance with the latter's signal.

2. SAME—NAVIGATION OF EAST RIVER—POSITION OF VESSEL IN CHANNEL.

A tug with two long car floats in tow alongside was not in fault for being on the east side of the channel in East river in passing up to make a landing on the Brooklyn side, where such position was necessary and customary to enable her to round to and land safely in the then state of the tide.

Appeal from the District Court of the United States for the Southern District of New York.

The libel was filed by Frank J. McBride, master of the steam tug Lowell M. Palmer, on behalf of himself and all others interested in said tug and car float No. 8 and the cars laden thereon and the contents of the same, which said float was being towed by the tug, against the steamboat New Hampshire

(the Providence & Stonington Steamship Company, claimant), to recover damages for the sinking of said car float No. 8 and the cars and their contents loaded on said float, which was caused by a collision with the said steamboat occurring in the East river March 13, 1903. All the testimony was taken in the presence of the District Judge, who found in favor of the libellant. The damages being stipulated, a decree was entered against the New Hampshire April 4, 1904, for \$19,381.34. From this decree the claimant appeals.

Charles C. Burlingham, for appellant.

La Roy S. Gove, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, Circuit Judge. On the morning in question the tug Palmer, with a loaded car float on each side, rounded the Battery into the East river intending to land at North Fifth street, Brooklyn. When off Houston street the New Hampshire was sighted, about off Fourteenth street, coming down the river. The tide was strong flood. The Palmer under a hard aport helm was heading for Brooklyn. On discovering the steamboat she blew a single blast of her whistle and there is testimony that the New Hampshire answered the signal by a similar blast, but this is denied by her master. The navigation of the New Hampshire indicating that she had mistaken the signal or was not conforming her navigation thereto, a second signal of one whistle was given by the Palmer and answered by the New Hampshire. Shortly thereafter the New Hampshire struck the car float No. 8 on her port quarter, sinking her with the loaded cars she was carrying. The collision occurred in the vicinity of the Tenth street buoy.

The District Judge found that the situation was one which warranted the application of the starboard-hand rule, and that, though there was light fog generally, and occasional patches of heavy fog, there was nothing to prevent the vessels from seeing each other when they were from a third to a half a mile apart. The claimant insists that this was error; that the weather was too thick to warrant the application of the ordinary rules of navigation; that the tug should have been inculpated for not blowing fog signals and for keeping on the westerly side of the channel. The claimant also insists that the starboard-hand rule was inapplicable for the additional reason that the vessels were approaching a bend in the river and the situation was only temporary. The decision was rendered orally immediately after the advocates had completed their arguments and the suggestion is made that if "the learned District Judge had deferred his decision until he had gone over the evidence carefully" he might have reached a different conclusion as to the density of the fog. We are unable to agree with this view. The judge had seen and heard all the witnesses and listened to the arguments of the advocates; the entire matter was fresh in his mind and there could not have been a more favorable opportunity for reaching a correct conclusion upon the questions of fact. If the judge had waited until time and a multitude of intervening events had dulled and confused the impressions formed at the trial there is no reason to suppose that the decision would have been more satisfactory—indeed the contrary is true. The judge finds

that above Hell Gate and at Fortieth and Thirty-Fourth streets there was heavy fog on the morning in question. He also finds that the preponderance of evidence is to the effect that in the vicinity of Tenth street it was so light that the vessels could have seen each other at least a third of a mile apart. We see no reason to disturb this finding of fact, which practically disposes of the entire controversy. As the New Hampshire saw, or could have seen, the Palmer in ample time to avoid collision and as the latter was crossing towards Brooklyn under a port helm, exhibiting her port side to the New Hampshire, it is manifest that the steamboat had the tug on her starboard bow, and that it was her duty to keep out of the way. The master of the New Hampshire testified that he first saw the Palmer on his starboard bow about two points.

We recently had occasion to consider and quote the rules applicable to this situation in the case of the *City of New York v. The N. Y. and East River Ferry Co.*, 135 Fed. 344. We do not deem it necessary to restate them here or to comment upon them further than to say that the navigation of the tug seems to have been in compliance with their provisions. She gave the proper signals and she held her course and speed. The New Hampshire was a passenger boat 310 feet long and, with the tide against her, could be handled with far greater ease and celerity than the Palmer. The latter, between two heavy car floats, was drifting up on an unusually strong flood tide. She is 100 feet long and the floats projected 100 feet ahead of her stem, a most ungainly and ungovernable combination for the execution of a quick or difficult maneuver. On the other hand, the New Hampshire was under perfect control and as she could have seen the situation ahead in ample time to have stopped, her failure to do so was negligence. In other words, the moment she discovered the Palmer it was obvious that a grave danger confronted her. It was her duty to keep out of the way, she could have done so by reversing but this she did not do. We agree with the District Judge in thinking that "the fault was that under the circumstances the New Hampshire should have reversed and held back until the Palmer got across."

No fault can be imputed to the tug because she was on the westerly side of the channel; it was necessary for her to be there in order to make her landing safely on the Brooklyn side. One of the witnesses testifies:

"They generally go in there to get in shape to round-to to land in Brooklyn on the flood tide. * * * It is their custom to go on the New York shore and round-to a little better than the middle of the river."

We are unable to find that there is a bend in the river at the point in question sufficient to change the rules of navigation ordinarily applicable to such a situation. A casual examination of the chart submitted indicates that the bend referred to is due rather to a widening of the river than to a sharp turn in its course.

The decree of the District Court is affirmed with interest and costs.

MUNSON STEAMSHIP LINE v. E. STEIGER & CO.

(Circuit Court of Appeals, Second Circuit. March 10, 1905.)

No. 163.

SHIPPING—LOSS OF LOGS IN LOADING—LIABILITY OF VESSEL.

Where, in loading a cargo of mahogany logs, the ship was obliged to lie three miles off shore in the open sea, the logs being delivered in rafts, which were made fast to the ship, and bills of lading then given for the same, the vessel is not liable for logs which broke away from the rafts and were lost before they were loaded, when reasonable diligence was exercised in the loading, and the loss arose either from unusual weather conditions, making a case of perils of the sea within the exceptions in the bills of lading, or because they were insufficiently secured in the rafts through the negligence of the shipper.

[Ed. Note.—Loss by perils of the sea, see notes to *The Dunbritton*, 19 C. C. A. 465; *Southerland-Iunes Co. v. Thyndas*, 64 C. C. A. 118.]

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 132 Fed. 160.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, in favor of libellant for the sum of \$344.89 (with interest and costs), being the balance of freight due for the transportation of a cargo of mahogany logs from Frontera and Tonala, Mexico, to New York. The only defense is a counterclaim for the value of 31 logs which were lost while the logs were alongside the steamer at Frontera, and before they could be stowed in the ship.

William L. Snyder, for appellant.

Charles S. Haight, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges

PER CURIAM. Frontera is an open roadstead, where a vessel, when loading, has to lie from $2\frac{1}{2}$ to 3 miles off shore, exposed to the prevailing northerly winds. A tug tows out a raft of logs. The raft consists of a large cable, called the "mother rope," to which the logs are attached by short smaller ropes, called "dog ropes," each of the latter being fastened to a dog or ring driven into one end of the log. When the raft arrives, and the mother rope is made fast to the ship, delivery is made, and receipts are given. Thereupon the ship proceeds to pass the logs aboard, continuing the operation till all are stowed, unless bad weather causes a suspension of the loading. The evidence in this case shows that on several occasions logs, aggregating 31 in all, which were thus attached to the vessel, were never got aboard, because they broke off from the mother rope, and it is shown that they broke off because of the action of the wind and waves. If this condition of wind and water was abnormal, the loss would be attributable to peril of the seas, and within the exception in the bill of lading. Delivery to the ship having been made, the burden of proof is on the ship to show suf-

ficient stress of weather to make out a case of peril of the seas. But if it were held that the District Judge were in error in finding that the proof warranted such a conclusion, then upon the undisputed facts the logs broke away from their respective rafts, under a condition of weather which was to be anticipated, either because the dog ropes were not strong enough to meet the strain of ordinary weather or because the dogs or rings were insufficient or not sufficiently secured to the logs, through the negligence of the shipper. For his carelessness in that respect the ship should not be held responsible. Making delivery by means of a raft to be attached to the ship's side till the logs could be hauled aboard, it was his duty so to make up the raft that under ordinary conditions of weather it would remain intact till the ship, using proper diligence, could have got its constituent parts aboard. There is no evidence to show that the ship was negligent in not providing a sufficient force to load the logs promptly before the weather changed. On the contrary, she kept a large gang of stevedores—30 or more—aboard to do that work promptly, and we find nothing in the proof upon which she can be held responsible for failure to load these 31 logs before they broke away.

The decree is affirmed, with interest and costs.

KINNEY v. MITCHELL.

(Circuit Court of Appeals, Third Circuit. April 19, 1905.)

No. 4.

1. PLEADING—AFFIDAVIT OF DEFENSE—WHEN NECESSARY.

A statement of claim, in form assumpsit, but which seeks to recover damages for acts of defendant done in his judicial capacity, does not set up a cause of action requiring an affidavit of defense under the act of Assembly of the state of Pennsylvania of May 25, 1887 (P. L. 271).

2. SAME—ACTION EX DELICTO.

The actions of assumpsit for which judgment may be taken for want of an affidavit of defense are limited to such as are founded on contract alone, and do not include cases in which the cause of action is *ex delicto* or of a mixed character of contract and tort.

3. TRIAL—MOTION TO DISMISS—JUDGMENT.

While a motion to dismiss for want of jurisdiction is pending, judgment for want of an affidavit of defense cannot be entered.

4. SAME.

If a suit does not involve a dispute or controversy properly within the jurisdiction of the Circuit Court, on a motion to dismiss being filed it is the plain duty of that court to proceed no further therein, but to dismiss the suit.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Plaintiff brought suit against defendant to recover certain sums, including consequential and exemplary damages, alleged to have been occasioned by defendant's action as chief justice of the Supreme Court of Pennsylvania.

A motion to dismiss the suit on the ground (1) that the Circuit Court had no jurisdiction, and (2) the alleged cause of action was frivolous, was filed, and ordered on list for argument. Before the time set for this argument, plaintiff moved for judgment for want of an affidavit of defense, which motion was denied, and an order made that it should be argued with the motion to dismiss. Plaintiff appealed, assigning for error the refusal of his motion for judgment, and the nonentry of said judgment.

Robert D. Kinney, in pro. per.

Samuel Dickson and H. Gordon McCouch, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. If we assume that the order complained of was a definitive denial of the plaintiff's motion for judgment for want of an affidavit of defense, still this writ of error cannot be sustained, for the reasons following:

1. The cause of action set out in the plaintiff's statement of demand was not one requiring an affidavit of defense under the act of Assembly of the state of Pennsylvania of May 25, 1887 (P. L. 271), as that act has been construed by the Supreme Court of Pennsylvania in *Corry v. Pennsylvania Railroad Co.*, 194 Pa. 516, 45 Atl. 341. In that case the court, speaking by Chief Justice Green, declared that under the act of May 25, 1887, the actions of assumpsit for which judgment may be taken for want of an affidavit of defense are limited to such as are founded on contract alone, and do not include cases in which the cause of action is *ex delicto*, or of a mixed character of contract and tort.

2. A motion to dismiss the suit for want of jurisdiction had been filed in the court below and was pending when the order appealed from was made, and when this writ of error was sued out. If the suit did not involve a dispute or controversy properly within the jurisdiction of the Circuit Court, it was the plain duty of that court to proceed no further therein, but to dismiss the suit. While the motion to dismiss for want of jurisdiction was pending the court could not properly grant the plaintiff's motion for judgment for want of an affidavit of defense.

The writ of error in this case is dismissed, with costs to the defendant in error.

HALL et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 24, 1905.)

No. 110.

CUSTOMS DUTIES—CLASSIFICATION—WOOLEN DRESS GOODS—EMBROIDERIES.

Held, that embroidered woollen dress goods are dutiable as "dress goods * * * of wool, and not specially provided for," under paragraph 369, Schedule K, § 1, Tariff Act July 24, 1897, c. 11, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1667], and not under paragraph 371 of said act 30 Stat. 185 [U. S. Comp. St. 1901, p. 1667], as "articles embroidered, * * * made of wool."

Appeal from the Circuit Court of the United States for the Southern District of New York.

For decision below, see 131 Fed. 648, which affirmed a ruling of the Board of United States General Appraisers, which had affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by Hall & Bishop. The question at issue involves the construction of paragraphs 369 and 371, Schedule K, § 1, Tariff Act July 24, 1897, c. 11, 30 Stat. 184, 185 [U. S. Comp. St. 1901, p. 1667], the pertinent parts of which read as follows:

"369. Women's and children's dress goods * * * composed wholly or in part of wool, and not specially provided for."

"371. Articles embroidered by hand or machinery, * * * made of wool or of which wool is a component material."

F. W. Brooks, for appellants.

D. Frank Lloyd, for the United States.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. The question in this case is whether the importations, which were women's dress goods of wool embroidered by hand or machinery, were properly classified for duty under paragraph 369 of the tariff act of July 24, 1897, c. 11, § 1, Schedule K, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1667], or whether they should have been classified under paragraph 371 of that act (30 Stat. 185 [U. S. Comp. St. 1901, p. 1667]). We should have no doubt upon the question were it not for the effect which is to be given to the qualifying words in paragraph 369, "not specially provided for in this act," and the absence of similar qualifying words in paragraph 371. The opinion of Mr. Appraiser De Vries, which was adopted by the Board of General Appraisers, presents a strong argument in favor of a classification under paragraph 369, and another opinion by him to the same effect was adopted by the Circuit Court of Appeals for the Third Circuit in *Thomas v. Wannamaker*, 129 Fed. 92, 63 C. C. A. 594. With some hesitation, but recognizing the propriety of uniformity of decision between courts of co-ordinate jurisdiction when that is practicable without yielding our clear convictions, we conclude to affirm the decision of the court below affirming the decision of the Board of General Appraisers.

Ordered accordingly.

BATES MACH. CO. v. WETTER NUMBERING MACH. CO.

(Circuit Court, E. D. New York. April 12, 1905.)

PATENTS—INVENTION—NUMBERING MACHINES.

The Bates patent, No. 676,084, for an automatic typographic numbering machine, claim 27, which covers a box or case for such machine, in which the side plates are interchangeable, and held in place entirely by pins instead of screws, as in the prior art, rendering them easy to remove and replace, was not anticipated, and shows invention. Also *held* infringed.

In Equity. On final hearing.

Alfred B. Carhart, for complainant.

Redding, Kiddle & Greeley, William B. Greeley, and William A. Redding, for defendant.

THOMAS, District Judge. The bill is filed to enjoin defendant's infringement of claim 27 of letters patent No. 676,084, issued June 11, 1901, to Edwin G. Bates, assignor of the complainant, pursuant to an application filed August 4, 1900. Claim 27 is as follows:

"(27) In an automatic typographic numbering-machine, adapted to be set up with type in a form, the combination of frame, 1, with smooth holes, 25, therein, a nonrotary axis supported by said frame, number-wheels on the axis, and loose wheel-protecting side plates, 23, having projecting pins, 24, fixed to said plates, and adapted to easily enter and move from said holes, while remaining fixed rigidly to the plates, whereby said plates, when not surrounded by type matter, are easily removed."

If the patent is valid, the defendant infringes. The defendant's defense is summarized by its counsel as follows:

"(1) The substance of the alleged invention covered by the claim in suit is a box with one side pinned on, instead of held on by screws, and that, if the box is to be regarded as the casing of a typographic numbering machine, it is immaterial, so far as the substance of the claim is concerned, what the precise nature of the numbering machine supported and protected by such box may be.

"(2) In view of the common and everyday use of smooth pins and holes to hold one part in position with relation to another, it could not have amounted to invention to employ such means in the casing of a numbering machine.

"(3) The use of pinned side plates in the printer's art, in electrotype blocks, as shown in the prior patents cited, and in numbering machines, as shown in the Bates Manufacturing Company numbering machine and in the Turlot numbering machine—the identical machines with removable side plates held by screws being old—Bates made no contribution to the world's knowledge.

"(4) The supposed invention was anticipated in the Bates Manufacturing Company's numbering machine and in the Turlot numbering machine."

The third and fourth of defendant's statements may be considered together. The defendant refers to letters patent issued to Gleeson April 28, 1885, pursuant to application filed February 12, 1884, which relates to an electrotype block for mounting electrotype or stereotype plates. The letters and diagrams show a plate placed on a box, and means for holding it in place by clamps having claws which clasp the beveled edges of the plate, and inner tongues fitting into grooves cut into the sides of the box. The specification states:

"In place of the tongue, f, and groove, g, pins, j, fixed to the plates, c, e, and fitting into corresponding holes in the binders, h, or block, b, may be used;

or said pins may be fastened to the block or binders; or any equivalent device may be used which will hold the plates or frame, c, e, securely to the binders, h, or block, b, so that they cannot work upward when locked in the chase, and so as to cause said plates, c, e, to assume their proper place automatically as the form is locked."

It is considered that this reference does not disclose the complainant's structure, for the following reasons:

(1) The clamps or side pieces are in part held in place by claws at the upper edges thereof.

(2) The clamps are merely to hold in place an electrotpe plate overlying the upper surface of the block.

(3) The clamps do not take the place of the side plates in suit, because such side plates are the sides of the box in which the machinery to be actuated and used for printing is placed, while Gleeson uses independent sides or binders for his box, to which the clamps are attached, and such clamps merely prevent movement of the electrotpe plate superimposed on the surface of the box. Bates uses the side plates to protect parts that are actuated, while Gleeson holds in place an inert plate. Gleeson wished to hold down on a box a plate for printing. Bates wished to make a box whose interchangeable sides were easily dismembered and replaced, wherein should be supported and protected a numbering machine. Gleeson wished to hold in place and protect a printing plate supported on a box. Undoubtedly Gleeson's pins helped the claws to hold in place and protect the plate. There the similarity of the devices ends.

The Sheldon letters of October 4, 1892, show bolts and nuts, and fingers with bent ends. The Burke letters show sections of printers' blocks held together by pins, like table leaves. The Fietsch letters show a block for holding electrotpe plates on its surface by stop pins placed along, but not through, the edges of the plate, and passing into holes in the block. None of these patents suggest the complainant's structure, the side plates thereof, or the uses made of the pins. The Sauer patent shows removable side plates, but nothing more.

This brings the inquiry to the "Bates Manufacturing Company numbering machine," of the plungerless variety, which is one of a lot manufactured in 1891 and 1892 by the Edison Phonograph Works. It has two side plates facing the number wheels, and held to the frame by screws, and two end plates which are located at the ends of the frame, one of which is held by screws to the frame, while the other, like "Defendant's Exhibit Loose Plate," is held to the frame by two screws, and by two pins that engage holes in the frame. As complainant states, the end piece was supplied with pins, in addition to screws, to locate more accurately the end piece as a working bearing for the main lever, but the screws were also used. It seems that neither the pins nor screws alone would have been sufficient. The defendant refers to the Turlot numbering machine, brought to this country as early as 1890, 1891, or 1892 by Joseph Wetter & Co., the defendant's predecessor in business. Wenz and Bartusch, for the defendant, and Sander, for

the complainant, give evidence respecting this structure, all in defendant's employ at the time. Sander has been in complainant's employment since 1903. The machine is a typographic numbering machine, of the plungerless kind, having number wheels mounted on a nonrotary shaft, and capable of vertical movement, all mounted in a frame. The shaft is supported at either end in a frame. On one side is a brass plate, which is fastened to the frame by two screws at either end; and in the center of such plate is a pin, which does not engage any part of the frame, but is understood to constitute a fulcrum for a lever used in connection with the operating mechanism. Outside this brass plate is another plate, attached to the plates at the ends of the frame by a dowel pin at each side, and also by screws. On the other side of the machine is a plate, held by a central pin at each end, and by a larger pin near the center, that enters into a lever connected with the actuating machinery. This plate is also held to the frame by screws. This side plate protects the shaft and wheels, there being between the plate and the wheels simply the lever just mentioned. At each end of the brass frame there is a plate attached to the outer side plates by screws passing through the latter, and each end plate has along its upper and lower ends claws that clasp this frame. At each end are also clips, which act as clamps upon the side pieces, and in each of them are two screw holes, evidently intended for screws, whereby they are fastened to the underlying end plate. Bartusch testified that this machine came to the Wetter Co. from France, and that he saw it in 1891 or 1892, when it was shown to him by Mr. Geary, who had charge of the Wetter factory. He testifies to two holes in each of the outer end pieces, and then:

"XQ. 27. Near the top of one of these side plates I find two small screw holes. Do you remember what was attached? A. There was a little projected piece that I guess was come in contact with that lever there. XQ. 28. Do you remember ever seeing that piece? A. I seen the piece there, certainly. It was, as far as I can remember, a thirty-second or a sixteenth of an inch thick. XQ. 29. Have you any knowledge of what has become of that piece? A. No. XQ. 30. Do you know exactly what function that piece which is lost performed? A. I cannot state anything positive about it. XQ. 31. Is there fixed to the inside of the side plate a large pin which forms a bearing for the lever actuating the forward movement of the number wheel? A. Yes. Otherwise the machine would not work. XQ. 32. In order that the machine should operate properly, is it necessary that the side plate should be fixed firmly with relation to the other parts of the mechanism, to afford that bearing for the lever? A. As far as the machine got to do some work, it has got to be locked up in form, and needs no screw at all. XQ. 33. Is it your opinion that the machine was intended to be used with screws in the holes which are provided in the side plates? A. Well, I guess so; the people who made it furnished it this way, and left it to the customer to leave the screws out if they wanted to. That happens every day in every typographic machine."

According to his evidence, the machine was kept in the safe. No other machines with side plates and pins were made while he was with Wetter & Co., nor was the question of side plates with pins discussed with him.

William Wenz was at that time in the employ of Wetter & Co., and during his continuance with them had charge of shipments, finally became a salesman, and later general manager. He testified

to the machine in its present condition, so far as pins were concerned, although he supposed that "the screws in the side plate, as well as a small check, are missing," and that the clips were applied to the ends of the machine to keep it from being locked overtight in the form; that the machine could be used with one plate, but, on account of its peculiar construction, the second plate is a part of the working mechanism.

Sander was with the Wetter Co. from 1888 to 1896, then absent eight months, and then from 1897 to 1903, and since has been with the complainant company. With Wetter & Co. he had charge of manufacturing machines. He states that he first saw the Turlot machine in 1890; that the side plates had screws in them, but does not remember whether either of the side plates had pins. On cross-examination he was asked:

"XQ. 101. Are you prepared to say that this Defendant's Exhibit Turlot Numbering Machine did not have pins in its side plates when you first saw it? A. No, sir; I can't say that."

From the evidence of these witnesses it must be concluded that Wetter & Co. did receive as early as 1892 the Turlot machine, and that its condition was the same as now presented, except as to the screws and the other part above mentioned, which are now absent. It is understood, however, that the side plate, lying directly against the frame, carried a part that had to do with the working mechanism, and in that case it seems that such side could not be used without being attached to the frame by screws. The other side is not the outer protection for the wheels, there being an intermediate plate, although there is a pin at either end. But such plate was evidently intended to be held in place by four screws. If any person should dismember this machine, he would at once discover the inconvenience of plates attached by screws, and would hold in higher estimate a machine capable of being used with side plates located and held in position by the pins alone, thereby allowing such plates to be quickly removed and interchangeably used. While this machine, as well as the earlier Bates machine, which has been discussed, have side plates with pins firmly attached by screws, yet it is concluded that the present Bates machine, as regards the use of side plates with pins alone, is much more useful and valuable; and the only question is whether the elimination of screws, and such use of pins alone, constitutes invention. The matter is so simple that there is a temptation to conclude that the mere elimination of the screws, leaving the pins to perform the entire function of fixing the position of the plates, and attaching them to the frame, does not show invention. But on the other hand, such arrangement appears to be highly useful, and it is concluded that it involves some invention. By dropping out the several screws there is a saving of expense and labor in the construction and maintenance of the machine, in the dismemberment of the parts for the purpose of cleaning, and the interchangeability of the sides is an advantage.

The first statement of the defendant above quoted—that "it is immaterial, so far as the substance of the claim is concerned, what

the precise nature of the numbering machine supported and protected by such box may be"—may be true, in a comparison of the present Bates machine with the Turlot machine and the earlier Bates machine. In other words, it is not understood how the difference in the mechanism of the machines is important in the determination of the question at issue, except that in the Turlot machine, as already stated, one side was to carry and support a part that engaged the working parts, and the other side was merely an outside plate, with an intermediate plate attached to the box, and immediately protecting the working parts. It is concluded that the elimination of screws, and the use of pins, only, for the purpose of holding plates, having an immediate relation to the working parts, whereby the pins perform the whole duty and function, is a sufficient advance in the art to sustain the patent. The familiar plea that a competent mechanic could have effected this end does not dispose of the fact that no competent mechanic had done it or had thought of doing it, and that Bates, by a machine embodying such conception, did something that was practically of very considerable benefit.

Pursuant to these views, the complainant should have a decree.

**DRAINAGE COMMISSION OF NEW ORLEANS v. NATIONAL CONTRACT-
ING CO. OF NEW YORK et al.**

(Circuit Court, E. D. Louisiana. June 25, 1904.)

Nos. 13, 134.

1. MONEY PAID—STATUTES—CONSTRUCTION.

The word "knowingly," as used in Civ. Code La. art. 2301 (2279), providing that he who receives what is not due to him, whether through error or knowingly, obliges himself to restore it to him from whom he has unduly received it, does not imply necessarily the idea of wrongdoing or bad faith, but means only "with knowledge."

2. CONTRACTS—SUBSTITUTION OF MATERIAL—PROFITS—RECOVERY—DEFENSES—ESTOPPEL.

Where a contractor for public work supplied a cheaper material than that specified, and thereby made an improper profit, it was estopped to say, when sued for the return of such profit, that the cheaper material was as good as the other.

3. SAME—STATUTES—ACTIONS—NATURE AND FORM.

Where a contractor for a public improvement substituted a cheaper material than that specified, and thereby made an improper profit, the public commission in charge of the improvement was entitled to recover such profit, under Civ. Code La. art. 2301 (2279), providing that he who receives what is not due to him, whether through error or knowingly, obliges himself to restore it, and article 2302 (2280), declaring that he who has paid through mistake, believing himself a debtor, may reclaim what he has paid, in an action *condictio indebiti*, and was not limited to the remedy of an action *quantum minoris*.

4. SAME—PUBLIC AGENTS—AUTHORITY—PRESUMPTION.

Where the engineer of a drainage commission consented to the substitution of a cheaper material by a contractor for that specified, the contractor was not entitled to presume that either the engineer or the commission were acting within the scope of their duty.

5. SAME—EXECUTED CONTRACT.

Where a contractor, under a contract with a drainage commission, made a large profit by substituting cheaper materials for those specified, the fact that the contract was executed did not prevent the commission from recovering such profit.

6. SAME—ULTRA VIRES.

In an action by a drainage commission to recover profits wrongfully made by a contractor for a public improvement by substituting cheaper materials for those specified, the defense of ultra vires was not available.

7. SAME.

In an action to recover profits wrongfully made by a public contractor by substituting cheaper materials for those specified, it was no defense that the contractor lost money by performing the work.

8. SAME—PUBLIC AGENTS—AUTHORITY.

Acts La. 1896, p. 162, No. 114, created a drainage commission to provide a drainage system for the city of New Orleans, and ways and means for the issuance and payment of bonds therefor. Section 5 declared that all work done, or supplies or materials ordered by the commission, except emergency work, should be let by contract to the lowest responsible bidder on sealed proposals after 30 days' advertisement on approved specifications, etc.; section 6 authorized issuance of bonds, and declared that all funds dedicated by the act should be consecrated to the payment of principal and interest on the bonds; and section 7 provided that the provisions of the act should constitute a contract with the holders of the bonds which should not be impaired, and might be enforced by mandamus or otherwise. *Held* that, under such sections, neither the drainage commission nor its engineer had any power to consent to the substitution of a cheaper material for that specified in a contract.

9. SAME—CONTRACTS—CONSTRUCTION.

Where a contract for the construction of a public improvement specified that the "best quality of imported Portland cement" should be used, the contract could not be satisfied by the use of any sound imported Portland cement which would have filled the three special requirements as to tensile strength, fineness, and weight.

On Motion for New Trial.

This was an action at law brought by the drainage commission of New Orleans against the National Contracting Company of New York, and its surety, the Fidelity & Deposit Company of Maryland, in solido, to recover \$60,000 alleged to have been overpaid by the plaintiff to the National Contracting Company on certain contracts for drainage work, the sum claimed being the difference in cost between certain Portland cement which the contractors were required to furnish and certain cheaper American Steel cement substituted by the contractors with the consent of the engineer of the drainage commission. At the trial the court directed a verdict in favor of the Fidelity & Deposit company, and submitted the case to the jury as to the National Contracting Company. The jury returned a verdict against the defendant for \$28,390. A motion for a new trial having been made, the same was overruled.

Carleton Hunt, Omer Villere, and P. S. Gidiere, for the Drainage Commission.

Farrar, Jonas & Kruttschnitt, for National Contracting Company.

P. M. Milner, for Fidelity & Deposit Co.

PARLANGE, District Judge (after stating the facts). Because of the public importance of the questions involved in this cause, I have reviewed again very carefully all the matters of law and fact which it presents.

It is obvious to me that this action lies under the plain textual provisions of the Louisiana Civil Code, "Of the Payment of a Thing Not Due," article 2301 (2279) to article 2314 (2292). Article 2301 (2279) provides that "he who receives what is not due to him, whether he receives it through error or knowingly, obliges himself to restore it to him from whom he has unduly received it." Article 2302 (2280) provides that "he who has paid through mistake, believing himself a debtor, may reclaim what he has paid." It is plain that he who receives money not due him must return it, whether or not he knew that the debt was due him. The word "knowingly," in article 2301 (2279), does not necessarily imply the idea of wrongdoing, as it would in criminal pleading, but is the translation of the French word "*sciemment*," meaning only "with knowledge," and not implying necessarily either bad faith or wrongdoing. Bad faith in such an action as this is only important as affecting the quantum of the recovery. Article 2311 (2289) et seq. The Louisiana Civil Code also provides that "every payment presupposes a debt. What has been paid without having been due, is subject to be reclaimed." Article 2133 (2129).

This action is not an innovation of the Louisiana Civil Code, but was taken from the Code Napoleon, article 1376 et seq., and article 1235. It is treated of at great length by Pothier, vol. 4, p. 129 (Paris Ed. of 1835), and is the action *condictio indebiti* of the Roman law, founded, as Pothier, the Roman juriconsults, and the French commentators tell us, on the maxim of Roman jurisprudence, which has been made a textual provision of the Louisiana Civil Code (article 1965 [1960]), "that no one ought to enrich himself at the expense of another." See Demolombe (Paris Ed. 1882) vol. 8, p. 199. The action is not confined to money received under any particular contract. Its rationale required that it should be made to apply to moneys paid in any transaction. As the matter is one of pure Louisiana law, it would be idle to inquire whether such an action would not lie as well in the other states. But it may be confidently asserted that no system of law can be logical, adequate, and complete without such an action in such a case as this. If there be jurisdictions where a lacuna in the law exists in this respect, the reproach cannot be applied to the Louisiana law, which has provided the remedy as old as the Roman law.

It has been argued, as I have understood the contention, that the plaintiff's proper action was an action for damages or an action *quantum minoris*. It might be conceded that the plaintiff could have availed itself of either of these two actions, had it believed that, under the facts of its case, either of them would have been adequate. The plaintiff might not have recovered in an action for damages. It might not have recovered in an action *quantum minoris*, in which the issue would have been the worth, and not the cost, of the cements. But I am aware of no reason, whether formulated into law or not, why the defendant, who enriched itself at the expense of the plaintiff by substituting for the cement which it had bound itself to supply another and a cheaper cement, should be allowed to withhold a profit which it made by violating its contract. A

contractor who agrees to build a house for an employer under specifications clearly designating the materials, who substitutes other and cheaper materials and is paid the full price of the contract because the employer believes that it has been faithfully carried out, will not be allowed to answer the employer, when he demands the return of the profit, by saying:

"It may be that I have made a profit to which I have no right under the contract; but you cannot recover it back from me unless you show either that you have been damaged, or else that the materials are not as good as those which I agreed to supply and for which you have paid me."

Circumstances might easily be conceived under which neither damages nor a difference in the worth of the materials could be proven in such a case. Yet the law would be impotent and infirm if a recovery could not be allowed, based on the amount of the wrongful profit. On similar lines, an agent who is instructed to buy an article of a certain quality, and who is given the money to pay for it, cannot, when he has bought a cheaper article of another quality, refuse to return the difference in price on the plea that the two articles were of the same worth.

Plainly the main, if not the only, purpose of the contractors in obtaining from the engineer the permission to substitute one cement for the other, was to make a profit which they could not have made under their contract. If it were true that the Steel was as good as the Portland cement, it would be difficult to understand why the importation of the much costlier Portland cement has continued; and the engineers who prepared or approved the specifications would be liable to blame if they had provided for a costly cement when a much cheaper one, equally good, could have been had. But I am convinced that they do not deserve such blame. Public policy will not permit the contractors of such a work as the one in question, affecting the health of a large city, to violate their contract by substituting their judgment concerning one of the most important materials of the work to that of the public body with which they contracted. And when they supply a cheaper and different material, instead of the material contracted for, and thereby make a large profit, they will not be heard to say, when sued for the return of the profit, that the cheaper material was as good as the other. They will not be allowed to profit from their violation of the contract. No injury can be done a defendant in such a case as the instant one. He is not asked, as he would be in a suit for damages, to satisfy out of his own property the injury done to the plaintiff. He is merely asked to return money which does not belong to him, and which belongs to the plaintiff. It seems to me that all the equities of this cause are with the plaintiff. Surely, the defendant was not injured or placed in a less advantageous position by the substitution made at its own request. On the contrary, it was largely benefited. It was certainly not misled in any way. Obviously it knew, by the mere reading of the contract, that the engineer had no right to allow the substitution. If the de-

fendant was relying on the assent of the commission—assuming that body to have had the right to give such assent—it was incumbent upon the defendant to ascertain that the assent had been given, and that the commission had the right to give it. In dealing with the engineer or with the commission, the defendant had no right to presume that they were acting within the line of their duty, but it was required to take care to learn the nature and extent of their authority. *McDonald v. Mayor, etc.*, of New York City, 68 N. Y. 23, 23 Am. Rep. 144; *Parr v. Village of Greenbush*, 72 N. Y., at page 472; and other cases. The defendant's cause, in my opinion, is entirely naked of equities.

It is clear to me that the plaintiff was not limited to an action for damages or to an action for reduction of price. With regard to the latter action, it may be said incidentally—though under my views of this case the matter is of no importance—that it is doubtful whether such an action would lie in a case like the instant one. The provisions concerning that action are found in the Louisiana Civil Code, under the title "Of Sale," art. 2520 (2496) et seq., with regard to animals and other movables; also under the title "Of Lease," art. 2697 (2667), with regard to the reduction of the rental where the leased house is partially destroyed. Those articles of the Code are intended to do justice in the cases for which they provide. They would certainly not do justice in this case. But I repeat that it is immaterial whether the plaintiff could or could not have brought the action *quantum minoris*. It certainly could bring this suit. It is true that the action *condictio indebiti* cannot be brought to recover money unless it "be not due in any manner, either civilly or naturally." Civ. Code La. art. 2303 (2281). But this matter involves the right and authority of the engineer to allow the substitution of the cement, and that question will be considered hereafter. Evidently, if the engineer had the right and authority to do what he did, then the payment was binding on the plaintiff, and it would be defeated on the merits of this action. But this would not show that the plaintiff had no right to bring an action *condictio indebiti*. It was argued, in an attempt to show that the plaintiff's remedy was an action *quantum minoris*, that no action *condictio indebiti* lies for part of a sum of money paid in error. The French commentators on the Code Napoleon show that such a contention is, as it plainly and logically must be, entirely without foundation. Larombière, one of the highest authorities on obligations, treating of the action *condictio indebiti*, says (translation):

"We pay without cause when we pay more than we owe. We can then bring an action in repetition for the excess of the payment beyond the debt."
* * *

"We not only pay more than we owe when we pay a numerical quantity larger than that which is due, but also when we neglect to make a retention or deduction which we could have made."

Larombière, *Théorie des Obligations* (Paris Ed. 1857), vol. 5, p. 617, § 13.

Laurent, *Droit Civil Français* (Paris Ed. 1878), vol. 20, p. 371, § 348, says (translation):

"We pay what is not due when we pay more than what was due. In such a case the excess can be demanded in an action of repetition. We pay more than we owed when we have neglected to make some deduction or retention which we had a right to make."

Notice, in the Supplement to the annotated Code Napoleon of Fuzier-Herman (Paris, 1903), at page 1616, as a note to article 1377, Code Napoleon (corresponding to article 2302 [2280] of the Louisiana Civil Code), the following reference to a decision of the Court of Appeals of Ghent (Belgium) of April 11, 1885 (translation):

"An action in repetition will lie in favor of the master who has paid more than was due, when the quantities of labor and supplies provided for by the specifications have not been satisfied."

In the "*Dictionnaire du Digeste*," a compendium of the Pandects (Paris, 1808) vol. 1, p. 100, it is said, citing the Roman law, that, notwithstanding declarations in writing by which the parties declare themselves respectively free from all further claims regarding the matter in which the payment is made, the action *condictio indebiti* will lie for a thing paid in error and not due.

Larombière, *Théorie des Obligations* (Paris Ed. 1857) vol. 5, p. 614, § 7, says (translation):

"We pay without a cause when afterwards, notwithstanding the payment, we obtain the nullity or rescission of the pretended contract which we have executed."

This authority I shall again refer to in considering the contention that the action did not lie in the instant case because the contract was executed.

I deem a further citation of authorities on the foregoing matter unnecessary. But before passing from this point, I wish to say that this action is one clearly cognizable at law. If there were any doubt on the matter, it is plain that, as no pleading has raised the objection, it is too late, in view of the nature of this case, to consider the matter now. *Union Pac. Ry. Co. v. Harris*, 63 Fed., at page 803, 12 C. C. A. 598, and cases there cited; *Altoona, etc., Co. v. Kittanning, etc., Ry. Co.*, 126 Fed., at page 561, and cases there cited; *Reynes v. Dumont*, 130 U. S., at page 395, 9 Sup. Ct. 486, 32 L. Ed. 934; *Brown v. Lake Superior Iron Co.*, 134 U. S., at page 536, 10 Sup. Ct. 604, 33 L. Ed. 1021, and other cases.

There is no force in the contention that the doctrine of *ultra vires* militates against the plaintiff. On the trial of the exception in this cause, it was argued for the defendant, on the authority of *Railway Co. v. McCarthy*, 96 U. S., at page 267, 24 L. Ed. 693, and similar cases, that the plea of *ultra vires* will not be allowed to prevail, either for or against a corporation, if the result is to allow a legal wrong to be committed. Even if such were now the rule in the federal courts, what wrong is the plaintiff attempting to inflict? It is not seeking to withhold property or money of the defendant without compensation. On the other hand, the defendant is en-

deavoring to prevent the redress of a wrong by resisting the demand for money which in law does not belong to it and belongs to the plaintiff. But the rule invoked on the authority of the McCarthy Case and similar cases, although in no manner unfavorable to the plaintiff, is not the law in the federal courts since the decision in *Central Transp. Co. v. Pullman Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, where, after a careful consideration of the whole matter, it was held that an ultra vires contract, whether performed or not, is void. See, also, *Pullman's, etc., Co. v. Central, etc., Co.*, 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108. See, specially, *Bank v. Kennedy*, 167 U. S. 367 et seq., 17 Sup. Ct. 831, 42 L. Ed. 198, and *O'Brien v. Wheelock*, 184 U. S., at page 490, 22 Sup. Ct. 354, 46 L. Ed. 636. Again, even under the rule invoked on behalf of the defendant, it is well settled as an exception that, where public corporations charged with the application of public moneys make ultra vires contracts in disregard of a limitation imposed upon them by law, or in violation of public policy, the contracts are void. See *Am. & Eng. Ency. Law* (1st Ed.) *verbis* "Ultra Vires," vol. 27, at pages 375, 376, 378, and numerous cases there cited. See *Parr v. Village of Greenbush*, 72 N. Y. 463, especially at pages 465 and 472; *City of Lancaster v. Miller* (1898) 58 Ohio St. 558, especially at pages 559, 562, 571, and 575, 51 N. E. 52; *McDonald v. Mayor, etc., of New York City*, 68 N. Y. 23, 23 Am. Rep. 144. Notice, especially, *McCloud et al. v. City of Columbus*, 54 Ohio St. 439, 44 N. E. 95, and cases there cited; *Dillon on Mun. Corp.* (4th Ed.) § 457 et seq. It is thus seen that, on the question of ultra vires, the rule derived from the McCarthy Case, the exception to that rule, and the present rule in the federal courts are all in favor of the plaintiff, and that there is nothing in them which could in any way benefit the defendant.

There was nothing in the evidence, which, in my opinion, could have supported a finding by the jury that the commission knew of or assented to the substitution or ratified the engineer's action, and therefore I withdrew that part of the case from the jury by charging them, as matter of law, that the engineer had no right to allow the substitution. The members of the commission testified that they did not know of the substitution. It was not claimed that the engineer had informed them. There was no evidence upon which a finding by the jury that they did know would have been allowed by me to stand. I do not understand that the defendant contended on that issue that the commissioners knew of the substitution notwithstanding they testified that they did not, but that they ought to have known had they exercised a reasonable supervision of their engineer. But let it be supposed that this was true, and that the jury would have been warranted in finding from the evidence that, notwithstanding the confidence which the commission reposed in its engineer and the engineer's conceded character, the commission was guilty of negligence in not keeping watch on his acts, and in not discovering the substitution when by due diligence they could have done so; what would be the legal

effect of such a condition of things? We are told in *United States v. Bebee*, 180 U. S., at page 354, 21 Sup. Ct., at page 375, 45 L. Ed. 563:

"Where an agent has acted without authority, and it is claimed that the principal has thereafter ratified his act, such ratification can only be based upon a full knowledge of all the facts upon which the unauthorized action was taken. This is as true in the case of the government as in that of an individual. Knowledge is necessary in any event. Story on Agency (9th Ed.) § 239, notes 1 and 2. If there be want of it, *though such want arises from the neglect of the principal* (underlining mine), no ratification can be based upon any act of his."

Also A. & E. Enc. of Law (2d Ed.) vol. 1, p. 1190, verbo "Agency."

Of course, ratification or consent by the commission would have amounted to naught if it had no power or authority to assent or ratify. But the needs of the case did not require me to determine at the trial whether the commission had that power, and I considered it sufficient to say to the counsel, when I was stating to them, out of the presence of the jury, the questions to which I would confine the jury, that it was extremely doubtful, to say the least, whether the commission itself had the power. That question was not reached, because there was no evidence which, in my opinion, would have warranted a finding that the commission ratified or assented.

With regard to the effect of any laches, error, or neglect on the part of the engineer or of the commission itself, it may be well to consider briefly the nature of that public body. It seems clear that it was created directly by the state as an instrumentality in the exercise of one of the highest functions of sovereignty—the police power—for the protection and enhancement of the health of the city of New Orleans. It was so considered by the Supreme Court of this state in the case of *State v. Flower et al.*, 49 La. Ann. 1199, 22 South. 623. This being so, it is not to be dealt with as an ordinary business corporation, nor as a municipal corporation in the exercise of its private and proprietary rights, as contradistinguished from its public and governmental functions. It partakes in some respects of the privileges of its creator, the state, and it is not itself a principal, but an agent. Its principals are the state of Louisiana and the taxpayers, as well as the whole people of the city of New Orleans. It is well settled that neither a state nor the United States are affected by the laches, errors, or neglects of their officers. I do not say that this doctrine is to be applied in its entirety to the public body with which this suit is concerned or to the employes of that body. But it seems to me that nothing short of the strongest equities should move a court, in such a case as this, to charge to the people of the city of New Orleans the laches or errors of its agents, even when occurring within the scope of their powers.

The fact that the money was paid and the contract executed is no obstacle in the plaintiff's way. It is manifest that no action for money unduly paid can arise until after payment. Larombière

has told us (see *supra*) that the action *condictio indebiti* lies though the contract has been executed. The well-considered case of *City of Lancaster v. Miller* (cited *supra*) was a case in which the contract for the public work had been executed, and the suit was for a balance due on work performed. Recovery was wholly denied. The case of *Parr v. Village of Greenbush* (cited *supra*) was also a case in which a contract for public work was executed and recovery for work done denied. See 72 N. Y., especially at page 472. I deem further citation of authorities on this point unnecessary, but I will advert below to considerations bearing on this matter in passing on the question of the authority of the engineer and of the commission with regard to the substitution. Practically all the cases and authorities to which I shall refer hereafter to show the necessity of advertising contracts for public works and letting them out to the lowest bidders relate to contracts which had been fully executed and performed.

The fact that the contractors lost money by performing the work which they had bound themselves to do is wholly irrelevant to the controversy. I consider it unnecessary to say more on this point than to remark that no one is permitted to avoid a contract because he is disappointed as to the profits which he expected to make from it. The contractors cannot be allowed to repair their losses by making an undue profit on their contract.

Did the engineer have authority to allow the substitution? In passing upon this point, it should be first stated that there is nothing in the pleadings or in the evidence reflecting in any manner upon the character or integrity of the engineer, and it was fully conceded that he acted in good faith. But it is plain that his good faith could not have had the effect of conferring upon him a power or an authority which his mandate did not give him, and that his unauthorized acts, though done in good faith, could not bind or estop the commission. The fact that the contracts and specifications gave no right to the engineer to allow the substitution is so obvious to me that I do not feel that I need do more than assert the fact. I do not understand—but this is my own conclusion, not binding upon the defendant—that it was contended that the engineer had the authority as a matter of law, but that reliance was placed on a tacit assent or ratification by the commission. That matter I have already passed upon. If the engineer could allow the change of one of the most important materials of the work (possibly the most important material), by which change the defendant made a profit, as found by the jury, of more than \$28,000—if the engineer could do this, what would be the limit of his authority? If the authority were conceded with regard to a matter of such importance and magnitude, I do not see how it could be denied as to any other part of the contract, or even as to the whole of it. It is true that an engineer has a reasonable discretion with regard to the carrying out of certain matters in contracts of this kind, but it is manifest that such discretion cannot be allowed to extend to the substitution of cements involved in this case. It is evident

to me that the engineer had no authority, and therefore his unauthorized acts neither bound nor estopped the commission.

Would the commission itself have had the power to allow the substitution, without at least providing for the deduction of the difference in the costs of the cements? While, as I have already stated, the condition of the evidence in the case did not require me to determine that question, I have decided that it is better, and that it will subserve a useful purpose for me to state the conclusions which I have reached in the matter. The drainage commission was created by the state of Louisiana by Act No. 114 of the Legislature of 1896 (Acts La. 1896, p. 162). Its purposes were to provide for the drainage of the city of New Orleans, to provide ways, means, and funds for such drainage, and to provide for the issue and payment of bonds for the purposes of the commission, etc.

Section 5 of the act enjoins upon the commission—

"That all work done or supplies or materials ordered by said commission, of every kind and nature, except emergency work in times of extreme peril from storm or flood, shall be let by contract to the lowest responsible bidder by sealed proposals or by public auction * * * after at least thirty days' advertisement in two newspapers in the city of New Orleans, on approved specifications, one of which specifications shall always be that the contractor shall give bond with security, * * * for the faithful performance of his contract," etc.

It was also provided that if the estimated cost of the work should exceed \$50,000, additional advertisement should be made in New York City and in Chicago.

Section 6 of the act provides for the issuance of bonds to an amount not exceeding \$5,000,000, "in order to raise funds for the purpose of doing such work speedily and on an extensive scale." The same section also provides that "all moneys and funds dedicated and applied by this act to the purposes thereof, are consecrated to the payment of the principal and interest on said bonds."

Section 7 of the act reads:

"That all the provisions of this act respecting the dedication and application of funds and money shall constitute a contract with the holder or holders of bonds issued as aforesaid, the obligation of which contract shall not be impaired and may be enforced by any holder of said bonds by proceedings of mandamus and injunction or by other proper proceedings in court."

The mere reading of the provisions of law just mentioned cannot, it seems to me, fail to create the conviction that the commission itself could not have done what was done in the instant case. There was a double duty as to the application of all moneys in accordance with the will of the Legislature. There was a duty to the taxpayers and the people, and also a duty to the bondholders, who were solemnly assured that the moneys would be applied under the safeguards provided by the act. It is perfectly plain that, if what was done in this case was permissible, those safeguards would amount to naught. That this is so, seems to me to be a self-evident proposition.

What have the courts held as to the effect of the disregard of such a limitation as the injunction concerning advertising and

the letting to the lowest bidder, contained in the legislative act above referred to? The following cases concerned municipal corporations. But their language and the results reached in them apply with full force and effect to such a body as the commission in this case, whether or not it be considered a municipal corporation.

In *City of Lancaster v. Miller* (cited *supra*), a contractor sued for a balance claimed for work done. Recovery was wholly denied because of failure to advertise for bids as required by law. The court said, *inter alia*:

"The evils against which these restrictive statutes (advertising for bids, etc.) are directed are municipal extravagance and the negligence and indifference of municipal officers. They were designed for the protection of municipal taxpayers generally. * * * The mischief arising from municipal prodigality, and the growth of municipal debts that attended thereon, called loudly for an efficient remedy. These restrictive statutes are the answer to that call. They embody that principle of sound public policy which seeks to enforce economy in the administration of public affairs. The judicial tribunals of the state should administer these laws so as to advance the purpose thus sought to be accomplished. Contracts made in violation of these statutes should be held to impose no corporate liability. Persons who deal with municipal bodies for their own profit should be required at their peril to take notice of limitations upon the powers of those bodies which these statutes impose. The corporation should not be estopped by the acts of its officers to set up these statutes in defense to contracts made in disregard of them. It would be idle to enact those statutes and afterwards permit their practical abrogation by neglect or other misconduct of the officers of the municipality. If such effect should be given to such acts of municipal officers, it would defeat the operation of the statutes. The strict enforcement of these provisions may occasionally cause instances of injustice; it is possible that municipal bodies may secure benefits under a contract thus declared void and refuse to make satisfaction. In the nature of things, however, these instances will be rare. * * * If, however, cases of hardship occur, they should be attributed to the folly of him who entered into the invalid contract."

In *Parr v. Village of Greenbush* (cited above), a case in which the municipal corporation had received the benefits of the contract, the court said, *inter alia*:

"A person contracting with public officers must take notice of their powers. He is charged with knowledge of the law, and he makes a contract in violation of the law at his own risk. When the law commands public officers, before entering into contracts, to advertise and contract with the lowest bidder, a contract made without advertising and without competition is wholly illegal, and imposes no obligation upon the public body assumed to be represented. Laws of this character, imposing restraint upon public agents, have been found to be necessary and beneficial, and public policy requires that they should be rigidly enforced."

The court, answering the contention that the municipal corporation, having received the benefit of the work and materials, should at least be made to pay on a quantum meruit, said:

"If this were so, the law could always be easily evaded; that it is not so, is no longer an open question in this court"—citing cases.

In *McDonald v. The Mayor, etc., of the City of New York* (cited *supra*), the headnote, which is in consonance with the opinion, says, in part:

"Where the municipal charter prohibits its officers from contracting on its behalf for the purchase of materials, save in cases and in a manner speci-

fled, the municipality is neither liable upon a contract made by an official in violation of or without a compliance with the requirements of the charter, nor can the value of materials furnished under the contract be recovered upon any implied liability."

See Judge Colt in *Worthington v. City of Boston* (C. C.) 41 Fed. 23, especially at page 27, and cases there cited.

In the *Am. & Eng. Ency. of Law* (2d Ed.) vol. 20, p. 1165, verbiis "Municipal Corporations," it is said:

"The general rule is that a provision with reference to the letting of contracts on bids is mandatory and essential to the validity of contracts entered into, in the absence of which no liability is imposed, even though fully performed by the other party thereto, and substantial benefits are conferred on the city."

See cases cited in the notes.

In *Dillon on Municipal Corporations* (4th Ed) § 466, it is said:

"Where the charter or incorporating act requires the officers of the city to award contracts to the lowest bidder, a contract made in violation of its requirements is illegal, and, in an action brought on such contract for the work, the city may plead its illegality in defense; and neither the municipality nor its subordinate officers can make a binding contract for such work, except in compliance with the requirements of the law."

As to the necessity of advertisement, and also specially as to the modification of the contract, see *City of Memphis v. Brown*, 20 Wall., at pages 320 and 321, 24 L. Ed. 924; also *Bonesteel v. The Mayor, etc., of the City of New York*, 22 N. Y. 162; also *Hague v. Philadelphia*, 48 Pa. 529, the spirit of which decision applies in this case. It is therein said:

"There was no authority in the commissioners to change the site, the terms of the contract, or the plan of execution. They had not a shadow of right to do so. To admit it, would be to strip the public of that protection which the act plainly intended to give by the restrictions it imposed, *for to alter the contract in these essential elements requires all the authority to make it* (underlining mine) * * *. Changes in plan and specification may open a wide door to many evils, not the least of which are fraud and favoritism. All experience teaches the utter impossibility of wholly preventing unfairness and advantage taken in the execution of public contracts, even with the most vigilant watchfulness of the public interest. If, in addition, courts of justice hold that public servants can without authority bind the public for extras, even in proper and honest cases, they establish a principle which will greatly add to the demoralization of public contracts," etc.

Other cases could be cited on the point under consideration, but I deem it unnecessary to do so.

I am aware of the argument *ab inconvenienti*, to the effect that great embarrassment might be caused in the carrying on of public works if there were no power to modify the contracts. In the first place, I am dealing with a case in which the result of the modification was the payment to the contractors of a large sum of money which they could not have earned under their contract. I am not concerned with the effect of a modification which, by a proper adjustment, would have caused no loss to the commission. Again, assuming that the engineers who prepare the specifications for such works are competent, the instances must be very rare, to say the least, where cheaper ways and means of carrying out the

contracts are available. I am very clear that no mere argument from inconvenience, even if founded in fact, should be allowed to stand in the way of the enforcement of provisions of law enacted for the protection of those whose money is being used in the performance of public works. But this argument *ab inconvenienti* has no foundation in fact. For it would require no special ingenuity to make provision in the advertised specifications for changes beneficial to the work by the use of ways and means equally efficient, but cheaper than those mentioned in the contract, and this could be provided for in such way as to protect the rights of the contractors. It is plain to me how all of this could be done and yet the law be obeyed.

The only remaining point is the construction of the specifications with regard to the cement. The interpretation was for the court, except as to such part of them as presented matters of fact on which there was a conflict of evidence. The included questions of fact were for the jury. See *Am. & Eng. Ency. of Law* (2d Ed.) vol. 23, p. 555, *verbis* "Questions of Law and Fact," and cases there cited. Therefore, in the condition of the evidence, I charged the jury, as matter of law, that the cement was required to be an imported Portland cement of the best quality, and that it was also to satisfy at least the three special requirements as to tensile strength, fineness, and weight provided for by the contracts. I also charged them, as matter of law, that the words "best quality" did not mean the best quality of such cement as was then manufactured, used, or intended for any purpose, but only the best quality that was ordinarily used in 1897 in such works as these contracts provided for. *McIntire v. Barnes et al.*, 4 Colo. 287. Subject to those charges, I left the jury entirely free to find, as matter of fact, what the parties meant by the words "best quality of Portland cement" when in 1897 they entered into the contracts. I charged the jury that they were required to make the comparison between the cost of the two cements under exactly similar conditions and circumstances, and that they were also required to give the contractors the benefit of the least cost at which, by any reasonable business method then practicable, they could have obtained the Portland cement. It was strenuously contended in this case that, by virtue of the rule that in designations and descriptions "the particular governs the general," the words "best quality" should be virtually stricken out, and that any sound imported Portland cement which would have filled the three special requirements would have satisfied the contracts. There was evidence in the case on behalf of defendant tending to show that virtually the special requirements had no force or virtue as tests of the worth of the cement. The effect of the contention, taken in connection with the evidence just referred to, would have been practically that the specifications as to the cement amounted to naught, and that no safeguard had been provided as to what might be termed the "thaws and sinews" of the work. If this were true, great censure would attach to the able and distinguished engineers who prepared or approved the specifications for this great public work, involving the health and

welfare of the people of New Orleans and the expenditure of millions of dollars of public moneys. But the specifications as to the cement were neither obscure nor repugnant. They seem to have provided, both as to the "general" and the "particular," what was at that time usually provided for public works. And the fact that similar specifications might be drawn up differently today, because knowledge as to the nature and manufacture of cements has advanced since 1897, is no proof whatever that the specifications in question deserve the criticism which they have received. Doubtless, a number of experts testified in favor of the construction which was contended for, as I have just stated, and I took account of and gave weight to their opinions on that question. But, while expert engineers and expert chemists—especially such experts as testified in this case—are entitled to the greatest consideration as to any matter within their special departments of knowledge, yet, however high may be their professional attainments, they are not privileged over other men to express opinions as to the meaning of plain English. It was finally for me to determine the meaning of the specifications, leaving to the jury the question of fact included in them. It was evident to me, from the specifications themselves, that the words "best quality" were material, and could not be disregarded; and, in the light of the evidence, I believe that they constituted an essential part of the specifications. It may be said that the highest requirement for a cement—certainly for a cement to be used in such a work as the one which was contemplated—is durability. This is a quality which comes near including within itself all other qualities. It appears to me that the main, if not the only, means by which the commission could, in 1897, obtain a durable cement, and one possessing also the highly important qualification of uniformity, was to require the "best quality" of imported Portland cement—which meant a cement with a reputation and with a past of from 50 to 75 years behind it. It is manifest that it could not then have been intended to experiment with a cement which, however good it may since have proven itself to be, had not then been in existence for more than two or three years, and was then evidently in its tentative stage as to durability. After having heard the great mass of expert and scientific evidence which is in this case, I do not understand that there is to-day, even with the great advance made in the matter of cements, any tests by which the durability of a cement can be determined, and it is plain that there can be none as to uniformity. Still, there are more and better tests to-day, and useful knowledge concerning the whole matter has advanced. But a requirement as to the "best quality of Portland cement," while still highly useful to-day, was much more useful in 1897, and it is impossible for me to believe that that requirement was then considered immaterial or was intended to be waived by the special requirements. The experts who testified with regard to the rule that "the particular governs the general"—and they much outnumbered those who testified to the contrary—plainly erred in applying the rule to the facts of this case. The fundamental rule for the interpretation of contracts,

the one in which all other rules merge, is to ascertain the real meaning and the intent of the parties from every word and part of the contract. This rule is elementary, and is found, stated in almost the very words which I have just used, in a scientific work relied upon in the testimony on behalf of the defendant. It is given in that work as the first rule of construction of engineering contracts, supplemented by a fourth rule to the same effect. Engineering Contracts and Specifications, by J. E. Johnson, C. E. 1895, at page 41. The rule as to general and specific terms follows at page 42. The rule *ejusdem generis*, the rule *exclusio unius*, the rule invoked in this case that "the particular governs the general," and perhaps other rules still, are mere subordinate and auxiliary formulas intended to assist in the application of the basic rule that the intent of the parties governs. Neither in law nor in ordinary logic can there be an inflexible rule by which parties are arbitrarily held to forego a general requirement merely because they also state a particular one. If the parties had contracted for "the best quality of imported Portland cement," it is certain that the commission would have been entitled to a compliance with the requirement. How can it be said that the result of adding the special requirements was to strike out the general requirement? If a party binds himself to furnish "a first-class horse," he will be compelled to comply with his contract, subject to whatever difficulties of proof may arise in determining what is a first-class horse. If the party binds himself to furnish "a first-class horse seven years old and sixteen hands high," it is not true that any sound horse seven years old and sixteen hands high will satisfy the contract. There are cases, of course, where the court concludes, upon reading an instrument, that it was intended by the makers themselves to forego general for particular terms. Typical of such a condition of things is the case of *Bock v. Perkins*, 139 U. S. 628, 11 Sup. Ct. 677, 35 L. Ed. 314, as also the cases therein cited, concerning schedules annexed to instruments as parts of the same. The schedules were properly held to have been intended to limit and restrict any general terms used in the instruments. But such cases, while obviously correct, have no bearing whatever on the matter under consideration. See *Am. & Eng. Enc. of Law* (2d Ed.) vol. 17, pp. 6, 7, 25, and cases there cited.

The matter of the construction of the specifications seems to me to require no further consideration. It has been gone into only because of the earnestness with which it was pressed in this cause. The cases of *Omaha v. Hammond*, 94 U. S. 98, 24 L. Ed. 70, and *District of Columbia v. Gallaher*, 124 U. S. 505, 8 Sup. Ct. 585, 31 L. Ed. 526, were cited to me during the trial before the jury. They have no bearing on this controversy. It is evident that in both cases the engineers were authorized to perform the acts which were properly held to be binding on the corporations.

Being fully satisfied, after mature deliberation, that my views and action in this cause are correct, the motion for a new trial must be refused.

SHARP v. BEHR et al.

(Circuit Court, E. D. Pennsylvania. April 19, 1905.)

No. 22

1. MINES—ROYALTIES—ACCOUNTING.

Plaintiff being entitled by contract to a royalty of one dollar a ton on ore from certain mines, defendant wrote him, with reference to certain ore, that it would be necessary to reduce the royalty, and suggested 50 cents a ton. Plaintiff did not reply thereto, nor to that part of a subsequent account of royalties in which he was only credited at 50 cents a ton for this ore; but 2½ months thereafter, when a check was sent in accordance with the statement, he refused to accept it in full, claiming royalty at the contract rate. *Held*, that plaintiff's failure to so object to the reduction was insufficient to preclude him from subsequently claiming royalty at the contract rate.

2. SAME—ACCOUNTING—DEDUCTIONS—BURDEN OF PROOF.

Where a contract for royalty on ore provided that the amount should be determined by railroad shipping receipts, the burden was on defendants, seeking to discredit such receipts on an accounting, to justify the deductions claimed.

3. SAME—DEDUCTIONS FOR DIRT—EVIDENCE.

On an accounting of royalty payable under an ore-shipping contract, evidence *held* insufficient to establish that deductions made by defendant for dirt were justified.

4. SAME—OBJECTIONS—WAIVER.

Where plaintiff was entitled to royalties on ore shipped to defendants, the amount of the shipments to be determined by the railroad shipping receipts, and defendants' statements of shipments were without any specification, except as to one shipment, and plaintiff had no figures with which to verify the account, the record of shipments being all kept at defendants' place of business, plaintiff's failure to object to the account rendered was not a waiver of his right to subsequently claim that deductions made by defendants were improper.

5. SAME—AGREEMENTS—EXECUTED TRANSACTION.

Where a payment on account of royalties for ore shipped, made by mistake, was allowed to go unquestioned by defendants for nearly a year after the mistake was discovered, and in a subsequent statement plaintiff was again credited with such royalty, though at a reduced rate, and a payment was made, such acts constituted a confirmation of such royalty, precluding defendants from thereafter claiming that plaintiff was not entitled to such royalty.

6. SAME—LOANS—REPUDIATION.

Where plaintiff was credited by defendants with royalties on ore mined from two farms, and such credits, together with some cash, was permitted to remain in defendants' possession as a loan, on which interest was paid on semiannual balances, and on one occasion the account was reduced by payment of \$1,000, defendants were not thereafter entitled to repudiate the transaction on the ground that the royalties were not justified.

7. SAME—CONTRACTS—DISAFFIRMANCE—ELECTION—DAMAGES.

A contract to convey certain real estate provided for payment of royalties to the grantor for a term of 20 years, unless the grantor should voluntarily leave the grantees' employment, and that, if the grantees at any time should fail to pay the royalties for ninety days after written demand, the grantor should be entitled to a reconveyance of the premises on paying the cost price thereof. *Held*, that where, after the grantees had discharged the grantor from their employment, he gave notice of forfeiture for nonpayment of royalties, he thereby elected to terminate the contract, and was not entitled to recover subsequent damages.

8. SAME—CONSIDERATION—INTEREST.

Plaintiff conveyed certain real estate to defendants at an actual cost of \$3,500, on defendants' agreement to pay certain royalties for a specified term from mines located thereon, if possession was obtained by defendants, and that, on failure to pay the royalties, plaintiff should be entitled to a reconveyance on payment of the cost price. *Held* that, defendants not having acquired possession because of an outstanding lease, on termination of the contract for failure to pay royalties they were entitled to interest on the repayment of \$3,500.

9. SAME—TENDER.

Plaintiff, being only bound to reimburse defendants as a condition to a reconveyance, was not bound to tender the amount necessary therefor in advance of a settlement of the accounts.

In Equity. Exceptions to report of master.

W. B. Broomall and A. B. Geary, for plaintiff.

Nelson S. Spenser and Arthur G. Dickson, for defendants.

ARCHBALD, District Judge.¹ According to the views previously expressed in this case (117 Fed. 864) it was found that the defendants were in arrears for royalty due on ore mined from the Lancaster Farm to the extent of at least \$14.40, on the strength of which it was held that the plaintiff was entitled to call for a reconveyance of the Fulton Farm, which he had originally owned, as provided by the fourth article of the agreement between the parties.² It is earnestly contended that this was a mistake, and as

¹ Specially assigned.

² The following is a copy of the agreement:

"Memorandum of agreement made this twenty-sixth day of September, 1891, between George W. Sharp, of the one part, and Herman Behr, Robert Behr, and Gustav Hewbach, trading as Herman Behr & Co., of the other part.

"First. George W. Sharp agrees to convey to Herman Behr & Co., for the consideration of one dollar, the premises described in a deed bearing date June 17th, 1891, and recorded in the office for recording deeds for Delaware county, in Deed Book 11, No. 7, page 238, made by James Fulton to George W. Sharp.

"Second. In consideration of said conveyance Herman Behr & Co. agree to pay to George W. Sharp a royalty of one dollar per ton of 2,240 pounds upon all ore shipped by them from their garnet mines in Bethel township, Delaware county, Pennsylvania, including not only the mines now owned or operated by Herman Behr & Co., but also the mines situated upon the property above mentioned, if possession thereof be obtained by Herman Behr & Co. The amount of shipments to be determined by the railroad shipping receipts.

"Third. The payment of royalties as above to continue for the term of twenty years, unless George W. Sharp shall voluntarily leave the employment of Herman Behr & Co. In case the said George W. Sharp shall die during the said period of twenty years, the royalty shall be reduced to fifty cents per ton and shall be paid to the wife, Martha Sharp, so long as she may live and no longer.

"Fourth. In case Herman Behr & Co. should at any time fail to pay the royalty for a period of ninety days after written demand for the payment of the same has been duly made of Herman Behr & Co. then George W. Sharp shall have the right to demand a reconveyance of the premises mentioned in the first article of this agreement upon his paying to Herman Behr & Co. the cost price thereof.

"Witness the signature of the parties hereto.

Herman Behr & Co.
"George W. Sharp."

the right to maintain the bill, with the other relief incident to it, depends upon the conclusion so reached, a reconsideration has been asked in the light of further evidence and argument.

* The arrears in question arise out of the shipment of February 11, 1898, stated at $28^{1740}/_{2240}$ tons, on which the defendants allowed the plaintiff \$14.40, or at the rate of 50 cents a ton, instead of \$1, the royalty fixed by the agreement referred to. There is some dispute as to just where this particular ore came from; that is to say, whether from the "dump" or refuse heap, or from a stock of "brown ruby" which had been condemned and put to one side. I accept the latter view, but it is not important. It was undoubtedly a special lot, which was cleaned up and reclaimed by direction of the defendants from a larger lot which had been intended to be thrown away; five cars, or 60 tons, of the best of it on hand being ordered to be shipped for a certain purpose outside of their sandpaper business. The material thing, on which the defendants particularly rely, is that, in a letter to the plaintiff January 12, 1898, inquiring with regard to what it would cost to clean up the rest of it and the quantity of "clean stuff" it would be likely to yield, it is said:

"We have to calculate on a different basis on this lot, to come out entire, as we cannot use it for sandpaper."

Adding:

"It will be necessary to arrange royalty for this old lot, and we suggest a credit of 50 cents per ton. Awaiting your estimate, and further news, we remain,
Yours truly,
Herman Behr & Co."

The plaintiff answered this letter the next day, giving an estimate of the cost of cleaning and the probable yield, but made no response with regard to the proposed reduction in the royalty, and the matter was allowed to rest at that until January 5, 1899, a year later, when the defendants, in accounting to the plaintiff for the royalties for the year, in a letter of that date, say:

Below we beg to hand you the figures of royalties for 1898, viz.:
Tons, $540^{1829}/_{2240}$ at \$1.00 per ton..... \$540 60
Brown ruby, tons, $28^{1774}/_{2240}$ at .50 per ton..... 14 40
\$555 00

Also royalty received from Fulton Farm, viz.:
Tons, $570^{600}/_{2240}$ at 75 cents per ton..... \$427 76

To this the plaintiff made prompt reply, objecting because he had not been allowed \$1 a ton royalty on ore from the Fulton Farm, the same as he had been receiving, but saying nothing as to the reduction on the "brown ruby." Subsequently, however, on March 18, when a check was sent in accordance with this statement, the plaintiff refused to accept it as a payment in full, and merely receipted for it on account, claiming a balance of \$14.40 still due. It is contended that the failure of the plaintiff to object to the reduction of the royalty, at the time it was suggested, was evidence of his acquiescence, on which the defendants had the right to rely, and to which he is therefore to be now held, and that this is confirmed by the fact that when the statement with regard to the royalties was received no question was made of it until over two months had

passed. It is to be remembered, however, that the defendants were held by a written agreement with the plaintiff to pay a royalty of \$1 a ton, which could not be changed without he gave his direct consent, and this the mere failure to repudiate their proposition did not necessarily do. The only thing that can be urged is the suggestion by the defendants in that connection that they had to calculate on a different basis on this particular lot of ore, which they designed for a special use, in order to come out whole, in consequence of which it would be necessary to adjust the royalty upon it. If the parties were newly bargaining together for something which the one was to supply and the other to pay for, an assent to the price so nominated might be implied from silence. But the ore was the defendants' own, subject only to a royalty to the plaintiff, which was already fixed, and which was not a measure of its value, but was one means of compensating the plaintiff for his services as mine superintendent. Something more positive is to be expected, therefore, than in the ordinary case, and the plaintiff's silence is not to be taken as an acceptance or acquiescence, but rather the contrary. The proposition of the defendants was not made a condition of shipment, and the failure of the plaintiff to respond to it should not have misled them. It was passed over unnoticed, although everything else in the letter was answered, and the matter was allowed to rest at that by both parties. Considering that the burden was on the defendants to secure a definite agreement to modify the royalty, in order to be relieved from liability to the full extent of it, and that the subject apparently never passed beyond the negotiating stage, I do not see that the plaintiff was bound.

If not, the statement rendered in January following, and the failure of the plaintiff to at once object to it, amount to little. It is true that it is said, in *Oil Co. v. Van Etten*, 107 U. S. 325, 1 Sup. Ct. 178, 27 L. Ed. 319, that an account rendered, if not objected to within a reasonable time, may ripen into an account stated, which the opposite party cannot change, except for fraud, accident, or mistake, although this seems to be somewhat of an overstatement of the law. 1 Cycl. Law & Proc. 376; *Perkins v. Hart*, 11 Wheat. 237, 6 L. Ed. 463; *Wiggins v. Burkham*, 10 Wall. 129, 19 L. Ed. 884; *Verrier v. Guillou*, 97 Pa. 63; *Lockwood v. Thorne*, 18 N. Y. 285; *Brown v. Kimmel*, 67 Mo. 430. But the crucial time in the present instance was not so much when the account was rendered, as when, on March 18, payment was tendered under it; and this the plaintiff declined to receive or receipt for, except on account, claiming the balance which is now asserted as still due. The interval of 2½ months was certainly not an unreasonable one, so as to compel him to express his dissent sooner or be bound. Nor is this affected by the fact that he saw fit to object more promptly to the reduced royalty proposed on the ore from the Fulton Farm. He subsequently and within sufficient season, before any controversy had arisen, objected to all, and that was the way the subject was left, and the condition in which it comes up here. It is to be noted, further, that the defendants seek to enforce, not only a re-

duction in the royalty, but also in the amount, for alleged dirt, of which the plaintiff had no notice. Except his failure to object to the statement in question, which amounts to little, there certainly is nothing to show that he gave his assent to both.

But, as was observed in the former opinion, \$14.40 was not the only default in royalty with which the defendants are chargeable, although, as there pointed out, it may be the only one that can be relied upon as the basis for a reconveyance; the proper steps by a prior demand not having been taken to make the other available. Whatever else was due, however, is to be considered in the present accounting, and it has its influence, also, in inducing a decree, by amplifying the default. It is important, therefore, to observe that there was an admitted shipment of 170 bags of ore (made in December, 1898, but not credited until February following), containing 32,300 pounds, gross weight, or 27,455 pounds, allowing 15 per cent. for dirt, as claimed by the defendants; and another of 158 bags, containing 32,000 pounds gross, or 27,200 pounds after a similar deduction, on which there would be due to the plaintiff, on the one basis \$28.70, and on the other \$24.39. None of this was included in the statement of January 5, 1899, a part of it at least having been shipped, and all of it credited, subsequently, and it is therefore unquestionably still due and owing, and was at the filing of the bill.

But, above and beyond this, it is contended by the plaintiff that the $569^{883}/2240$ tons ($540^{1329}/2240 - 28^{1744}/2240$) reported January 5, did not correctly represent the shipments up to that date. These shipments, according to the railroad receipts, amounted to 1,576,055 pounds, from which the defendants deducted from 15 to 25 per cent. for alleged dirt, leaving a net 1,283,429 pounds as the basis of the tonnage which they acknowledge, and for which alone they claim to be bound. There is a slight error in this calculation; 1,283,429 pounds amounting to $572^{2149}/2240$ tons, leaving $3^{1318}/2240$ tons unaccounted for, which at \$1 a ton makes \$3.58. Without stopping over this, however, the larger question remains as to the right of the defendants to make the deductions which they have. According to the agreement between the parties, the shipments of ore were to be determined by the railroad shipping receipts, which, although not conclusive, are so far to be taken as correct that the burden is on the one who seeks to discredit them, and the defendants are therefore called upon to explain and justify the variations which they have made therefrom. Unobjected to, they may be said to stand as an account rendered, by which the defendants are bound, just as much as the counter statements on which they rely to conclude the plaintiff, if the rule on that subject is to be adhered to in all the strictness for which they contend. But, waiving that point, and conceding, as was before decided, that royalty was only to be paid for clean or refined ore, and not on dirt, as to which the shipping receipts, of course, afford no guide, the question is whether the defendants have successfully met the burden imposed upon them to show that dirt was actually shipped to the extent of the deductions which they have made. It was clearly pointed out in the former opinion that they would be re-

quired to do so, and there can be no just complaint, therefore, if they are. And this is particularly the case, in view of the plaintiff's testimony, which does not seem to be controverted, that the same pains were taken and the same course pursued with regard to cleaning the ore during these shipments as previously, with such facilities as the equipment of the mine afforded. Notwithstanding this, however, beginning with the very first of the year, and extending to every lot of ore received, there was a persistent dockage, ranging from 15 to 25 per cent., as to which there is no explanation, except the complaints to be found in two or three letters. But complaints are not necessarily true, and do not justify themselves; and the only thing that can be made out of them here is the possible inference that, because the plaintiff did not resent them, they must have been well grounded. Criticisms between employer and employé, however, are often indulged in, whether just or unjust, as a supposed incentive to greater effort; and it is a question whether, in this or any similar instance, they would be understood to mean more. Neither is it to be expected that one in a dependent position will reply and defend his work; it being his duty rather to satisfy his superior if he can, who is the one to determine the particularity which he requires. The failure to do so, therefore, is not to operate the same as where parties stand on an equal footing. Nor, except in the instance to be presently referred to, was there anything to suggest to the plaintiff that dockages were to be made; much less that his royalties were dependent upon them. It is, on the other hand, most significant that during the year in question the defendants were subject to sharp competition in the manufacture of sandpaper, for which this ore was utilized, enforcing greater care in the selection of abrasive material, and causing them to eventually give up the mine and seek it elsewhere, although with but little better success. It is evident, therefore, all things considered, that it is this that was at the bottom of the deductions, rather than any failure on the part of the plaintiff to mine and clean the material as he should—either a new standard being set up by the defendants to meet the exigencies of the business, or a change in the quality of the ore having occurred, with neither of which is he to be charged. At all events, taking the year as a whole, the defendants have nothing on which to rely, except the fact that, when they rendered an account of it to the plaintiff, he took no exception to the amount, and that, when payment was subsequently tendered in accordance with it, he made no claim that anything was due beyond the \$14.40 already alluded to, receiving and receipting for all outside of this. But whatever inference this might warrant, or however the plaintiff might be held to it under some circumstances, I see no occasion for doing so here. The tonnage was given in gross in the statement, without any attempt at specification, except as to the "brown ruby," so called, and the plaintiff had no figures at hand by which to verify the account; the record of shipments being all kept in New York. It may be that he ought to have known in a general way the quantity which had been mined

and forwarded for the year, but that is not to conclude him from insisting upon the real extent of it, now that it appears.

It is said, however, that as to the shipments covered by the statement of June 20 the plaintiff had notice that the weights were intended to be adjusted according to the deductions there shown, as to which he was called upon to express himself, unless he expected to be bound. But in the main the same observations apply to this that have been already made. These deductions were imposed in the face of actual commendation, which goes far to negative their justice, if, indeed, it does not call in question the good faith of the defendants in making them. Thus, in the letter of April 25, acknowledging 1,011 bags of ore and giving the correct weight—116,265 pounds, instead of 120,000, according to the shipping receipts—it is said:

"The ruby gives satisfaction to the factory as far as they have gone. Color is good."

This was confirmed the next day by another letter:

"As expressed yesterday, the ruby looks very well—indeed, quite different from last year's; and we hope to catch up in business with its help."

And yet, notwithstanding this, 10 per cent. was subsequently taken off of the shipment referred to, and, not satisfied with that, after the statement of June 20 had been rendered, another deduction was made of 10 per cent. more. It is said that this commendation was of the color merely, and not of the quality; but that is not the way it reads. Besides, color is quality, as the very next letter shows. But, without stopping further over the correspondence (although there is great temptation to do so to bring out the other inconsistencies, as well as the competition in trade which the defendants were experiencing, which evidently lies at the bottom of all), the significant thing with regard to the statement in question is that, while seeking to hold the plaintiff up to it, the defendants do not themselves propose to stand by its terms. After submitting it to him, showing a deduction of 10 per cent. on the first three items, without further notice, and moved by what considerations they have not disclosed, the defendants proceeded to deduct 10 per cent. more. This makes a change in the shipment of April 25 three times—first, in correction of the railroad receipt reported to the plaintiff; next, in the statement of June 20; and finally, on the defendants' books, unknown to any one except themselves. The plaintiff is, of course, not affected by deductions of which he was not informed. And as to the rest, the only thing that can be said is that he did not object. No doubt this warrants the inference that he accepted them as correct; but in view of all the evidence, and particularly of the fact that the defendants, by shifting the figures as they have, instead of justifying, have themselves discredited them, it does not seem to me that it should be drawn. The treatment of these shipments is too much in line with those of the whole year to be any better received, and the tonnage shown by the railroad receipts must therefore prevail.

The quantity of material on this basis for which the defendants are liable amounts to 1,640,355 pounds, or 732⁸⁷⁵/₂₂₄₀ tons. This varies slightly from the figures adopted by the master, due to his failure to follow the corrected shipment of April 25, which I accept. The royalties on it would be \$732.30, upon which there is to be credited the payment of \$555 March 18, 1899, leaving \$177.30 due. This includes and covers the \$14.40, as well as all the other items which have been discussed, which thus disappear in it, and do not need to be further noted. It represents the actual default of the defendants in the payment of royalties at the time the bill was filed, to which it thus lends support.

It is claimed, however, that the plaintiff had been paid, and had in his hands, royalties from the Fulton Farm at \$1 a ton, amounting to a large sum, for which the defendants were not liable, and which should, therefore, be applied in liquidation of anything for which they were in arrears on the Lancaster Farm, leaving nothing due, and requiring a dismissal of the bill. But the subject of the Fulton Farm royalty was fully discussed in the former opinion and needs but a passing notice here. While the payment of it in my judgment was a mistake, not only was it allowed to go unquestioned by the defendants for nearly a year after the mistake was discovered, but in the statement of January 5, 1899, the plaintiff was again credited, as we have seen, with similar royalty, although at the reduced rate of 75 cents, and a payment of \$427.76 made. This was a distinct confirmation of what had been done, and it cannot now be disturbed. Assuming that it was a gratuity, a person may be bound by a completed gift just as much as by anything else, and that is what it was in effect. Indeed, it was virtually conceded by Mr. Dale at the former argument, as shown by my notes, that for these payments the defendants had no remedy. The plaintiff by no means agrees that this royalty was not due him, and, on the contrary, has all along contended that the payments made him were to be taken as a contemporaneous construction of the contract, by which the defendants are bound. I have not adopted that view, but it will be seen on what disputed ground we enter when once the question is opened, which the defendants by their final payment, when all the facts were known to them, have seen fit to close.

By a kindred argument it is further contended that the plaintiff is not entitled to recover the \$2,000 which was left by him in the defendants' hands as a loan. The position taken is that this is mainly made up of royalties on ore from the Fulton Farm, which, not having been paid to the plaintiff, but only credited to him on the defendants' books, can now be repudiated. This account began in January, 1893, with what amounted to a loan to the defendants of \$1,200 at 5 per cent., of which \$701.32 was cash, and \$498.68 royalty due on the Lancaster Farm for the preceding year. It was increased in January, 1895, by a credit of royalties from both this and the Fulton Farm, to \$2,500; and in January, 1896, a year later, to \$3,000, at which amount it stood for 3½ years, until July 1, 1899, when it was reduced by a payment of \$1,000. Not all the

royalties accounted for, however, went into this loan—payments on account being made from time to time, and only the balances carried forward; interest being paid semiannually on what was found due. It is not necessary to go into the involved marshaling of credits and payments, by which it is sought by the defendants to individuate a part of this and give it the character of Fulton Farm royalties. No such distinction was preserved, and none can be imposed upon it here. It is only to be brought about by applying all payments made, to the satisfaction of Lancaster Farm royalties, contrary to the intention of the parties, for which there is thus no warrant. The money in the hands of the defendants, from whatever source derived, stood as a loan, and has to be treated just as if the royalties, of which it was made up, were actually paid over to the plaintiff in cash, and turned back to the defendants again for their use. To that extent the transaction was a closed one—not so, perhaps, but that it could be reached and adjusted in equity, if need be; but there is no call or occasion for doing so. The whole amount must therefore be treated as due and owing by the defendants in arriving at the true state of the accounts between the parties.

So far the conclusions which I have reached are adverse to the defendants. But with regard to the damages for failure to continue the mining operations on the Lancaster Farm, which were referred to the master to estimate, and for which he has allowed some \$4,000, I find myself compelled to revise the opinion which I previously expressed. It is contended in support of this claim that the plaintiff's services were tied up for 20 years by the provision which only made the defendants liable for royalties so long as he remained in their employ, and on the strength of this the master has endeavored to fix the present value of these royalties on an estimate of what they would fairly amount to for the full term if mining operations were prosecuted with reasonable diligence, according to the implied obligation to do so. *Pittsburg Railroad Co.'s Appeal*, 99 Pa. 177; *Aye v. Philadelphia Co.*, 193 Pa. 452, 44 Atl. 555, 74 Am. St. Rep. 696; *Huggins v. Daley*, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320. There are many factors which enter into any such problem; but, passing by the question whether the method adopted by the master was the correct one, the difficulty is in the argument which lies at the base of the claim. It is said that one of the confessed objects of the defendants in entering into the agreement was to secure the retention of the plaintiff in their service, and keep him out of the competition with them which might otherwise ensue if a man of his experience were in charge of mining operations on the adjoining Fulton Farm. But, whatever inducement or inspiring cause of this kind there was, it formed no part of the consideration contributed by the plaintiff, from which it is to be carefully distinguished, which consisted purely and simply in the conveyance of the farm, which he then owned and now seeks to get back. It is true that by the peculiar wording of the agreement it was made to his interest to continue at work for the defendants, so

long as they required it, as he did until he was discharged; and at the former hearing he attempted to set up, although without success, an admitted undertaking, as he alleged, to retain him for the full term. Except, however, as he was thus constrained by self-interest, there was nothing to prevent him from leaving at any time, and the defendants could not hold him. No doubt he would forfeit the royalties by so doing; but, if so, it would be a matter of his own volition, of which he could not complain, nor would the consequences become a part of the consideration moving from him on which he could now rely.

In view of this, and without assenting to the contention of the defendants that the fourth clause of the agreement provided a special remedy for a breach, to which the plaintiff is confined—that is to say, by a reconveyance of the property which he parted with in the transaction—I am satisfied that, having invoked this provision, it measures the relief to which he is entitled. The notice of forfeiture and the demand for a reconveyance were in disaffirmance of the agreement, which the plaintiff thus elected to bring to an end. This was a provision for his protection and benefit, of which he had the right to avail himself or not, as he chose; but, having taken steps in this way to terminate the contract and get back the consideration which he had contributed, and which must be regarded as the legal inducement to the defendants in entering into it, he cannot maintain it against them, as though in other respects continuing in force. There can be no partial abrogation, in other words. The contract stands or falls as a whole. In *Jones v. Carter*, 15 Mees. & Welsby, 718, action was brought to recover rent alleged to be due on a mine lease. It appeared, however, that prior to the time when the rent accrued the plaintiff had served a declaration in ejectment on the defendant, alleging a failure to comply with certain covenants, whereby, according to the provisions of the lease, he had the right to re-enter and avoid it; and it was held that the mere starting of the ejectment, although it went no further, was an exercise of the option to forfeit, after which no rent could be demanded. To a similar effect are *Birch v. Wright*, 1 Term Rep. 378, and *Stuyvesant v. Davis*, 9 Paige, 427. This principle is applicable here. Mr. Geary, as attorney for the plaintiff, on July 10, 1899, and the plaintiff himself 2 days later, made demand on the defendants in writing for the royalties claimed to be due, and gave notice that, unless they were paid within 90 days, a reconveyance of the premises would be required according to the provisions of the agreement; and on February 26, 1900, the royalties not having been paid, the present bill was filed. This put an end to the agreement, and the plaintiff was entitled to nothing further under it, outside of the reconveyance sought, and the damages, if any, which had been sustained, which, as it is to be observed, was all that was contended for by Mr. Broomall at the former argument. This is not to deny that the plaintiff, had he desired to take that course, allowing the agreement to stand, instead of bringing it to an end by the demand for a reconveyance, could have brought suit from time

to time for the royalties which he should have received upon a due prosecution of the mining, on the principle laid down in the former opinion, and not now intended to be departed from. But, undertaking, as he has, to get back what he put into the bargain, he must be content with that, together with damages up to the time he took steps to do so. The last shipment from the Lancaster Farm was on April 26, 1899, ten months prior to the filing of the bill. The master finds that the average annual quantity mined by the defendants, for the seven years that the agreement was in force, was 636 tons; and, accepting this as a fair approximation, there should have been mined in the ten months in question, to make up the quota, 530 tons, on which the plaintiff would be entitled to receive \$530, which represents the damages which he sustained by the breach of the contract.

Turning to the other side of the account, the plaintiff, as was before decided, is bound to pay back to the defendants, as a condition of the reconveyance, what the premises cost them, which, as previously found, amounted to \$3,500. It was suggested in the order of reference that this should be without interest, and the master has accordingly disallowed it. The idea was that the defendants, having had the benefit of the property, were fully compensated for the cost of it. But upon this point also I feel compelled to change my views. At the time of the conveyance from the plaintiff there was an outstanding mine lease, which has been kept in force by the exercise by the lessees of the option to renew which it contained; and all that the defendants have derived from the property in consequence, outside of the little which has come from the farm proper, which is negligible, have been the royalties which have been paid upon it, at the stipulated rate of 75 cents a ton, which have in turn been accounted for to the plaintiff at the advanced rate of \$1 a ton, excepting only the final payment in January, 1899. Up to that date, therefore, the plaintiff having had all the benefits derived from the property, interest should certainly be allowed to the defendants on the money which they put into it at the time of their purchase. This only runs, as it is to be noted, up to January, 1899, since which time the defendants have received and retained the royalties, and must therefore be assumed to have been compensated by the possession and beneficial ownership of the property.

As to a tender being necessary before demanding a reconveyance, whatever is involved in this, as was before observed, is a matter to be adjusted in the final decree. *Sloane v. Shiffer*, 156 Pa. 59, 27 Atl. 67; *Thackrah v. Haas*, 119 U. S. 499, 7 Sup. Ct. 311, 30 L. Ed. 486; *Billings v. Aspen Mining Co.*, 51 Fed. 338, 2 C. C. A. 252. The plaintiff is simply called upon to reimburse the defendants as a condition to a reconveyance, not in advance of it, which, in the unsettled state of the accounts between the parties, is all that could be expected.

The findings of the master which are not in accordance with these views must be set aside, and the corresponding exceptions, without further specification, sustained. The rest, including all the

exceptions of the plaintiff, are dismissed. The account between the parties, which is to be adjusted as of the date of filing the bill, is thereupon stated as follows:

The defendants are chargeable with:

1. Royalties on ore mined and shipped from the Lancaster Farm, due and owing at the time of bringing suit:		
(a) For the year 1898, 703 ¹³³⁵ / ₂₂₄₀ tons, at \$1 a ton	\$703 60	
Less amount paid January 5, 1899.....	555 00	
		\$148 60
(This includes the \$14.40 which was made the basis of a demand for a reconveyance.)		
Add interest from January 5, 1899, to February 26, 1900		
		10 16
		\$158 76
(b) Mined in 1899, up to April 26, 28 ¹⁵⁸⁰ / ₂₂₄₀ tons, at \$1 a ton.....	28 70	\$ 187 46
2. Estimated Royalties on coal which should have been mined for the ten months from April 26, 1899, to February 26, 1900, allowed as damages.....		
		530 00
3. Money left as loan in defendants' hands, with interest at 5 per cent. per annum from July 1, 1899, to February 26, 1900.....		
		2,065 27
		\$2,782 73

The defendants are entitled, on the other hand, to the following credits:

By cost of Fulton Farm, \$3,500, with interest, made up as follows:		
(a) Note for cash loaned to plaintiff, canceled.....	\$1,100 00	
Interest from October 3, 1891, to February 26, 1900	554 22	\$1,654 22
(b) December 31, 1892, paid James Fulton mortgage..	\$1,216 00	
Interest to February 26, 1900.....	522 07	1,738 07
(c) November 29, 1899, paid Mrs. Martha Sharp, legacy charged on farm.....	\$ 705 65	
Interest to February 26, 1900.....	10 25	715 90
(d) October 3, 1891, paid Howell note.....	\$ 500 00	
Interest to February 26, 1900.....	252 00	752 00
		\$4,860 19
Deduct debits shown above.....		2,782 73
		\$2,077 46

Upon the balance so found against the plaintiff he is entitled to have credited the royalties from the Fulton Farm, which have been received by the defendants since the bill was filed. A reconveyance, as it is now determined, was due him at that time, and from thence on the returns from the property were of right his. These are only partially shown by the proofs, but must be definitely known and ought to be easily established. If they can be agreed upon, the amount can be embodied in the decree to be drawn, without sending the case back to the master; or, if not, it will have to be referred to him to ascertain them. They are too important to the plaintiff not

to permit him to supply the omission, and the defendants are also interested in not having the subject left open for further litigation.

Let the case stand over for the proofs suggested, on the coming in of which, by agreement or otherwise, a decree may be drawn by counsel, in favor of the plaintiff, in accordance with the views expressed in this opinion, with costs.

CURNEN & STINER v. UNITED STATES.

(Circuit Court, S. D. New York. December 22, 1904.)

No. 3,629.

1. CUSTOMS DUTIES—ILLEGAL REAPPRAISEMENT—FAILURE TO EXAMINE MERCHANDISE.

In making reappraisements of imported merchandise under the provisions of Customs Administrative Act June 10, 1890, c. 407, § 13, 26 Stat. 136 [U. S. Comp. St. 1901, p. 1932], the general appraisers had before them only the same packages that the collector of customs had sent to the local appraiser under section 2901, Rev. St. [U. S. Comp. 1901, p. 1921], requiring that at least one package of every invoice and one package at least of every ten packages of the merchandise shall be sent to the appraiser for examination and appraisal; and these packages did not represent every variety of the goods under reappraisal. *Held*, that the reappraisements were void as to the merchandise not actually present nor represented by samples before the general appraisers.

2. SAME—DUTIABLE VALUE.

Certain proceedings on reappraisal held by general appraisers under Customs Administrative Act June 10, 1890, c. 407, § 13, 26 Stat. 136 [U. S. Comp. St. 1901, p. 1932], on appeal by the importers from the findings of the local appraiser, were held to be invalid because the general appraisers had not examined the merchandise or samples thereof. It appeared that, though the importers could not have produced either the merchandise or actual samples thereof, they had offered evidence equivalent to the presence of the actual samples, which was rejected by the general appraisers. *Held*, that duty should be assessed on the importers' entered value, and not on that found by the local appraiser, though his appraisal was valid.

On Application for Review of a Decision of the Board of United States General Appraisers.

In the decision in question, G. A. 5,720 (T. D. 25,423), the Board of General Appraisers affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by Curnen & Stiner. Among the various statutory provisions construed by the board are the following:

In case of appeal from reappraisal by a general appraiser "the collector shall transmit the invoice and all the papers appertaining thereto to the board of three general appraisers, * * * which board shall examine and decide the case thus submitted, and their decision, or that of a majority of them, shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein." Extract from Customs Administrative Act June 10, 1890, c. 407, § 13, 26 Stat. 136 [U. S. Comp. St. 1901, p. 1932].

"That it shall be the duty of the appraisers of the United States, and every of them, and every person who shall act as such appraiser, * * * by all means in his or their power, to ascertain, estimate and appraise * * * the actual market value and wholesale price of the merchandise." Extract from Act June 10, 1890, c. 407, § 10, 26 Stat. 136 [U. S. Comp. St. 1901, p. 1922].

"The collector shall designate on the invoice at least one package of every invoice, and one package at least of every ten packages of merchandise, and a greater number should be or either of the appraisers deem it necessary, imported into such port, to be opened, examined and appraised, and shall order the package so designated to the public stores for examination." Extract from section 2901, Rev. St. [U. S. Comp. St. 1901, p. 1921].

"Sec. 2939. The collector of the port of New York shall not under any circumstances direct to be sent for examination and appraisement less than one package of every invoice, and one package at least of every ten packages of merchandise, and a greater number should be, or the appraiser, or any assistant appraiser, deem it necessary. When the Secretary of the Treasury, however, may be of the opinion that the examination of a less proportion of packages will amply protect the revenue, he may, by special regulation, direct a less number of packages to be examined." Rev. St. [U. S. Comp. St. 1901, p. 1938].

"Sec. 2614. The appraiser at New York, before he enters upon the duties of his office, shall take and subscribe an oath faithfully to direct and supervise the examination, inspection, and appraisement according to law, of such merchandise as the collector may direct pursuant to law, and to cause to be reported to the collector the true value thereof, as required by law. All other appraisers, and all resident merchants appointed according to law to act as appraisers, shall severally take and subscribe an oath diligently and faithfully to examine and inspect such merchandise as the collector may direct, and truly to report, to the best of their knowledge and belief, the true value thereof." Rev. St. [U. S. Comp. St. 1901, p. 1804].

Among the questions discussed by the board in construing these various provisions were: (1) Whether the requirement in said sections 2901 and 2939 that at least one package of every invoice and one package at least of every ten packages shall be sent by the collector of customs to the public stores to be examined and appraised was applicable to reappraisement proceedings before general appraisers under said section 13; (2) if so, whether the examination of these public-store cases would be sufficient to validate the reappraisement if there were other varieties of merchandise involved which the contents of those packages did not represent; (3) or whether there should be produced all the merchandise under reappraisement, or samples thereof. It appeared from the evidence that at the reappraisement proceedings only the public-store packages were present, and that the contents of those packages failed to represent many varieties of the merchandise whose value was in question. The majority of the board held that the examination of those packages satisfied every requirement of law, irrespective of the absence of a part of the merchandise and of samples thereof; that upon an appeal to a general appraiser from the action of the local appraiser, or from a general appraiser to a board of general appraisers, the reappraisement in question is presumably correct, and the onus of showing the contrary is upon the party appealing; and that in this case it was the duty of the importers to produce the merchandise or its samples, if they wished them to be inspected by the general appraisers. The third member of the board held that it is essential to the legality of reappraisements that general appraisers should have before them the merchandise in question or fair samples of it. The grounds of this view are stated by him as follows:

Somerville, General Appraiser. "How far an inspection and personal examination of imported goods under appraisement is necessary in order to give validity to the proceeding in the ascertainment of market value has been the subject of much litigation both before the courts and before this board. Prior to the organization of the Board of General Appraisers, which was effected by the Customs Administrative Act of June 10, 1890, c. 407, § 13, 26 Stat. 136 [U. S. Comp. St. 1901, p. 1932], it was uniformly held that both local appraisers and merchant appraisers, under the system then existing, were required to make an inspection and examination of fair samples of the goods subject to appraisement, and that all appraisements made without such inspection and examination were invalid, and without legal effect. *Converse v. Burgess*, 18 How. 413, 15 L. Ed. 455; *Oelberman v. Merritt*, 123 U. S. 356, 8 Sup. Ct. 151, 31 L. Ed. 164, and cases cited. A

careful examination of these decisions will show that they were necessarily based upon the provisions of section 2614 of the United States Revised Statutes, which expressly required appraisers to take an oath to faithfully examine and inspect such merchandise. Said section reads as follows: 'Sec. 2614. The appraiser at New York, before he enters upon the duties of his office, shall take and subscribe an oath faithfully to direct and supervise the examination, inspection, and appraisement according to law, of such merchandise as the collector may direct pursuant to law, and to cause to be duly reported to the collector the true value thereof, as required by law. All other appraisers, and all resident merchants appointed according to law to act as appraisers, shall severally take and subscribe an oath diligently and faithfully to examine and inspect such merchandise as the collector may direct, and truly to report, to the best of their knowledge and belief, the true value thereof.' [U. S. Comp. St. 1901, p. 1804.] But for some previous decisions of the board and of the courts, I would be disposed, after careful consideration of the subject, to hold that this statute applied only to the local appraisers at the port of New York and other ports, and to the former merchant appraisers, who were then required to be selected on the ground of their expert knowledge in reference to the particular goods the market value of which was under investigation. No such oath is required either by the customs administrative act or in actual practice to be taken by any of the general appraisers who hold their commissions under said act, and who either now are, or have heretofore been, members of the Board of United States General Appraisers. It was held, however, in *United States v. Murphy*, 136 Fed. 811, decided by the United States Circuit Court for the Southern District of New York, per Townsend, J., in December, 1898, that an appraisement of merchandise made by a single general appraiser under the provisions of section 13 of the customs administrative act was invalid if that officer did not have before him any of the goods, or samples of the same, at the time of appraisement, and that such an appraisement could be successfully challenged by protest. This decision affirmed, without opinion, a like ruling made by the board in an unpublished decision. A similar view seems to have been taken in *United States v. Loeb* (C. C.) 99 Fed. 723, and in the same case when before the Circuit Court of Appeals, 107 Fed. 692, 46 C. C. A. 562. In *Renvy et al. v. United States* (C. C.) 121 Fed. 441, it was held by Wheeler, J., that an importer is entitled to have no greater portion of an importation produced and examined on appeal before the Board of General Appraisers than is prescribed by section 2939 of the Revised Statutes [U. S. Comp. St. 1901, p. 1938], where no evidence is offered to show that the cases designated by the collector were not fair samples of the importation. While in these cases, which seem to be predicated upon the old decisions, there is a failure to observe the difference between the oath required by said section 2614 of the Revised Statutes [U. S. Comp. St. 1901, p. 1804] and that required of the general appraisers, I do not feel at liberty to depart from the rule which seems to be settled by them, namely, that an appraisement made by a general appraiser is not valid unless he has before him under examination fair representative samples of the goods subject to appraisement. While such officer may not be an expert, and cannot, in the nature of things, become one as to all kinds of merchandise, nevertheless his judgment is usually based upon the opinions of expert witnesses who are familiar with the market value of such goods in the country of exportation, and who must themselves examine the goods before they are competent to give any opinion as to their values. In the case of the appraisements which are the subject of the protests now under consideration, no objection seems to be taken to the regularity of the appraisements of the merchandise which were made by the local appraiser at the port of New York. In the absence of evidence to the contrary, the presumption is that he did make an examination of the goods or of representative samples, and that his decision as to the market value of the same is correct in the first instance."

In the Circuit Court evidence was taken in behalf of the importers, which showed that, while the goods under reappraisement had been sold, and had passed out of the possession of the importers without ever being opened, so that neither they nor samples therefrom could have been produced at the

reappraisement proceedings, yet the importers had in their possession samples from which the orders for the goods in question had been taken, and which they offered to prove were identical with such goods in every material particular; also that the Board of General Appraisers refused to receive such proof.

Albert Comstock, for importers.

Henry A. Wise, Asst. U. S. Atty.

PLATT, District Judge. The question presented by these protests is as to the validity of a reappraisement of several large importations of dolls. The facts, as set forth in the decision of the Board of General Appraisers, are that the dolls in question were of very many varieties, each variety differing from every other, and that a sample one was not in any way representative of any other; that the general appraiser who appraised these dolls on appeal from the local appraiser and the board of three general appraisers which appraised them on appeal from the decision of the general appraiser had before them only one case out of ten of each importation, the same being at least one case from every invoice, and that this by no means represented the numerous varieties of dolls making up the importations. They also find as a fact that, although the law requiring one case from every invoice and at least one case out of every ten cases covered by each entry to be examined was complied with, it was impossible to make a personal examination of the articles in the other cases which differed from those in the cases retained, and as the appeal only covers such articles as were not retained and examined there was no way of getting at the actual values of the portions of the invoices now at issue.

Two questions were presented before the board: First. Is a reappraisement of merchandise by a United States general appraiser or a board of three United States general appraisers invalidated when all of the merchandise or samples of every variety thereof under reappraisement is not present before and examined by the general appraiser or board of three general appraisers at the time the same is passed upon by him or them? In answering this question two members of the board say that it is not invalidated. The third member of the board says that it is. The reasoning of Judge Somerville, the third member, seems to be unanswerable, and I must therefore disagree with the majority of the board in their answer to the question, being clearly of the opinion that all of the proceedings upon appeal were invalid.

The second question which the board had before it was: If such a reappraisement is invalid, should duty be collected upon the value entered upon the invoice or upon the value fixed by the local appraiser? In other words, should the duty be collected upon the value fixed by the last valid appraisalment or upon the value fixed by the importer in his entry? In the minds of the majority of the board an answer to this question was unnecessary. But the position taken by the minority member on the first question compelled him to answer this one, and so, in bringing his mind in accord with the majority on the merits, he was forced to decide that the value

fixed by the local appraiser should be the one to which they were relegated. The board, in stating the question in the alternative, seem to take it for granted that that was a valid appraisement. Whether valid or not, it was the original action from which and of which the importers complained, and undertook in every way known to the law to obtain redress. To send the importer back at this time to an enforced acceptance of the value against which he resorted to such remedies does not strike me as right. The importer was contending that the values placed upon certain portions of the invoice were wrong, and he is entitled to the conclusive presumption that he could have sustained his contention had the opportunity been given him. The customs administrative act provides means by which the government could have produced all the necessary samples. The importers implored the board to permit them to produce evidence which would have been equivalent to the presence of the actual samples, and were denied that right. In the circumstances it must be held that the general appraisers, by acting as they have in this case, conceded that the presence of samples or equivalent testimony would have established the contentions of the importers as to the values of their goods. The present contention of the importers is, to some degree, at least, supported in the case of *Erhardt v. Schroeder*, 155 U. S. 124, 15 Sup. Ct. 45, 39 L. Ed. 94, and in *U. S. v. Phillips* (D. C.) 46 Fed. 466. The collector ought to accept the invoice and entry values upon the goods which did not come into the hands of either of the boards acting in reappraisement whose decisions are found invalid, against which entry values there is no suggestion of any attempt to distort or conceal facts.

The decision of the Board of General Appraisers is reversed.

UNITED STATES v. MURPHY.

(Circuit Court, S. D. New York. December 12, 1898.)

No. 2,704.

CUSTOMS DUTIES—REAPPRAISEMENT—LEGALITY—FAILURE TO EXAMINE GOODS.

On appeals from appraisements by the local appraiser of imported merchandise taken by the collector of customs under Customs Administrative Act June 10, 1890, c. 407, § 13, 26 Stat. 136 [U. S. Comp. St. 1901, p. 1932], the general appraiser who made the reappraisements did not have before him the merchandise in question, nor samples thereof, the merchandise had passed out of the possession and control of the importers, and the collector had not ordered its return, in accordance with the terms of a bond which had been given by the importers under section 2899, Rev. St. [U. S. Comp. St. 1901, p. 1921]. *Held*, that the reappraisements were void, and that the duties should be assessed on the basis of the values found by the local appraiser, and not those found by the general appraiser.

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision below related to the assessment of duty by the collector of customs at the port of New York on goods imported by

Alexander Murphy & Co., and was on the question of the validity of certain reappraisements by a single general appraiser, made under section 13, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 136 [U. S. Comp. St. 1901, p. 1932]. Note *Curnen v. United States* (C. C.) 136 Fed. 807.

The opinion of the board reads as follows (Somerville, General Appraiser):

We find the facts in these cases to be as stated in the accompanying Exhibit A, dated December 28, 1897, and admitted in evidence as part of the record. The point of contention in the protests is that certain reappraisements made by a general appraiser of the various goods covered by the invoices were invalid and void on the ground that the general appraiser who made the reappraisements did not examine any of the goods in question, having neither the goods nor samples before him at the time of the hearing. The reappraisements in question were ordered by the collector, and no second reappraisal was made by a board of three general appraisers of any of the cases of merchandise. Counsel for the importers appeared at the hearing of these reappraisements, and objected to the general appraiser taking any action concerning the cases of merchandise covered by the protests, alleging that the original appraisal was presumably correct, as the official act of a public officer, until the contrary was shown, and insisting that unless the cases of merchandise, or sufficient samples, were present before, and were examined by, the general appraiser, or witnesses, if any, no reappraisal could be made. The merchandise in question had been duly delivered by the custom-house authorities to the importers, had by them been sold and sent to their customers, and had passed out of their possession and control; and none of the merchandise, nor any samples, had been seen by the general appraiser or any of the witnesses called in these matters. It is the judgment of the board that the reappraisements made by the general appraiser were not valid, for want of compliance with the requirements of the regulations of the Secretary of the Treasury covering reappraisements of merchandise made pursuant to law, and also as being in conflict with certain well-settled principles of law. *Customs Regulations* 1892, art. 847: *T. D.* 6,957; *T. D.* 12,483; *Converse v. Burgess*, 18 How. 413, 15 L. Ed. 455; *Greely v. Thompson*, 10 How. 225, 13 L. Ed. 397; *U. S. v. Doherty* (D. C.) 27 Fed. 730; *Origet v. Hedden*, 155 U. S. 228, 15 Sup. Ct. 92, 39 L. Ed. 130; *Muser v. Magone*, 155 U. S. 240, 15 Sup. Ct. 77, 39 L. Ed. 135; and other cases cited in the brief of counsel for the importers.

In addition to the facts stated in the foregoing opinion, it appeared that a bond had been given under section 2899, Rev. St. (U. S. Comp. St. 1901, p. 1921), providing that "the collector may * * * take bonds * * * in double the estimated value of such merchandise, conditioned that it shall be delivered to the order of the collector at any time within ten days after the package sent to the public stores has been appraised and reported to the collector." No such demand was made by the collector within the period named. No additional evidence was introduced in the circuit court.

Everit Brown, for importers.

Henry C. Platt, Asst. U. S. Atty.

Before TOWNSEND, District Judge.

At the conclusion of the argument the court affirmed the decision of the Board of General Appraisers without opinion.

ROGERS v. BROWN et al.

(District Court, S. D. New York. March 30, 1905.)

ADMIRALTY—EMPLOYMENT OF STENOGRAPHER ON REFERENCE—POWER OF COURT TO AUTHORIZE.

A court of admiralty has power to authorize the employment of a stenographer, whose fees shall be taxed as costs, to take and transcribe the testimony before a commissioner on a reference, and will exercise it where the parties refuse to stipulate, and the services of a stenographer are necessary if progress is to be made on the hearing, as where it involves a large number of disputed items of account.

In Admiralty. On motion for order authorizing commissioner to employ stenographer.

Carpenter, Park & Symmers, for the motion.

Frederick W. Park, opposed.

ADAMS, District Judge. This is a motion to authorize the employment of a stenographer to take and transcribe the minutes of a trial of a large number of items, constituting the libellant's claim of \$19,-363.58. The matter comes before me on a certificate of the commissioner as follows:

"I, Herbert Green, the Commissioner to whom the matters in controversy were referred by the Court in the above cause, hereby certify that the first cause of action set forth in the libel is for the recovery of an alleged balance of \$19,363.58 for vessel supplies sold and delivered to respondents, and the answer is in substance a general denial. To make out his case, libellant is required to prove a vast number of items ranging from ten cents upwards, not one of which is admitted by respondents in their answer. or has thus far been admitted on the reference, in which four hearings have been had and little progress made except at the last hearing, when I made use of the services of an expert stenographer to take the testimony for that occasion only and for whose compensation I became personally responsible. If I am required to take down the testimony in long hand, the rate of progress will be so slow that the reference will continue indefinitely. Respondents' proctor has refused to consent that the fees of a stenographer be taxed as an item of costs, but owing to the nature of the action, the issues presented and the character of the evidence required the services of a stenographer are essential if progress is to be made, and the case is, in my opinion, pre-eminently one in which the court should exercise such power as it has to authorize the employment of a stenographer whose fees shall be a taxable disbursement."

The respondents oppose the motion upon the ground:

"First, that they respectfully submit the Court has no authority to make such an order as is petitioned for herein. Second, on the ground that the fees of stenographers in Courts of Admiralty are thirty cents a folio and are exorbitant and unwarranted; the fees for stenographer for similar services in the Supreme Court of this State being but ten cents a folio. Third, on the ground that it would impose unnecessarily harsh terms upon them if they should not succeed in this action and should be obliged to pay the said stenographer's fees.

It is true the libellants claim some nineteen thousand dollars, and that the reference will be necessarily long and tedious, but that is incident to litigation of this class, and is hardly an excuse for employing a stenographer where such employment is objected to."

Ordinarily, there is no difficulty about a matter of this kind, because the employment of a stenographer is so obviously for the convenience

of all parties, as well as of the court, that an agreement to that effect is the desire of the litigants and they readily enter upon the necessary stipulation. This is a case, however, in which the respondents, for the reasons stated, object to the use of a stenographer and the question is whether the court has authority to direct the employment of one, and make the expense a taxable disbursement in the action, because, assuming it has such authority, there does not seem to be any question but that it should be exercised here to expedite the transaction of business. It has been the practice in this court for many years to have the parties stipulate for the employment of a stenographer in each case and that has come to be regarded as necessary and doubtless is, where the court does not make a general or special order, but it seems to be well settled that the court may, in the furtherance of justice, make such orders as will tend to advance its business.

It is provided in the Revised Statutes :

"Sec. 918. The several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings." [U. S. Comp. St. 1901, p. 685.]

In *Hussey v. Bradley*, 5 Blatch. 210, Fed. Cas. No. 6,946a with respect to the taxation for printing pleadings, testimony etc., Judge Hall said, in disallowing them :

"The third item also must be disallowed. It is not shown that the printing charged for was done by the consent of the parties, and under an agreement that the expense thereof should be charged as costs in the case, or that any order or rule of Court, either special or general, required or authorized the printing of the papers for the printing of which these charges were made. In *Brooks v. Byan*, 2 Story, 553, Fed. Cas. No. 1,949, where the record had been printed by order of the Court, and the bill was dismissed without costs to either party as against the other, the Court directed the costs of such printing to be equally divided between, and paid by, the parties. This was, however, on the ground that the expenditure had been ordered by the Court and was considered to have been incurred for the benefit of both parties. I am much inclined to think that the Circuit Court ought to adopt a rule that, in all Equity cases, the papers necessary to be examined by the Court on the hearing shall be printed, and to provide for the taxation of the expense as part of the costs of the cause; but until this is done, the costs of such printing, in the absence of any agreement of the parties or order of the Court, should not be taxed."

Subsequently, a similar question came up before Woodruff, J., in *Dennis v. Eddy*, 12 Blatch. 195, 198, Fed. Cas. No. 3,793, and he said :

"2. The appeal of the defendants is from the taxation of the cost of printing the papers, which, by rule of Court, the complainant was required to have printed. It was a necessary disbursement, made by order of the Court. I am of opinion, that the Act of Congress, of February 26th, 1853, c. 80 (10 Stat. 161), was not intended to prohibit the allowance of indemnity for such disbursements as were made necessary by the order of the Court, and that it does not prohibit such allowance. After the decision in *Hussey v. Bradley*, 5 Blatch. 210, Fed. Cas. No. 6,946a, this Court adopted the rule which made the printing imperative. The appeal of the defendants must be overruled."

Later, a question respecting the taxation of stenographer's fees came up before Benedict, J., in *The E. Luckenbach* (D. C.) 19 Fed. 847, and he said:

"The judge's notes of the trial of this cause contain the memorandum 'Stenographer take notes.' This memorandum indicates a direction given at the time that the testimony given in court be taken down by a stenographer. A direction to that effect made in open court is sufficient. It was unnecessary to enter a formal order. The sum paid stenographer was therefore for services rendered in pursuance of a direction of the court, and, like the expenses of printing (*Dennis v. Eddy*, 12 Blatchf. 195, Fed. Cas. No. 3,793), is taxable by the successful party."

The objecting parties have referred to no authority sustaining their contention and these uphold the libellant's position.

The respondents' second objection is apparently without merit. A much lower rate than thirty cents a folio is frequent and I understand that in this case the services can be had for considerably less, depending upon the number of copies required.

The motion is granted.

THE PAULINE.

THE YOUNG AMERICA.

(District Court, S. D. New York. March 31, 1905.)

MARITIME LIENS—PAYMENT OF SEAMEN'S WAGES BY MORTGAGEE—RIGHT OF SUBROGATION.

The mortgagee of a vessel, who takes possession and in good faith pays off arrears of wages due to the crew to prevent libels being filed therefor, on distribution of the proceeds of the vessel in proceedings instituted by other lien claimants, is entitled to enforce the preferred lien of the seamen for the amount of such wages.

In Admiralty. Suits to enforce maritime liens.

James J. Macklin and Le Roy S. Gove, for libellant.

Hyland & Zabriskie, for claimant.

ADAMS, District Judge. This action was brought by Alanson J. Prime to enforce the liens of the pilots and crews of the steamboats *Pauline* and *Young America*, for wages earned during June, July and August, 1904. This libellant was the mortgagee of the boats and finding that the owner and registered master was not keeping the boats free from liens, and libels being imminent, he took possession of them and paid the wages claims. The matter was referred to a commissioner to pass upon the merits of the claims and he reports that the libels should be dismissed because the libellant was mortgagee in possession and therefore not entitled to receive the benefit of the liens, citing *The Georgia* (D. C.) 46 Fed. 669, where Judge Benedict held that the "purchase of a seaman's claim by the owner of a vessel is in legal effect, a payment of the claim and discharges the vessel of the lien." The libellant seeks to distinguish that authority by alleging that he did not owe the seamen and was not therefore paying his own debt, as was the case in

The Georgia. There is an obvious difference between that case and the one under consideration in the fact that the mortgagee here did not originally owe for the wages.

The theory upon which the decision has proceeded is, that the libellant is barred by reason of his possession of the vessels and was libelling his own property, which the law does not permit. It is true that he had legal possession of them but that was liable to be divested by the payment of his mortgages and he really continued to hold them as security, except upon a strict technical construction of the instruments. The right of redemption was never cut off by a sale and remained with the mortgagor.

There were numerous claims against the boats and when this libellant caused a seizure to be made in his interest, one of the other creditors, the corporation of the Burt & Mitchell Company, intervened to defend, averring that it was attaching libellant in possession. In fact the libellant here was in possession, as heretofore stated. Other actions were instituted by creditors and there was a general effort to secure their various claims. Finally the boats were sold in one of the other actions, but did not produce enough to pay the claims, hence this controversy.

The libellant here was under no liability to the pilots or crews, excepting for the last few days of their service, after he had taken possession of the vessels and continued the men in his employ. For that part of their services, I think he should not recover, but see no sound reason why he should not be permitted to do so for the previous time, the wages for which would have been preferred liens on the vessels, if he had not stepped forward and advanced the necessary money to relieve them.

The situation now presented is really one of distribution of the assets among the several creditors and should be governed by principles of equity, which would not permit the libellant here to suffer by reason of his advances, if they were made in good faith, about which there does not seem to be any doubt. I conclude that the commissioner was wrong in recommending a dismissal of the libels upon the technical grounds he presents.

Another question to be determined is whether the wages of the so called pilots can be recovered. It is well settled that masters of vessels are not entitled to liens for their wages and if these men were really masters, and the designation of pilots assumed for the purpose of avoiding the law, no allowances in such respect should be made. As it is necessary, however, for the matter to be remitted for the purpose of ascertaining the amounts the libellant is entitled to in conformity with the foregoing, the commissioner can consider and report upon this question.

Exceptions sustained as above indicated.

UNITED STATES v. MERCK & CO.

(Circuit Court of Appeals, Second Circuit. January 12, 1905.)

No. 184.

CUSTOMS DUTIES—CLASSIFICATION—GADUOL—CHEMICAL COMPOUND—MEDICINAL PREPARATION.

Gaduol, an extract of cod liver oil, which in the form in which imported is not prepared for the use of the apothecary or physician, and which is not dispensed in that form, is not a "medicinal preparation," under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 67, 30 Stat. 154 [U. S. Comp. St. 1901, p. 1631], but is dutiable as a chemical compound under paragraph 3 of said act (30 Stat. 151, c. 11, § 1, Schedule A [U. S. Comp. St. 1901, p. 1627]).

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here on appeal from a judgment of the United States Circuit Court for the Southern District of New York (126 Fed. 438), which reversed a decision of the Board of General Appraisers (G. A. 4,268; T. D. 20,046), which had sustained the action of the collector.

Chas. D. Baker, for the United States.

A. H. Washburn, for appellees.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. The article in question, known as "gaduol," is an extract of cod liver oil, in the preparation of which alcohol is used. The sole question is whether it is a "medicinal preparation," as found by the board, and therefore subject to duty under the provisions of paragraph 67 of the act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 154 [U. S. Comp. St. 1901, p. 1631]), or a "chemical compound," and therefore dutiable under the provisions of paragraph 3 of said act (30 Stat. 151, c. 11, § 1, Schedule A [U. S. Comp. St. 1901, p. 1627]).

The Supreme Court of the United States, in *Fink v. United States*, 170 U. S. 584, 586, 18 Sup. Ct. 770, 42 L. Ed. 1153, 1154, said as follows:

"The commercial meaning of the term 'medicinal preparation' is the same as its ordinary meaning, viz., a substance used solely in medicine and prepared for the use of the apothecary or physician to be administered as a remedy in disease. Muriate of cocaine is dispensed in the form in which it is imported, or more often reduced therefrom to a powder by means of a mortar and pestle, or diluted in water, or admixed with inert or neutral matter."

Gaduol, in the form in which it is imported, is not prepared for the use of the apothecary or physician, and is not dispensed in said form.

The judgment is affirmed.

In re COLEMAN.

(Circuit Court of Appeals, Second Circuit. March 20, 1905.)

No. 26.

1. BANKRUPTCY—PROPERTY OF BANKRUPT—INSURANCE POLICIES—SURRENDER VALUE.

Where certain insurance policies belonging to a bankrupt had no cash surrender value, but they had a collateral loan value and a paid-up insurance value, they had an inchoate value to which the bankrupt's trustee was entitled as property, which, prior to the filing of the petition, the bankrupt could have transferred, etc.

2. SAME—BANKRUPT ACT—CONSTRUCTION.

Bankr. Act July 1, 1898, c. 541, § 70, subd. 5, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], authorizing a bankrupt to retain insurance policies having a cash surrender value by paying the amount thereof to the trustee, does not by implication deprive the trustee of the right to policies having an inchoate, but no cash surrender, value.

3. SAME.

Where a bankrupt held a life insurance policy, payable to his wife, if living, otherwise to his executors, administrators, and assigns, and, though such policy had no cash surrender value, the insurer voluntarily agreed to pay a certain sum for the policy, on condition it received a release from the bankrupt and his wife, the bankrupt's interest, though contingent, was assignable, and his trustee was entitled to sell such interest and to have the bankrupt assign the same.

In Error to the District Court of the United States for the Eastern District of New York.

The following is the opinion of the court below:

THOMAS, District Judge. The three policies, each for \$10,000, issued by the New York Life Insurance Company on January 30, 1901, in the very nature of the contract, had no cash surrender value, and, in fact, had none at the time of the adjudication of Coleman as a bankrupt on November 20, 1902. Mr. Howard, officially connected with the insurer, testified that on January 30, 1903, each policy would have a paid-up value of \$1,000, and could be used by the company as collateral for a loan to the extent of \$869.90. While the policies could not be converted into values on the day of adjudication, November 20, 1902, yet, without further payment, they would, on January 30, 1903, have a certain surrender value for paid-up insurance, and a certain value as collateral security by the company. They had an inchoate value. Thus each policy had a substantial value as property, and the trustee is entitled to the benefit of it. Therefore he may take the \$750 deposited in court in lieu of the three policies.

Section 70, subd. 5 (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]), contains a proviso which is intended to modify the right of the trustee to take title to policies by enabling the bankrupt to retain policies that have a cash surrender value by paying the amount thereof to the trustee. This is a privilege conferred upon the bankrupt respecting the class of policies that have an ascertainable cash value. In such case the rights of the parties

are specifically stated. The value of such a policy is easily ascertainable, and the bankrupt is given an opportunity to pay the ascertained value and keep the policy. This peculiar favor to the bankrupt is a limitation upon the trustee's right, but the proviso is not to be regarded as the sole grant of power to the trustee to take policies not exempt. The trustee's capacity to take this and other property is found in the portion of the statute, whereby he is vested with the title to all "property which, prior to the filing of the petition, he [bankrupt] could by any means have transferred or which might have been levied upon or sold under judicial process against him." This is sufficiently comprehensive to carry to the trustee the policies in question. If a tontine policy have but a day to run after the adjudication in bankruptcy, the trustee should not be deprived of it because it has no technical cash surrender value. It is difficult to conceive that Congress so intended. Indeed, the evidence of Mr. Howard shows that the New York Life Insurance Company does not issue at present policies that have a cash surrender value. If that be the practice of other companies, an intended bankrupt could withhold his property from his creditors in bankruptcy by investing it in insurance, if the bankrupt's present contention prevail. The proviso in question was an exception, intended to be helpful to the bankrupt in a certain class of cases, and the only class which Congress could regulate definitely, and it may not be used to defeat the right of the trustee to any policies save those subjected to specific treatment. The contention made by the bankrupt would convert a proviso into a restricted grant of power, rather than a qualification of such grant, and make the exception more effectual than the body of the statute.

The final inquiry relates to the policy for \$5,000 issued May 26, 1900, by the Equitable Life Assurance Society, upon the bankrupt's life, payable to his wife, Ida M. Coleman, if living at the assured's death, and, if not, then to the assured's executors, administrators, or assigns. This policy was issued on January 30, 1870, for the benefit of the bankrupt's first wife, and presumably inuring to him upon her death. The premium stipulated is \$99.45 per annum. The insurer will pay voluntarily, but by no obligation, \$939.43 for the policy, but very properly requests a release from the bankrupt and his wife. There is no evidence that the husband's contingent interest has any value, and, if ordered sold by the court, will be open to the hazard of bringing a nominal price, like other unmarketable or worthless assets. But that furnishes no sufficient reason for denying the trustee's title. It would be the duty of the court to arrange for its disposition in such manner as not to oppress either the bankrupt or his wife. It may be observed that the sum of \$939.43, which the company would pay for the policy, does in fact represent a cash surrender value. This value, it is believed, does not arise from the continuance of the present contract, which has been in force for less than a year, but is dependent upon the fact that this policy is an extension, in a changed form, of the old policy issued in 1870. Of course, a policy maintained from 1870 to 1902 would have a substantial cash surrender value. It may be that the

trustee would have the right to reach a valuable asset of the bankrupt thus turned over to another. But that question is not before the court.

In this regard the decision in *Holt v. Everall*, 34 Law Times Reports (N. S.) 599 (Court of Appeals), may have application. In cases like *In re McKinney* (D. C.) 15 Fed. 535, and *Leonard, as Receiver, v. Clinton*, 26 Hun, 288, the court very properly declined to give the bankrupt's estate the benefit of the policies so far as their value arose from payments made by others than the bankrupt, and the cash surrender value of the property, growing out of the payments made by the bankrupt, suitably measured the trustee's right. Some other rule, equally just, and based on existing facts, might have been adopted. But if policies have no cash surrender value, and yet would be redeemed by the insurance company and a sum paid for them, that sum, so far as it grows out of payments by the bankrupt previous to the adjudication, should accrue to the trustee.

Counsel for the bankrupt call attention to *In re Buelow* (D. C.) 3 Am. Bankr. Rep. 389, 98 Fed. 86, where the court held that policies were not assets of the bankrupt's estate, and directed that the trustee should deliver the policies to the petitioners. But the learned judge stated:

"They have no cash surrender value, and no value for any purpose, except as they may become valuable at the time of the death of the insured, provided the premiums shall be kept paid."

Morris v. Dodd, 110 Ga. 606, 36 S. E. 83, 50 L. R. A. 33, 78 Am. St. Rep. 129, seems to sustain the bankrupt's contention. There was a contrary decision in *Re Slingluff* (D. C.) 5 Am. Bankr. Rep. 76, 106 Fed. 154, and in *Re Welling*, 7 Am. Bankr. Rep. 340, 113 Fed. 189, 51 C. C. A. 151. In *Re Holden*, 7 Am. Bankr. Rep. 615, 113 Fed. 141, 51 C. C. A. 97, it was held that a policy payable to the wife of the assured, if she survived the husband, or otherwise to his representatives, gave each a contingent interest that would accrue to his or her trustee in bankruptcy. It is stated that the policy had a cash surrender value, and of this the trustee could avail himself. In *Re Boardman* (D. C.) 4 Am. Bankr. Rep. 620, 103 Fed. 783, it was held that a free tontine policy, payable to the bankrupt, his executors, administrators, or assigns, or to his mother, if living at his death, before a certain date, had a cash surrender value within the intent of the statute, although the value was not stated in the policy, and that, if in the ordinary course of business the bankrupt can obtain cash from the company by surrender of the policy, his creditors are entitled to cash. In *Re Diack* (D. C.) 3 Am. Bankr. Rep. 723, 100 Fed. 770, it appears that a policy was issued by the Equitable Life Assurance Company, and upon its surrender the company would pay a substantial sum, but required the receipt of both the assured and his wife. Judge Brown held that, in spite of the fact that the wife had paid a certain portion of the premiums thereon, the bankrupt had an interest in the policy which it paid, and directed him to assign to the trustee.

In the case at bar the plain facts are that the policies had no technical cash surrender value at the time of the adjudication, but they did have a surrender value, and the bankrupt has an interest, vested or contingent, therein. Such interest, although contingent, is assignable, and the trustee succeeds to it. It is considered that the exemption laws of the state have no application. The trustee is at liberty to sell the husband's interest in the Equitable policy, and the bankrupt should execute an assignment of his interest to the trustee, for the purpose of enabling the latter to give title on such sale.

Steinhardt & Goldman, for American Metal Co., creditor.
Kenneson, Crain, Emley & Rubino, for bankrupt.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Order affirmed on opinion of Judge Thomas.

J. P. BROWDER & CO. v. HILL.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1905.)

No. 1,371.

1. SUBROGATION—VOLUNTARY PAYMENT OF ANOTHER'S DEBT.

The mere fact that one pays off a debt at the instance of the debtor, or lends money with which to pay it, does not entitle him to subrogation to a lien of the creditor; nor is it enough that there is an understanding on his part and that of the debtor that the right of subrogation will result from such payment, in the absence of an express agreement therefor.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Subrogation, §§ 60-68.]

2. SAME—AGREEMENT WITH DEBTOR—EQUITIES OF THIRD PERSONS.

Subrogation by agreement with the debtor alone, to the equities and liens of a creditor whose debt is paid off by one under no obligation, will be enforced in equity only when the agreement creates equitable rights against the debtor, which will not impair or overthrow equitable rights of the creditor or of innocent third persons.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Subrogation, §§ 60-68.]

3. SAME.

A third person who pays a portion of a debt secured by a lien, at the instance of the debtor, will not be subrogated in equity to such lien, to the prejudice of the original creditor with respect to the remainder of his debt.

4. BANKRUPTCY—SUBROGATION TO LABORER'S LIEN OR PREFERENCE.

A bankrupt corporation gave to its employes orders on claimants for goods, and charged the same against the current wages of the men. Claimants filled such orders, and charged the amount to the corporation, which paid the same from time to time, either in cash, or by note or credits on its books. Under the statute (Acts Tenn. 1897, p. 222, c. 78) the employes were entitled to laborers' liens on the property of the corporation for wages earned within three months prior to the bankruptcy. *Held*, that no right of subrogation to such liens arose in favor of claimants from such transactions, nor to the priority given labor claims by

the bankruptcy act, and that such subrogation would not be accorded them where it appeared that, if it were, the estate would not be sufficient to pay the preferred claims in full.

Appeal from the District Court of the United States for the Eastern District of Tennessee.

Robert Pritchard and J. B. Sizer, for appellants.

Wm. L. Frierson (Lewis Shepherd, of counsel), for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. The appellants constitute a partnership which was engaged in selling groceries and other merchandise at Chattanooga. The appellee is the trustee in bankruptcy of a corporation engaged in making iron at the same place. Appellants supplied goods to workmen in the employment of the furnace company upon orders of the company, and for the amount of such orders supplied within three months prior to adjudication in bankruptcy, remaining unpaid, filed a claim in their own name, and asserted a laborer's lien upon the property of said bankrupt under a Tennessee statute giving a lien to workmen employed by such corporations. The claim was allowed as an unsecured claim. Because the lien claimed was disallowed, the creditor has appealed.

The evidence shows that from time to time the furnace company gave to its workmen, on account of current wages, orders upon the appellants for goods and merchandise. These orders were charged up against the men receiving them, and at the end of each month appellants would present the orders received and paid during the month, and receive a credit for the total amount on the books of the company, less 5 per cent. deducted from the face of the orders by an arrangement between the parties. Upon some occasions only partial payments were made, and notes given for the balance, and for the two months immediately preceding bankruptcy no payments at all were made to appellants on account of such orders. The aggregate of appellants' claim is \$2,265.85, of which \$750 is represented by a promissory note for that amount. The workmen themselves received such orders as payments, and neither made any assignment of them, nor of their claim for wages, nor agreed to any substitution of appellants to any lien in their favor as laborers. Such orders rarely, if ever, equalled the amount due to the receiver as wages, and only from 40 to 60 per cent. of their monthly wages were paid in such orders. For the rest they received or expected to receive money upon the next pay day. It is inferable that the workmen who accepted such orders for part of their wages are themselves claiming, for the balance due them, priority out of the bankrupt estate, either as lienors under the Tennessee labor lien statute, or under the priority accorded by the bankrupt law.

The stipulated facts include a statement that, "if the priority claimed by Browder & Co. is allowed, the assets [of the bankrupt

estate] will not be sufficient to pay labor claims in full, after paying expenses of administration."

By the Tennessee act of 1897, p. 222, c. 78, a lien is given in behalf of the employes and laborers of any corporation doing business within the state, upon corporate property, "for any sums due them for their labor and service." By the second section of this act it is provided, that the lien so created "shall only extend to and protect such claims as may have accrued within three months of the beginning of any suit for the enforcement thereof, and shall continue during the pendency of any suit brought for its enforcement." Assuming that this Tennessee statute creates a specific lien, and not a mere right of priority in distribution, the question we have to decide is whether the lien which once existed in behalf of the respective laborers survives in behalf of appellants under the circumstances of this case. Appellants do not claim in their petition or assignment of error or briefs that there has been any assignment of the labor claims pro tanto by consent or knowledge of the laborers themselves. In the absence of evidence that the owners of such lien claims intended to sell, and agreed that the lien should be kept alive for the benefit of the purchaser, payment, and not an assignment, will be presumed. *Venner v. F. L. & T. Co.*, 90 Fed. 349, 33 C. C. A. 95. There is therefore no foundation for any claim that appellants are assignees of the claims or lien in behalf of labor claims under any agreement, express or implied, with the creditors themselves. What they do claim is that there existed an express agreement with the debtor, the furnace company, that such claims, when paid off by them, "should stand against the furnace company in the same attitude as if held by the original wage earners."

The mere fact that one pays off a debt at the instance of the debtor, or lends money to pay off such debt, does not entitle him to subrogation to the liens of the creditors so paid off. *McDonald, Shea & Co. v. Railroad*, 93 Tenn. 281, 24 S. W. 252; *Wood v. Guarantee Trust Co.*, 128 U. S. 416, 9 Sup. Ct. 131, 32 L. Ed. 472; *Morgan's, etc., v. Texas Cent. R. Co.*, 137 U. S. 172, 11 Sup. Ct. 61, 34 L. Ed. 625; *Rheeling's Appeal*, 107 Pa. 161; *Sheldon on Subrogation*, § 243; *Unger v. Leiter*, 32 Ohio St. 210; *Griffin v. Proctor's Adm'r*, 14 Bush (Ky.) 571; *Venner v. F. L. & T. Co.*, cited above.

Conventional subrogation may result from a direct agreement between a debtor and a third person who pays the debt that he shall be subrogated to all the rights and securities existing in behalf of the creditor whose debt is paid off. But nothing short of an express agreement to that effect will move a court of equity in behalf of such a creditor. A mere understanding upon the part of such a third person, under no obligation to pay the debt, that he by such payment will be subrogated to the liens of the creditor, is not enough. *Sheldon on Subrogation*, §§ 243, 248, 250; 27 *Amer. & Eng. Ency. of Law*, 257; *Receivers of N. J. Ry. Co. v. Wortendyke*, 27 N. J. Eq. 658, overruling *Coe v. N. J. Ry. Co.*, 27 N. J. Eq. 111; *Unger v. Leiter*, 32 Ohio St. 210; *Brice v. Watkins*, 30 La. Ann.

21; *Hutchinson v. Rice*, 105 La. Ann. 474, 29 South. 898; *Cumberland B. & L. Ass'n v. Sparks*, 111 Fed. 648, 49 C. C. A. 510.

Subrogation, by agreement with the debtor alone, to the equities and liens of a creditor whose debt is paid off by one under no obligation, is an equitable doctrine, which comes from the civil law, and is enforced only when the agreement creates equitable rights against the debtor, which will not impair or overthrow equitable rights of the creditor or of innocent third persons. When, therefore, subrogation depends wholly upon an agreement with the debtor, the rights of the creditor to the remainder of his debt must not be prejudiced. *Sheldon on Subrogation*, § 248, and sections 70 and 127; 27 Am. & Eng. Ency. (2d Ed.) p. 257; *Bissett v. Grantham*, 67 Mo. App. 23, 26; *Stuckman v. Roose*, 147 Ind. 402, 46 N. E. 680; *Smith v. Morrison* (Tex. Civ. App.) 29 S. W. 1116; *Fievel v. Zuber*, 67 Tex. 279, 3 S. W. 273.

The evidence of a direct agreement between Browder & Co. and the furnace company that the lien in behalf of laborers should be kept alive, and appellant substituted thereto, is not so clear and satisfactory as to justify a reversal of the finding against such an agreement by the referee and district judge. That both parties supposed that Browder & Co. would stand precisely in the shoes of the laborers who received orders on them for goods, simply because the orders were given as credits upon current wages, is not enough. It may have been of some convenience to the workmen to receive such orders in advance of one of the regular pay days, but it was a convenience for which they doubtless more than paid, for it appears that, if they insisted upon money instead of goods, a discount of from 15 to 25 per cent. was exacted. Neither was the scheme without profit to the debtor, for the arrangement was that the furnace company should give credit for these orders on Browder & Co. only to the extent of 95 per cent. of their face value. So, too, if it did not suit the convenience of the furnace company to pay these orders when the wages of the men became due, an ordinary promissory note was given in settlement, or a mere credit was given upon the books for the aggregate of the orders presented. All of these circumstances tend to indicate that the ordinary relation of debtor and creditor existed, and that the parties acted upon the erroneous idea that, because the orders given were in partial payment of wages, the debt thus created would stand in the shoes of the debt paid off. Neither would we be justified in reversing the order denying subrogation when it is evident that subrogation will prejudice the rights of the very laborers whose claims were only partially paid by the goods supplied them upon the employer's order. The distinct stipulation is that the assets of the bankrupt, after paying expenses, will not pay labor claims proper in full, if this substitution is allowed. Being a pure equity, subrogation by agreement with the debtor alone will not be accorded if it impair the security of the creditor for the remainder of his debt, or prejudice innocent third parties having equities of equal rank.

Affirm the order.

QUINETTE v. BISSO et al.

(Circuit Court of Appeals, Fifth Circuit. April 10, 1905.)

No. 1,273.

1. COLLISION—STEAM VESSEL IN FOG—"MODERATE SPEED."

"Moderate speed," required of a steam vessel in a fog, is purely a relative term; and what constitutes such speed in a given case is to be determined with reference to the time, place, and circumstances, rather than from the actual speed.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, §§ 170-175.]

Collision rules—Speed of steamers in fog, see note to *The Niagara*, 23 C. C. A. 532.]

2. SAME—CARE REQUIRED WITH RESPECT TO SMALL CRAFT.

The right of a steamer to maintain her course or speed, even against small craft like a skiff or yawl, is relative, and not absolute. She has no right to maintain a speed which is dangerous to a smaller craft which can be seen ahead, and, where she is navigating in a fog so dense that such a craft cannot be seen at any considerable distance, and in a locality where numbers of them are liable to be encountered, she is required to exercise extraordinary care and watchfulness, and is not justified in relying solely on fog signals as a warning to other vessels.

3. SAME.

Where a tug was going up the Mississippi river in the early morning near the shore at Nine-Mile Point, above New Orleans, at a time and place where people were likely to be crossing the river in small boats, and in a fog so dense along the water as to render it impossible to see such boats more than a few feet, a speed of $7\frac{1}{2}$ to 9 miles an hour was immoderate, and gave a right of action against the owners, under the Louisiana statute, to recover for the death of a person who was run down by the tug while crossing in a skiff.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, §§ 213-215.]

4. ADMIRALTY—ACTION FOR WRONGFUL DEATH—ENFORCEMENT OF REMEDY GIVEN BY STATE STATUTE.

An action in admiralty for wrongful death, based on Civ. Code La. art. 2315, is governed by the local law, with respect to the defense of contributory negligence.

5. COLLISION—SKIFF—FAILURE TO USE FOG HORN.

The noise made by the use of patent rowlocks on a skiff is not equivalent to the fog horn required by the navigation rules.

6. CONTRIBUTORY NEGLIGENCE—PASSENGER IN SKIFF—IMPROPER NAVIGATION.

A person who entered a skiff owned and rowed by others, to be taken across the river at New Orleans during a fog, and who was run down by a passing tug and drowned, was not chargeable with contributory negligence because the skiff was not equipped with a fog horn, where that was not customary, nor because of any error on the part of the oarsman, who was skilled and accustomed to make the passage, and had full charge of the boat; nor was her act in so doing a proximate, contributing cause of her death, resulting primarily from the immoderate and unlawful speed of the tug.

7. FEDERAL COURTS—FOLLOWING STATE DECISIONS—ENFORCING STATUTORY REMEDY.

A federal court, in administering a state statute giving a right of recovery for wrongful death, will follow the decisions of the highest court of the state with respect to the measure of damages.

[Ed. Note.—State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

Appeal from the District Court of the United States for the Eastern District of Louisiana.

This is an appeal from the decree of the District Court dismissing the libel exhibited by Malvina L. Quinette, a feme sole, against Joseph Bisso and Joseph A. Bisso, owners of the steam tug Leo (Joseph A. Bisso being master) for running down a skiff, in which libellant's daughter Sophie L. Quinette and a negro oarsman were attempting to cross the Mississippi river, in consequence of which Miss Quinette was drowned, on the morning of the 5th of November, 1900, at Nine-Mile Point, above New Orleans.

The libel charged that the Leo failed to give fog signals, got out of her proper course, maintained an immoderate rate of speed, failed to keep a proper lookout, and did not use proper efforts to rescue Miss Quinette after she was thrown in the water. It alleged "that Robert Bolds, the oarsman, gave signals by calling out in a loud voice, sufficient to be heard by those in charge of the Leo, and, further, that the noise made by the patent rowlocks with which the skiff was equipped was equivalent to the signal required to be given by skiffs in a fog, and a due compliance with the laws of the United States," and that the death of Miss Quinette "was due wholly and solely to the incompetency, unskillfulness, wanton negligence, and gross, criminal negligence of those in charge of the Leo, and by reason of the violation of navigation laws of the United States." The answer denied generally and specifically all the faults charged, and that the noise made by the rowlocks was an equivalent for the signal required by the statute and rules, and, further, insisted that Miss Quinette's "death was caused by her own fault, as well as the fault of said Robert Bolds, in that said skiff was navigated in a dense fog without observing due care and caution, in failing to give fog signals, although in the track of vessels, crossing the course of approaching vessels, and in not keeping out of the way of an approaching steamer, and in failing to give any signal or warning of their location and proximity to the tug." The case was heard upon the depositions of some 50 witnesses, taken down stenographically before a commissioner. The witnesses were examined at great length, and the record contains 330 pages of printed testimony. It is impossible, without unduly swelling the statement of facts, to notice in detail the testimony of the different witnesses. It suffices to say that the record, in substance, presents the following state of facts:

Miss Quinette at the time of her death was not quite 22 years of age. She lived with her mother at Nine-Mile Point, and had two brothers, James and Frank, and a sister, who also resided there. For three or four months prior to the time of her death she had been going from Nine-Mile Point to New Orleans, where she had been studying to perfect herself as a milliner. She was then paying her own board, and had just begun to receive \$12 a month from her employer. In that time her brothers had given her \$60. Her mother testified "that she had made as much progress in four months as some others had in two years and a half," and stated that, "had she lived, she had a prospect of receiving sixty dollars a month," which statement libellant made "because others were getting that, who were not as efficient as she." This was all the testimony on that point. Bolds, the negro oarsman, was then 21 years of age, but had lost an eye by an accident in his youth. He was shown to be a good oarsman, having had 8 years' experience on the river. On the morning of the accident, James Quinette, who was the owner of the skiff, told Bolds, who was in his employ, "to get the boat ready to take his sister over the river," and shortly afterwards she and the oarsman got in the skiff and started on their journey. It was then a few minutes before 7 o'clock. The skiff was 20 feet long, the sides of cypress plank, 2 inches thick, according to the testimony of its owner, and was substantially built, and propelled by oars. "It was an extra long skiff, more like a yawl." Miss Quinette took her seat in the stern of the vessel, and the oarsman sat near the front end, pulling the oars at the front oarlocks. They boarded the skiff while fog hung low on the river just above the raft of logs, about five or six hundred feet long and one hundred and twenty feet in width, which was moored to the bank, near, if not at, the very apex of the bend at Nine-Mile Point. As the raft lay partly aground, only about half of it rested in the water.

The part which was in the water jutted out nearly at right angles from the shore, a distance of about 60 feet, into the river. The skiff was afterwards found, deposited on the top of the logs, on the edge of this projecting side of the raft, not over 35 feet from the shore. Photograph marked "P1" shows the situation.

Bolds testified that after getting in the skiff he "pulled out about middleways of the raft," and was headed down the river to Protection Levee, on the opposite bank, and "never heard any noise of the tug or whistle blown at all; and so, in pulling, all of a sudden she said, 'Robert, look at that tug,' when I looked around and the tug was coming right on me. I pulled and hollered all I knew how, and jumped up and tried to check her headway, but she just run into us and upsetted us." Bisso made the following report of the accident:

"New Orleans, Nov. 5th, 1900.

"Messrs. Kelly and Youngblood, Local Inspectors, New Orleans, La.—Sirs: I herewith respectfully report that while ascending the Mississippi river, on the tug Leo, at about 7 a. m., during a dense fog on the river, yet the tops of the trees were visible, and running under a slow bell, I sighted a skiff some fifteen or twenty feet in front of the tug. I immediately stopped and backed the boat at full speed astern. The skiff contained two persons, a young lady and a one-eyed negro, who was rowing the skiff. The tug came in collision with the skiff, shattering it, thereby throwing the occupants into the water. The mate of the tug jumped overboard to assist in the rescue of the parties, and at the same time a boat was lowered, but unfortunately the negro alone was saved. I have since learned that the name of the unfortunate lady who was lost was Miss Sophie Quinette. All possible means were used to preserve life. The tug at that time was about 150 feet from the right bank, just above Nine-Mile Point.

"Yours truly,

Joseph A. Bisso, Master."

The Leo left her landing in New Orleans, at the foot of Walnut street, nine miles from Nine-Mile Point, early that morning, to go to Twelve-Mile Point for a tow. After reaching the ferry landing, she quartered across the river until near Westwego, on the opposite bank, and then went up on that side towards Nine-Mile Point. The Leo is an ocean-going, iron-hull, steam tug, 83 feet in length, 19 feet in beam, and 7 feet draught. She had one compound condensing engine, of 16 and 28 inches diameter of cylinder, and 20" stroke of piston, and one boiler, 14 feet in length and 117 inches in diameter, and was allowed a steam pressure of 127 pounds to the square inch. The record does not show her horse power. All the evidence shows, however, as her master states, that the Leo was "a powerful boat"; an "ocean-going, steam, iron tug." Her propeller sat rather low in the water, and, being driven by a low-pressure engine, she made less noise when in motion than high-pressure boats. She ordinarily carried 90 pounds steam pressure. Her pressure that day was from 90 to 95 pounds. Her ordinary speed was from four to five miles an hour, but she could make twelve miles an hour. The testimony of the witnesses is quite conflicting as to her speed that day. Her master swears that her speed was between three and four miles an hour. Her engineer testifies that it could not have been more than four or five miles an hour. Some of the crew testified she was not going "over three to three and a half miles an hour." Other witnesses, who are not shown to be interested in any way, say the "Leo was not going over four miles an hour at the outside." Other witnesses, more numerous, and most of them disinterested, testify that "the Leo was going at a pretty fair rate of speed"; that "she was going pretty fast." Some of them fixed the speed at "seven or eight miles an hour"; and others, "eight or nine miles an hour." The witnesses as to the giving of fog signals are generally the same witnesses who testified as to speed, some affirming and others denying that fog signals were blown. In the view the court took of the matter, it is unnecessary to detail the testimony on that point.

During the voyage of the Leo a low-lying fog hung over the river, and there was no breeze. The fog was quite thick, and rose 8 or 10 feet above the water. It was densest at the water, and gradually grew thinner upwards. "At times it would raise, and at times lower. Sometimes a little gush of it would come

up, and then it would lower." The lookout stationed at the stem of the bow, which stood about 10 feet above the water, could not see objects ahead in the fog, like small water craft, which sat low in the water. Persons standing in her pilot house were from 20 to 25 feet above the water, but could not see an object like a skiff in the water more than 25 or 30 feet ahead, although the tops of the trees on either bank were visible from the pilot house. As the Leo was nearing the point of Nine-Mile Point bend, Capt. Bisso discovered ahead, not over 25 or 30 feet distant, a skiff in which Miss Quinette and the negro oarsman were seated. The captain immediately gave the signal to back the tug astern at full speed, which order was at once obeyed, and shouted that some one was overboard, and ordered the lifeboat lowered, but did not change her course. Miss Quinette at the time was sitting in the stern of the skiff, and the oarsman, near the front end, using the front oarlocks. It is not clear from the testimony whether both the occupants of the skiff fell on the same side of the tug as she passed on. The Leo continued to go forward until she struck the raft, carrying the skiff forward with her, and landing it upon the raft. Some of the witnesses say, "The skiff was hanging on the bow of the tug;" others, that "she went in with the tug"; and others, "that the skiff rested on the bow of the tug." The contact of the tug with the raft broke two heavy wooden binders, eight inches in diameter, by which the logs were fastened by means of wooden pins driven through the binders into the logs, broke the wooden pins by which two inside binders were fastened to the logs, snapping in two parts of the first set of binders—the broken parts floating in the water—and mashed or jammed two or three of the logs of the raft. Yaeger, who was watching timber at the point near Quinette's house, testified that when the accident happened he was inside, eating his breakfast, when he heard the crash of the timber, and he went at once down to the lower end of the raft. Another witness (White) testified that while taking his breakfast in a boathouse, which was near the middle of the raft—the boathouse being about 45 feet out in the river—his wife heard a crash, and they all went out to see about it. Mrs. Frank Quinette, sister-in-law of the deceased, testified, she was standing in her yard, some distance from the house, and "heard hollering, which she thought was at the Southport; that she listened a few minutes, and did not hear any more hollering, and then heard a crash, which she thought to be over at Southport," on the opposite bank. Listening a few minutes thereafter, but hearing nothing more, she went into the house, and remained there until notified of the accident. Several of the witnesses thus attracted to the scene testified that on going to the raft, which they reached very soon after hearing the noise of the crash, the Leo was not then in sight, but that they saw the skiff, which was resting on the raft, in the position hereafter stated, and that the raft was wet, and the skiff on the outside was wet, and probably on the inside. While on the raft they heard noises, which were apparently continued at one place for eight or ten minutes, "like men giving orders," and talking out in the river, at a considerable distance from the bank. They remained on the raft until they found the Leo had landed at another portion of the raft. According to the testimony, the negro oarsman "was swimming and hollering out there" for some time, and the tug, whose engines were working full speed astern, backed out in the stream immediately after contact with the raft; and this oarsman was taken aboard by a life line thrown to him, by which he was drawn over the stern of the tug, but upon which side is not clearly shown. Miss Quinette, who could not swim, was drowned, despite the brave efforts of Benjamin F. Stewart, the acting mate, who jumped into the river and swam to her assistance, and held her above the water for some time; the fog, as he states, having lifted a little about that time. The oarsman testified that he did not see Miss Quinette in the water until he got upon the tug. Stewart could not give any accurate judgment of the time he was struggling in the water with Miss Quinette, but thought it was "about fifteen minutes," and other witnesses put the time at less. Stewart did not know whether the tug was standing still, going ahead, or backing while he was in the water. He became exhausted, and a life line was thrown to him. He did not have hold of Miss Quinette at that time, and his judgment was that they were not within reach of the life line when he was struggling with her.

At the time the skiff was run down, the tug, and doubtless the skiff, had lost their bearings in the fog. The oarsman had no compass, and, according to his own statement, he judged the direction he took by the way he was guiding the skiff. The Leo had been feeling her way at times, and locating her position by the echo of her whistle, and sighting the tops of the trees on the banks. Bisso could not tell at the time he struck the skiff how close he was to the bank—whether it was 25 or 150 feet away. The skiff was struck on the port bow, not far from the stem, and that side of the skiff was ripped and broken towards the stern, which was not injured. The bottom of the skiff and its starboard side were not broken, and, when found on the raft, it was resting right side up, near the edge of the raft, very slightly quartering, near by and almost parallel with the direction the binders were pinned on the side of the raft. Photograph P5. From the evidence it is not clear at what point the skiff was sighted, or how far that point was from the raft. It may have been a hundred yards or more down the river, not far from the shore, below the raft.

It is a conceded fact that the lifeboat was not lowered. Capt. Bisso explained that the statement in his report as to it was a mistake due to the excitement incident to the accident, and the fact that he had been arrested, but that he believed the statement when made, because he ordered the lifeboat lowered. Several of the witnesses, however, testified that when the tug was landed, after rescuing Bolds, Bisso's attention was pointedly called to the fact that the lifeboat was neither lowered, nor the canvas cover taken off. Stewart jumped overboard before the tug struck the raft. The rest of the crew testified that they felt no shock and heard no noise from the contact.

Opposite Nine-Mile Point, on the other shore, about three-quarters of a mile distant, is Southport, where there are railroad terminals, steamship wharves, grain elevators, and like enterprises. The river is constantly used by steam vessels and smaller water craft, and for floating and towing rafts, and by persons crossing from one bank of the river to the other in skiffs and flat-boats, in all seasons and conditions of the weather. New Orleans was the home port of the Leo, and Bisso, her master and pilot, was familiar with the locality at Nine-Mile Point, and knew the dangers attending navigation there. In running her course from Westwego Ferry Landing to the point where the collision occurred with the skiff, the Leo traversed a distance of from $2\frac{1}{2}$ to 3 miles, and had not left the Ferry Landing, according to the great preponderance of the testimony, more than 20 minutes that morning before she ran down the skiff. The time of the accident is clearly about 7 o'clock in the morning. Bisso fixes it at 7. Mrs. Quinette, who testified to hearing the crash at the raft, stated that after hearing of the accident she looked at the clock, and it was then 10 minutes past 7.

The court below, in dismissing the libel, intimated that perhaps the deceased was guilty of contributory negligence in undertaking the voyage under the circumstances, with no means of signaling, no compass, and under the sole guidance of a young, one-eyed oarsman, and held that the contention that the noise made by the patent oarlocks was equivalent to the required signal was clearly untenable. It decreed upon the merits, however, upon the assumption that the skiff was under no obligation to provide itself with any means to indicate its presence in the fog, and that the occupants were guilty of no contributory negligence. Without reviewing the testimony in detail, and after giving only proper weight to witnesses who were interested or displayed undue bias, it was of the opinion that the conflict between other witnesses as to the giving of fog signals was a conflict between positive and negative testimony, and did not discharge the burden resting upon libellant, and that the conflict as to speed, in the most favorable light to libellant, left the question in equilibrium, if it did not favor respondents' version. It said: "On the question of speed of the tug, it should be specially noted that there is one well-proved fact which shows that the speed was moderate, and that fact is that it was possible to save Bolds, the oarsman, and for Stewart to reach the young lady. I am convinced that, if the tug had been running at a high rate of speed, Stewart could not, especially in so dense a fog, have reached her as he did." "As to the failure to rescue the unfortunate young

lady after she had been thrown into the water, I believe that during the very brief and anxious moment when efforts were available the tug did what she could be expected and held to do under such circumstances."

There were 17 assignments of error; among them, that the court erred in dismissing the libel, in holding that the *Leo* was going at a slow rate of speed, in holding that she gave proper fog signals, in holding that she had a proper lookout as required by law, in not holding that Miss Quinette was a passenger on the skiff, in not holding that the custom of the port allowed her to cross the river without a fog signal and in not holding that the *Leo* failed in proper efforts to rescue Miss Quinette after she was thrown in the water.

Edwin T. Merrick, for appellant.

John D. Grace, John Clegg, and Lamar C. Quintero, for appellees.

Before SHELBY, Circuit Judge, and MAXEY and JONES, District Judges.

JONES, District Judge, after stating the facts, delivered the opinion of the court.

Witnesses, who, as far as we can judge from scanning their depositions, were of equal intelligence, equally disinterested, having equal opportunity and sense of hearing, and equally attentive, testified that fog signals were given, and that they were not given. There was other testimony, which, owing to the interest and evident bias of the witnesses, must be taken with much allowance. The most that can be said of the testimony upon this point is that it leaves the truth of the issue in doubt. The burden of proof being upon the libellant, the fault of the *Leo* in respect of fog signals is not established.

The assignment as to the want of a proper lookout has not been much insisted on. If it had been, it could not avail appellant. There was a lookout on watch, at his proper station. Moreover, he could not see the skiff before it was run down, owing to the density of the fog. The master, from his better point of observation in the pilot house, discovered the skiff before the lookout possibly could.

The conflict between the witnesses as to the *Leo's* speed is very pronounced. It is hard to reconcile their divergent testimony as a mere difference in judgment about the speed at which an object moved over the water. However, with the aid of the map and the photographer's art, and facts which are undisputed, we have been able to reach a satisfactory conclusion as to the speed at the time of the collision, without engaging in the unpleasant task of sifting mistake of fact from conscious untruth in this mass of testimony.

"Moderate speed" is purely a relative term, which means no more than that the vessel must run at a prudent rate of speed. Time, place, and circumstance, rather than the swiftness of the vessel over her course, determine whether the actual speed was immoderate, in that it was imprudent. In *The Pennsylvania*, 19 Wall. 135, 22 L. Ed. 148, the Supreme Court adopts the words of the Privy Council in the *Europa*:

"This may be safely laid down as a rule on all occasions—fog or clear, light or dark—that no steamer has a right to navigate at such a rate of speed

that it is impossible for her to prevent damage, taking all precautions at the moment she sees the danger to be possible; and, if she cannot do that without going at less than five knots an hour, then she is bound to go at less than five knots an hour."

The same rule, expressed in different words, was again approved by the Supreme Court in *The Colorado*, 91 U. S. 702, 23 L. Ed. 379, wherein it is said no rule yet suggested "for determining whether the speed of a steamer in any given case was or was not greater than was consistent with the duty the steamer owed to other vessels navigating the same waters is better suited to enable the engineer to reach a correct conclusion than the one adopted by the Privy Council. *The Batavier*, 40 Eng. L. & Eq. 25"—which is, "At whatever rate she [the steamer] was going, if going at such a rate as made it dangerous to any craft she ought to have seen and might have seen, she had no right to go at that rate." In *Newton v. Stebbins*, 10 How. 606, 13 L. Ed. 551, it is said:

"It may be a matter of convenience that steam vessels should proceed with great rapidity, but the law will not justify them in proceeding with such rapidity if the lives and property of other persons are thereby endangered."

In *The Martello*, 153 U. S. 70, 14 Sup. Ct. 725, 38 L. Ed. 637, it is said:

"While it is possible that a speed of six miles an hour, even in a dense fog, may not be excessive upon the ocean and off the frequented paths of commerce, a different rule applies to a steamer just emerging from the largest harbor on the Atlantic Coast, where she is liable to meet vessels approaching the harbor from at least a dozen points of the compass. Under such circumstances, and in such a fog that vessels cannot be seen more than a quarter of a mile away, it is not unreasonable to require that she reduce her speed to the lowest point consistent with good steerageway, which the court finds in this case to be three miles an hour."

In *The Umbria*, 166 U. S. 417, 17 Sup. Ct. 615, 41 L. Ed. 1053, it is said:

"The general consensus of opinion in this country is to the effect the steamer is bound to use only such precautions as will enable her to stop in time to avoid collision after the approaching vessel comes in sight, provided such vessel herself is going at the moderate rate of speed required by law. In a dense fog it might require both vessels to come to a standstill until the course of each was definitely ascertained. In a light fog it might authorize them to keep their engines in sufficient motion to preserve their steerageway."

True, these were cases of collision by steam or sailing vessels, and the language quoted was with reference to their duties to each other, and not with reference to the duty of a steamer to small craft like a skiff or yawl. It is also true, as argued, that neither a steamer nor a sailing vessel is ordinarily required to change its speed or course to avoid small craft, like a yawl or skiff, when it sees them, and that the steamer has a right to presume, until the contrary appears, that they will keep out of harm's way. The right of a steamer, however, to keep its course or speed, even against small craft, like a skiff or yawl, is relative and contingent, not absolute. The steamer has no right to maintain a speed or course which is dangerous to the safety of a smaller craft which can be seen ahead. There are, moreover, frequent occasions when

a steamer owes high duties as to speed not only to sail vessels and steamers, but to craft of any kind which it cannot see, if there be good reason to apprehend they may be ahead in its pathway. When the course of a steamer in a fog, on an inland highway of commerce, near a great port, takes it over waters which swarm with large vessels and smaller craft, which it can see only a few yards ahead, under conditions which may prevent the smaller craft from hearing or properly locating the steamer's fog signals, or from being misled by them, she is liable to run down the smaller craft at any moment unless her speed is very slow. Dwellers on the thickly settled banks of a navigable river have as much right to cross from one bank to the other in a skiff in a fog as steam tugs have to traverse the river at such a place during a fog; and, while the exigencies of commerce in many respects subordinate the rights of the smaller vessel and crafts, like bateaux, skiffs, and yawls, to the movements of the steamer, the more powerful vessel "is justly required to exercise extraordinary care and watchfulness when surrounded by feebler craft." *The Nevada*, 106 U. S. 159, 1 Sup. Ct. 238, 27 L. Ed. 149. The rules of navigation are enforced not only to secure the safety of the vessel which is commanded to conform to the particular rule, but also to prevent her increasing the danger to any other craft which may be put in peril by the failure to obey the rule. A steam vessel has no right, under the conditions prevailing at Nine-Mile Point, to act upon the theory that giving proper fog signals discharges her whole duty to vessels and craft which may be in her pathway in the fog. Slow speed and the utmost caution under such circumstances are of far more importance to small craft than the persistent sounding of fog signals. As said in the *Konig Willem 1*, 9 Asp. Mar. Cas. 300:

"Sound is conveyed in a very capricious way through the atmosphere. Apart from wind, large areas of silence have been found in different directions and at different distances from the origin of sound, even in clear weather. Therefore too much confidence should not be felt in hearing a fog signal."

The time elapsing between the collision and the departure of the *Leo* from the ferry landing, and the distance traversed between the two points, conclusively show that her average rate of speed over her course must have exceeded six miles an hour. Her average speed, however, would not necessarily show her speed at any given point on the voyage. She was feeling her way in the fog, now and then taking her bearings by the echo of the whistle from the banks and by sighting the trees. In navigating in a fog under such conditions, the vessel, after assuring her position at any given point, most usually takes on greater speed, and continues it until she reaches the next point ahead, where she must again reduce her speed and feel her way. Evidently the skiff was struck at a stage in the voyage where the *Leo* was not feeling her way. She was then proceeding confidently ahead, on a course which she believed conformed to the lay of the shore, and would safely take her around Nine-Mile Point, with a speed which, but for the reversal of the engines when the skiff was sighted, would either have landed the tug with tremendous force against the lower end of the

raft, within 35 feet of the bank; or if, as her master thinks, her bow veered somewhat into the shore in consequence of going forward while her propeller was reversed, she would, but for sighting the skiff, have gone into the front of the raft a little further upstream, or, skirting it, would have run down the boathouse, which was moored on another part of the raft, about 45 feet out in the river. The distance of the skiff from the raft when first sighted is not by any means clear, under the testimony. The distance the tug traversed with its engines reversed after sighting the skiff was undoubtedly greatly more than the length of the Leo, and in all probability two or three times as great. Going ahead, as she was, upstream, with her powerful engine working full speed astern, if her speed at the time of the collision had been as slow as three or four miles an hour, as appellees contend, she would have stopped, after the engine was reversed, before reaching the raft, or, at all events, would not have struck the raft such a blow as the witnesses describe, and landed the skiff bodily out of the water upon the raft. Although the crew testified they felt and heard no jar or crash at that time when the binders were broken and the logs jammed, the noise of the crash was such that people near by were attracted to it, and others not so near heard it, and thought it proceeded from the opposite side of the river. Stewart was not on the tug when she struck the raft. The testimony of the rest of the crew on this point is unworthy of credit. They sought to prove that the lifeboat had been lowered at least to the deck, and that the canvas cover over it had been torn off. Nothing of the kind happened. This is abundantly proved not only by credible and disinterested witnesses, who pointedly called attention to the position of the lifeboat at the time, but by the master's own statement, and the correction made in his report. Some of the crew testified, although they were bound to know it to be untrue, that the skiff was put upon the raft by members of the crew after the tug returned from rescuing Bolds. All the disinterested witnesses and Stewart and Capt. Bisso state that the skiff was carried on the bow of the tug when it first struck the raft. It was there before the Leo came to the raft the second time. No one pretends that it was put on the raft by the crew when the tug first struck the raft. The whole proof shows the skiff could not have gotten on the raft in any other way than as stated by Stewart and Bisso.

Bearing in mind that the skiff was struck upon its port bow, and that on that side only were the sides and knees broken, while neither its starboard side nor bottom nor stern were injured at all, and that the nature of the fractures shows that the blow which struck the skiff ranged in the direction of its stern, and that the skiff started from the upper end of the raft, and was found deposited on the lower end of the raft, the theory that the tug may have struck the skiff just after the skiff turned into the shore, after passing and within a few feet of the lower corner of the raft, is not at all reasonable, under the evidence. It was only 100 yards from the middle of the raft, the point from which Bolds pulled out and commenced to row downstream, to the lower end of the raft.

He had been rowing "five or ten minutes" when the skiff was struck, and he rowed at least three miles an hour, if not considerably more, according to the testimony. If Bolds had rowed directly down the stream, along the front of the raft, the time he was rowing would have carried him much further downstream than the lower end of the raft. If he abruptly turned the corner of the raft towards the shore as soon as he reached the end of the raft, the time he was rowing would have carried him, in a few seconds, right into the bank, only 60 feet distant, which it is not claimed or pretended he struck. As he did not row into the bank, he must have gone downstream. The time he was rowing shows, at any reasonable estimate, he had gotten at least 100 yards downstream below the raft, when the tug struck the skiff. If he was below the raft anywhere in the river, or if he was out in the stream above the raft, and rowing down to the point of the lower end of the raft, while the tug was approaching in the direction of the raft from any place in the stream where the evidence justifies us in placing the Leo, it is, in view of the nature of the injuries received by the skiff, possible to account for the collision in but one way; and that is by collision nearly head-on, while the tug was ascending and the skiff descending, somewhere below and in the vicinity of the lower corner of the raft. If Bolds had gotten downstream, and was rowing back upstream, the skiff could not have received the nature of the injuries it did on its port side. In that event the skiff would be below the raft, and would have been rowed upstream, and necessarily, according as the skiff was further out or closer in shore than the tug, would have crossed the course of the ascending tug either on the port or on the starboard side of the tug. If the skiff had crossed from the port side of the tug, the skiff must have been struck and injured on its starboard side. If, on the other hand, it crossed on the tug's starboard bow, the tug could not have inflicted, nor the skiff received, the nature and kind of injury the evidence shows. In a collision from crossing the starboard side of the tug, the force of the blow on the port side of the skiff must have smashed the stem of the skiff and broken the sides in the direction of its bow, and would not have inflicted breaks and rips on the port side, from the direction of the stem of the bow towards the stern of the skiff, as was the case.

Aside from the breaking of the binders on the raft, there is another significant fact bearing on the rate of speed. The ends of the logs, including the height of the heavy binders on top of them, rose a foot or more, perpendicularly, out of the water. The skiff itself sat at least five or six inches in the water. The skiff, being carried in on the bow of the tug, if actually impinged between such an obstacle and the tug—this part of the raft being practically immovable, owing to the length of the raft, half of which lay on the shore—would have been shattered to fragments, or at least its bottom and starboard side would have been fractured. The laws of matter do not permit us to doubt that such would have been the result if the skiff had been projected from the bow of the tug directly against such a perpendicular obstacle, as undoubtedly

would have been the case if the tug had been going at slow speed when its bow struck the raft. That the skiff was not injured in either of these respects can be accounted for only on the theory that the swiftness with which the tug approached upstream, the revolutions of the reversed propeller sending the waves in the same direction, against the side of the raft, made such a commotion in the water in front of the perpendicular point of contact made by the end of the raft as to cause the volume of the water there to act as a cushion, and lift the skiff, from where it rested on the bow of the tug, over the perpendicular obstacle of the side of the binders and end of the logs, and land it on the raft; the height of the binders preventing the skiff from going into the stream with the receding wave, which, after having spread out over the raft, returned with less volume and force than when it first went over the raft.

If the tug had passed at considerable speed, parallel to, and along the front of the raft, it might be, in such a situation, that the commotion in the water and undulation of the logs along the front of the raft would submerge that part of the raft on the water's edge, so that the skiff floating along there on the bow of the tug, while the logs were under the water, would, without itself being lifted above the normal level of the raft in the water, be taken up on that part of the raft as the submerged logs returned to their normal level above the water. Such measure of undulation would not be imparted to the logs midway of the side of the raft by any moderate speed of the tug. One end of this side of this raft rested firmly on the shore; the logs lying parallel to the shore, extending outward 60 feet into the stream at its other end. The logs were fastened and held together by long wooden binders, about eight inches in diameter, running at right angles across the logs, and securely pinned to them. As the shore end of the raft rested firmly upon the bank, and could not sink or give way at that end so as to conform to the elevation or depression of the center, which at the point where the tug struck the raft was at least 25 feet from the river end, the end furthest from the shore would necessarily be elevated or depressed, as the case might be, in a considerably greater degree than the center, to conform to its elevation or depression. A wave which would depress the raft a foot or more in the water, by washing over the raft from the point of the tug's approach, must have power enough, therefore, to sink the end of the raft furthest from the shore a still greater depth in the water. A wave of sufficient power to do this, as the tug struck the raft, perpendicularly, 25 feet from the river end, must have had a front of at least 50 feet, for it would spread nearly equally on each side of the bow of the tug; and the height of the wave, when we remember that the binders and logs sat normally a foot or more out of the water, and the skiff drew at least 5 or 6 inches of water, must have been at least 2 feet, to cause the raft to be so depressed in the center that the skiff, instead of being uplifted there, would merely have floated onto the raft when the undulation of the logs caused by the wave raised the raft to its normal level. So, also, if it be

argued that the binders were not snapped in twain by the direct force of the tug's blow upon them, but because the volume of the wave, caused by its coming up, going under the raft, elevating the center of the raft a foot or more above its normal level in the river, necessitated the end of the raft furthest from the shore to be uplifted a still greater distance in order to conform at that end to the elevation of the raft in the center, and that in consequence the binders were too weak to resist the strain of uplifting the weight of the logs at the river end, and were thus snapped, that theory would not solve the difficulty of accounting for the production of a wave heavy enough to bring about such results if the tug were proceeding at a slow speed at that time. It is manifestly certain, under all the circumstances, that the striking of the raft with its bow at about right angles, when the tug was moving upstream, on a smooth river, in still weather, could not produce a wave of sufficient power either to deposit the skiff on the raft, without striking against its perpendicular side, or to depress the raft sufficiently in the center so that the skiff would float over on the raft without coming in contact with the ends of the logs and sides of the binders, at the time when the tug collided with the raft.

The testimony of the master is positive, that on discovering the skiff ahead he did not give orders to change the course of the Leo, but only to back her at full speed astern. On cross-examination the master was asked about his distance from the shore, and how, if his estimate was correct, he could have struck the raft within about 37 feet of the shore after reversing on sighting the skiff. He answered, "In backing up, the tug may have swung in that way, sir, which could have happened." He was further asked, "How could the backing of the tug swing it in when it was going forward?" His answer was, "In turning her back, why, she would swing one way or the other—sometimes back the tug to port, or sometimes back the tug to starboard." If this surmise be correct, it is highly probable, in the course and with the speed of the tug at the time it sighted the skiff, that, had not the machinery of the tug been reversed on that account, it would have skirted the front of the raft, and ran down the persons in the boathouse, which was moored in the river, on the lower part of the raft, about 45 feet out in the stream, if the tug did not earlier strike some nearer point on the front of the raft. Every phase of the transaction at this time serves to illustrate the danger to which the Leo exposed the smaller craft by her speed along the bend. The whole record impresses us with the conviction that the master of the tug, being able, from his elevated position in the pilot house, to discover any large obstacle, which would loom 10 feet above the water, in time to prevent collision with it by stopping or veering his course, and, being thus assured of the safety of the tug, was very heedless of the safety of smaller craft, which could not be seen far ahead, and would not jeopardize his safety in case of collision with them; and was proceeding at a speed which threatened their destruction if they did not hear or failed to properly locate his fog signals,

and did not get out of his way. He was entirely familiar with the locality, and the conditions and dangers of navigation there. The great preponderance of the evidence shows that the time elapsing between the moment of the Leo's passing Westwego Ferry Landing and reaching the point of collision with the skiff could not have been much, if anything, over 20 minutes. The distance traversed between the two points was between $2\frac{1}{2}$ and 3 miles. If the distance was 3 miles, and the time 20 minutes, this would give an average rate of speed of 9 miles an hour. If the distance be taken at $2\frac{1}{2}$ miles, and the time 20 minutes, it would make a speed of something over $7\frac{1}{2}$ miles an hour. Under the conditions prevailing that morning, while rounding Nine-Mile Point, the master being unable to tell how far he was from the banks or to accurately ascertain his course, the Leo was not entitled to maintain a greater rate of speed than to give her sufficient steerageway. We are all of opinion that her speed at the time of the collision with the skiff was immoderate.

It does not seem to us that the fact that Bolds was rescued, and that Miss Quinette was held up some time in the water before Stewart abandoned the effort to save her, militates against the finding of undue speed at the time of the collision with the skiff. If the version of the captain and most of the crew and that of Bolds be correct, the latter was picked up after the vessel backed astern out in the river, and after it had struck the raft. What was done, or the time taken to do it, after the collision with the skiff, when the tug had to first stop its forward momentum before its stern could be backed down the river, which was not done until the bow of the tug had first struck the raft a heavy blow, sheds little light on the speed of the tug at the time when, moving forward, it collided with the skiff. Consideration of these questions helps us, rather, only in approximating the distance the skiff was from the raft when the tug struck the skiff. As the stern of the tug, whose bow apparently struck the raft at right angles, was necessarily already 83 feet down the stream when the tug commenced to back, and as Bolds "was swimming and hollering out there, so they backed out there, and pulled me up in the tug," some minutes must have elapsed after the collision with the raft before Bolds was taken aboard over the stern of the tug. As the tug must have consumed some time in backing the distance necessary to reach the place where the skiff was struck, the facts that Bolds was saved, and that Stewart had an opportunity to go to Miss Quinette and hold her up some time, go to show, after making due allowance for the ordinary current in taking persons downstream, that the distance from the raft of logs to the point where the skiff was run down and Miss Quinette and Bolds were thrown in the water was, in all probability, two or three times greater than the length of the Leo. The time the tug seems to have been actually backing, as far as we can gather the time from the testimony, goes to show that its bow must have gone at least that distance from the raft, downstream, to reach the probable point of collision with the skiff. In the view we take of the case, it is unnecessary to decide whether there were

errors in extremis that would fasten liability on the libelees on this account, if not at fault in other respects.

The right of action here is given by article 2315 of the Civil Code of Louisiana, as amended in 1884, which declares that:

"Every act whatever of man which causes damage, obliges him by whose fault it happens to repair it; the right of this action shall survive in case of death in favor of the minor children or widow of the deceased or either of them, and in default of these in favor of the surviving father and mother, or either of them, for a space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parent and child, or husband and wife, as the case may be."

Without this statute the libelant could not maintain her libel. The statute must be applied in admiralty just as if the suit had been brought in the state courts, and any defenses which are open to the defendant under the jurisprudence of the state, if successfully maintained, will bar recovery under the libel. *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358; *The Alaska*, 130 U. S. 201, 9 Sup. Ct. 461, 32 L. Ed. 923; *The Oregon* (D. C.) 45 Fed. 62. In *the Corsair*, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727, it is said that "this local law did not give a lien or privilege upon the vessel, and that nothing more was contemplated by it than an ordinary action according to the course of law as administered in Louisiana." Under the law of Louisiana, the deceased's negligence, directly and immediately contributing to the injury, is a good defense.

The libelees insist on the defense of contributory negligence; contending that it was gross negligence in Miss Quinette to venture out in the river, during the prevalence of such a fog, in a skiff, which must pass the track of ascending and descending steamers, without having and sounding a fog signal, and that the noise in rowing with patent rowlocks is in no wise an equivalent signal to that prescribed by the laws of navigation and pilot rules. The failure to sound the fog horn, under the facts disclosed by the record, would be a good defense to this libel if the deceased could be charged with contributory negligence in that respect. Rule 15 of the "pilot rules for the rivers whose waters flow into the Gulf of Mexico and its tributaries, adopted by the board of supervising inspectors of steam vessels March 1, 1897." *The Albert Dumois*, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751. The noise made by the patent rowlocks is quite different from the sound made by fog horns, and cannot well be heard over the rumbling of machinery of a steamer, or distinguished from sounds of shore. From its nature, it is more likely to be swallowed up or confused in other sounds than the blast of a fog horn. Besides, the force of the sound waves the rowlocks put in motion is not as great as the disturbance in the atmosphere produced by the blowing of a fog horn, and certainly cannot be heard at as great a distance. It cannot be, therefore, accepted as an equivalent for the fog signal prescribed, which is really only carried forward in rule 15 from the statute. Whatever may be the custom of private individuals to venture in skiffs on the river, especially at a place like Nine-Mile Point, without sounding fog signals, in time of dense fog, it cannot operate to

change or displace those rules, or to absolve those to whom they are addressed from the legal consequences of disobedience to them.

Miss Quinette is not chargeable with any negligence which may have been committed by the owners of the skiff in failing to provide the fog horn or other equivalent signal, or because the oarsman did not use one in the fog, or was negligent, or made errors in navigation. The skiff belonged to her brother. The oarsman was his servant. Her brother directed the oarsman to row Miss Quinette over the river. Neither she nor libellant, so far as the evidence shows, had any interest in the skiff, or control over it or over the oarsman, or attempted to exercise any. Deceased was evidently alert, and did not hear the fog signal, and first perceived the tug coming through the fog, and instantly called the oarsman's attention to it. The law enjoins the duty of giving fog signals only upon those who control or navigate the skiff. Its commands are not addressed to guests, licensees, or passengers on the skiff, who neither control the skiff, nor take part in its navigation. The learning as to imputed negligence in cases of this kind is reviewed and exhausted by Mr. Justice Field in delivering the unanimous opinion of the Supreme Court of the United States in *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652. In that case it was held that a person who hires a hack, and gives the driver directions as to the place where he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for his acts or negligence, or prevented from recovering against the railroad company for injuries suffered from collision of its train with the hack, caused by the negligence of the managers both of the train and of the hack. The same doctrine is held in *Louisiana. Perez v. R. Co.*, 47 La. Ann. 1391, 17 South. 869. The reason of the rule applies equally as forcibly to the case of a mere licensee in a private conveyance. *Nesbet v. Garner*, 75 Iowa, 314, 39 N. W. 516, 1 L. R. A. 152, 9 Am. St. Rep. 486; *Masterson v. R. Co.*, 84 N. Y. 247, 38 Am. Rep. 510; *Pyle v. Clark*, 79 Fed. 744, 25 C. C. A. 190; *B. & O. R. Co. v. Maryland*, 79 Md. 355, 29 Atl. 518, 47 Am. St. Rep. 415.

Miss Quinette not being identified with the skiff or its management in anyway, can it be justly charged that her conduct in attempting to cross the river, under the circumstances, without seeing that there was a fog horn, was an act of such known danger and recklessness on her part as will legally condemn her as for personal contributory negligence? It is true, she was of age, and that the oarsman was young, and had but one eye. She had frequently crossed the river, presumably in this same skiff, and certainly with this oarsman, and, having lived at the Point nearly all her life, had doubtless been rowed over the river during the prevalence of a fog. The evidence shows that Bolds was a skilled oarsman and a man of character and prudence. He had long been a trusted servant in the family. The universal custom seems to have been for skiffs there not to carry or sound fog horns. Some of the witnesses testified they never heard of a skiff carrying a fog

signal. Indeed, five or six of the witnesses in this case were out in the river in skiffs as the *Leo* passed that morning, and none of them carried fog signals. Dwellers upon the banks of the river, according to the testimony, seem never to have regarded the crossing of the river in a skiff in time of fog, without fog signals, as a very dangerous undertaking. While their custom, as we have said, cannot affect the validity and force of the statute, or absolve those to whom the rules are addressed from the legal consequences of their violation of them, it is material, in this connection, in judging the recklessness of Miss Quinette's personal conduct in undertaking to cross the river.

The negligence sought to be visited upon Miss Quinette, is, in its last analysis, either that she did not see that the skiff had fog signals, or that, after ascertaining that it did not have fog signals, she nevertheless consented to be rowed across the river in a fog. She was under no duty to furnish the skiff with fog signals, and, clearly, her simple act in consenting to be rowed across the river, in the fog, in a skiff which she knew did not carry the fog signals, was not the proximate cause of her death, in view of the circumstances attending it. New and independent causes intervened between her going upon the skiff and the collision of the tug with it. Her act in going upon the skiff did not cause the immoderate speed of the tug, or prevent the oarsman from hearing or locating the fog signals, and nothing she did tended in the slightest degree to cause either the tug or the oarsman to lose their course in the fog. It was this succession of faults and errors, none of which her original act put in motion, which, combined with her act in consenting to be rowed across the river, brought about the collision. The speed of the tug, the failure to hear or locate its fog signals, and the errors of navigation were purely intermediate causes, not springing from her act of going on the voyage, and were self-operating, and were the last negligent acts contributing to the collision, and without which it would not have happened. Besides, Miss Quinette, who did not know when she started out that the *Leo* was coming in her direction, had a right to presume that a tug would not violate the rules by moving at an immoderate speed in the fog, and she was not charged with anticipating, so far as anything in the record shows to the contrary, that the oarsman would not hear the fog signals or the noise of an approaching tug, or would row directly across its bow. The ordinary and probable result of her act in taking passage in the skiff, which was well built and substantial, and in charge of a competent oarsman, whom she did not direct or control, was not that the skiff would be run down by the steamer. In view of the new, independent, and self-operating causes, which her act did not produce, her going upon the skiff, and consenting to be rowed across the river in the fog in a skiff which she knew did not carry fog signals, cannot, in any sense, be said to be the juridical cause of the catastrophe. *Milwaukee R. Co. v. Kellogg*, 94 U. S. 469-475, 24 L. Ed. 256; *Insurance Co. v. Tweed*, 7 Wall. 52, 19 L. Ed. 65.

In *McGuire v. R. Co.*, 46 La. Ann. 1555, 16 South. 457, the Supreme Court of Louisiana said:

"It is difficult to adopt a standard of damages for loss of life. The law gives the surviving parent the damages the deceased could have recovered if he had survived the injury, and damages for the support the parent might have derived from the deceased. Her courts have allowed one thousand dollars up to five thousand dollars. Rarely more."

In that case the deceased was addicted to drink, and there did not seem much prospect of his contributing to the support of the parent who survived. The jury rendered a verdict for \$20,000, and the court reduced it to \$1,000.

In *Ortolano v. R. Co.*, 109 La. Ann. 905, 33 South. 914, the parent recovered \$10,000 damages for the negligent killing of the plaintiff's young son. The Supreme Court reduced the parent's recovery to \$4,000. Administering a Louisiana statute as to a wrong occurring within its borders, involving its own citizens, we think we should be governed in the measure of damages by analogy to the decisions of its highest court under similar circumstances.

The decree dismissing the libel is reversed, and the case remanded to the District Court, with directions to decree in favor of the libelant, and to award her \$4,000 as damages, and the costs of suit. The costs of the appeal will be taxed against the appellees.

CROWN CORK & SEAL CO. OF BALTIMORE CITY v. STANDARD
STOPPER CO. et al.

(Circuit Court of Appeals, Second Circuit. February 28, 1905.)

1. PATENTS—SENIORITY BETWEEN PATENTS OF SAME DATE—NUMBERS.

Where two patents are issued on the same day by the Patent Office, and there is no other evidence of seniority between them than such as appears from their several numbers, the earlier in number must be regarded the senior and the earlier in publication.

2. SAME—INVENTION—BOTTLE STOPPERS.

The Painter patents, Nos. 468,258 and 582,762, both for bottle sealing devices, are void for lack of patentable novelty, in view of the prior art, which contained all the elements of the combinations described therein used to perform the same functions.

Coxe, Circuit Judge, dissenting in part.

Appeal from the Circuit Court of the United States for the Southern District of New York.

J. Q. Rice and F. H. Betts, for appellants.

Wetmore & Jenner and Robert H. Parkinson (John C. Rose, on the brief), for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal by the defendant from a decree for the complainant adjudging the validity and the infringement of two patents for "Bottle Sealing Devices" granted to William Painter, and by him assigned to the complainant. The first of the two patents, No. 468,258, was applied for June 16, 1890,

and was granted February 2, 1892. The second, No. 582,762, was applied for December 8, 1892, and was granted May 28, 1897. Of the nine claims of the earlier patent, the first three only are in controversy. The later patent contains two claims, and both are in controversy. The assignments of error challenge the validity of all the claims for want of patentable novelty, and assert that, if their validity should be sustained, they have not been infringed by the defendant.

Besides the patents in suit, two other patents were granted to Painter for bottle sealing devices—No. 468,226, which was applied for May 19, 1891, and granted February 2, 1892, and No. 468,259, which was applied for November 5, 1889, and granted February 2, 1892. Thus it will be seen that three patents were granted to Painter upon the same day, and that No. 468,226 was the patent earliest granted, that No. 468,259 was the earliest applied for, and that the application for 468,258 was of earlier date than that of No. 468,226. No. 468,226 shows in its drawings a bottle sealing device which is substantially identical with some of those shown in No. 468,258. No. 468,259 also shows in its drawings a bottle sealing device which is substantially identical with some of those shown in No. 468,258. The bearing of these patents upon the question of the validity of the first of the patents in suit will be considered hereafter.

The patents of Painter all relate to a metallic sealing cap for use upon glass bottles, with a cork or plug or any suitable sealing medium applied at or in the mouth of the bottle, which can be pressed down upon the neck of the bottle and locked by pressure into fixed contact, to make a strong and tight seal, and keep the contents of the bottle intact, and which can be readily removed when it is intended to open the bottle. It is important that such caps be sufficiently flexible to permit them to be used upon bottles notwithstanding such variations in size and shape as ordinarily exist in bottles intended to be of the same size and shape, and to permit them to be readily removed, and yet be sufficiently stiff to maintain their position when locked. It is also important that they be so inexpensive as to justify destroying them after a single use. Preferably, they are intended for use upon bottles in which, instead of an ordinary cork or plug, the closure is effected by a cover extending over the mouth or the top of the neck of the bottle, sometimes called a sealing disk, and composed of a layer of cork, or some other yielding material, which can be compressed so tightly over the orifice as to prevent any escape of the liquid or the gases of the contents. One of the earliest sealing caps of the prior art is shown in a patent to Whittlesey granted May 19, 1863, which was made by "striking up a flat piece of metal into a cap having a flat top, slightly tapering sides, and corrugated flange edge." Later in the prior art they were constructed with sides or flanges, to enable them to be locked around an annular shoulder on the bottle near its orifice, or to be locked by compression within an annular groove in the bottle near its orifice.

Patent No. 468,258 contemplated an improvement in the sealing caps previously used. The specification contains the following recitals:

"Metallic sealing caps have heretofore been devised and largely used, and these have involved great variety in the character of the metal employed, and in the form and construction of their pendent flanges; but my sealing cap, in its best form, differs from all others of which I have knowledge, in that it has a pendent flange, which is unbroken or continuous, but is nevertheless resilient both radially and circumferentially, and is therefore contractible and expansible, and capable of adapting itself and of being adapted to the largest as well as the smallest head in a set of bottles; it being well known that bottles of the same size are unavoidably more or less varied in the external dimensions of their heads. * * * Prior sealing caps or 'capsules' composed of thin soft metal have had continuous or unbroken pendent flanges; but they are not resilient, although capable of some slight distension, as when forced upon a bottle head. Other prior sealing caps have been composed of harder metals, and they have had continuous or unbroken flanges, which, unlike the capsules, are practically incapable of being distended upon a bottle head, and though, like the 'capsules,' they are capable of distension on a diametric line, they are not resilient or springy circumferentially; and hence, when distended diametrically on one line, the flange correspondingly contracts on a line at right angles to the line of distension, whereas the continuous or unbroken flange of my cap, in its best form, may be extended diametrically without this corresponding contraction because of its circumferential resiliency and its contractile and expansible capacities, all of which are secured by me, because, in the best form of my cap, the flange is corrugated substantially throughout all, or at least a considerable portion, of its depth, in lines substantially parallel with the axial line of the cap."

The patentee then points out that, for use with liquids bottled under low pressure, the continuity of the metal in the flange is not indispensable, and the cap may be relied on if the flange be slotted at one or more points. The specification further recites:

"The aforesaid corrugations not only serve an important purpose in connection with securing the adaptability of caps of some one precise size to bottle heads, varied as to their external dimensions as well as to the precise location of their locking or engaging shoulders, but still further in that, having been forcibly applied for service, the flange retains its corrugations on the line of locking contact with the bottle head. * * * My sealing caps are so strong and so firmly applied to bottles that some form of lever or a corkscrew must be employed for detaching them, and my caps are also the first which, when applied to a bottle and locked thereto, as described, have the edge of the flange so projected as to afford a reliable shoulder, with which a detaching lever may be engaged, for enabling a cap to be promptly removed as a result of a prying or wrenching action. * * * I am aware that cork holders of hard metal plate have heretofore been provided with a flange cut or slotted to afford a series of pendent arms or fingers, each of which at its lower end was bent inwardly for causing it to engage with an annular shoulder on a bottle head. Some of said prior devices have had pendent spring arms which were corrugated at their extreme lower ends, to afford strong fingers at their points of contact with an engaging shoulder on the bottle. * * * Such of my caps as have a slotted flange have, in substance, a series of pendent arms; but they differ from all prior cap-arms, in that each arm is so corrugated that each inner corrugation is adapted to, and is forcibly conformed to, the contour of the engaging shoulder on a bottle."

He then describes various caps containing his improvements, and these are illustrated in the drawings, in which Figs. 1, 2, 3, 8, 10, 12,

14, and 15 show the several forms. The other figures show bottle necks of different forms, with the cap locked into its place. The specification continues:

"Figs. 1, 2, and 3 illustrate one of my sealing caps in its best form. * * * Said cap has a flange which is symmetrically corrugated substantially throughout its depth, and parallel with the axis of the cap. * * * These caps are struck up from disks of sheet metal by means of appropriate dies. * * * The flanges may be varied in depth or width, but I prefer that it be as narrow as will be consistent with the proper engagement with a bottle head having thereon an annular shoulder. * * * The shoulder should be so located, or the flange be of such width or depth, that, when the top of the cap has been properly forced upon the sealing disk and held there, the flange will so overlie said shoulder that the latter may be properly embraced by the inner corrugations. * * * It will be seen that, when a cap has been thus applied to a bottle head, the lower edge of the flange is so far projected from the adjacent surface of the bottle that it is readily accessible for engagement by a bottle opener. * * * This projecting edge on a metallic sealing cap employed in combination with and locked to a bottle is believed to be novel, and is of material value when considered in connection with opening a bottle; but such an edge is not wholly dependent upon these corrugations, although the lower edge of the outer corrugation presents an appropriate projecting edge for reliable engagement with an opener. * * * In the cap as shown in Fig. 8, the flange is flared, and is symmetrically corrugated at its lower portion only. * * * The cap as shown in Fig. 10 has a flaring flange, which has its lower portion initially corrugated, but in a more or less irregular manner; the metal being crimped, instead of being symmetrically corrugated, as in the caps previously described. * * * The cap shown in Fig. 12 has a flaring flange, which is not initially corrugated at all, but which, when applied to a bottle, has the lower portion irregularly corrugated, as a result of bending the expanded flange downwardly and inwardly into locking relations with the engaging shoulder of the bottle, and the lower edge affords the same reliable projection with which a bottle opener may engage. * * * The cap shown in Fig. 14 has a plain flange, which is not flaring and not initially corrugated, * * * but, as shown in Fig. 15, has radial indentations at proper intervals, which bend the flange into desired locking relations with the engaging shoulder, and cause the metal to be corrugated at or adjacent to the line of locking contact, * * * leaving the lower edge projected, as with the other caps, for a reliable engagement with a bottle opener. It is now to be distinctly understood that the sealing caps shown in Figs. 14 and 15 must be composed of hard metal, * * * and, although I do not presume them to be novel as to form and construction, I do believe they are the first caps composed of hard sheet metal which are adapted to the service indicated. * * * It will be obvious that, while some special form of opener may be required for detaching caps with the greatest possible convenience, a thin-edged tool or a knife may be readily applied to the projecting edge for detaching a cap; and, to provide for the use of a corkscrew, each cap is centrally perforated at the top, enabling a corkscrew to enter the sealing disk or cork. * * * In some instances it is desirable that the edge of the flange be so thoroughly housed within the recess below the engaging shoulder as to practically eliminate the projecting edge feature and thereby secure specially high resisting power; * * * and it will be obvious that while all of the corrugated caps shown will afford a well-defined, stiff, and strong projecting edge, either of them, on being well compressed on the line of the middle of the recess in the bottle head, will have the entire lower portion of the flange made substantially flush with, and merging with, the surface of the bottle head below the recess. While I prefer the flanges of my caps to be continuous or unbroken, the caps may be relied upon for service with liquids under comparatively light pressure if the flanges be slitted at intervals. * * * I have illustrated but one form of sealing disk, but it is to be understood that various forms may be employed, and also that they may be varied as to their component character."

The three claims in controversy are as follows:

"(1) The combination, substantially as hereinbefore described, of a bottle having on its head an annular engaging shoulder, a sealing disk, and a metallic sealing-cap which encircles the periphery of the disk, and has a flange which is bent into locking contact with said shoulder, and which also has a projected edge to afford a surface with which a bottle-opener may reliably engage for detaching the cap from the bottle.

"(2) The combination, with a bottle having on its head an annular locking shoulder, and below said shoulder a projecting surface, of a sealing disk and a hard-metal sealing cap having a flange which is bent into locking contact with the said annular shoulder, and has a projecting lower edge for engagement by a bottle-opener lever fulcrumed on the projecting surface of the bottle below said edge.

"(3) The combination, substantially as hereinbefore described, of a bottle having a head provided with an annular engaging shoulder, a sealing-disk, and a hard-metal sealing cap having a flange which encircles the disk, and is bent into locking contact with said shoulder, and is corrugated in the bent portion in the line of said locking contact."

It will be observed that neither of these claims, except the third, makes the corrugated flange, in terms, an element, and that this claim makes only such a flange an element when it is "corrugated in the bent portion." Other claims of the patent are similar to claim 3, except that they specify a flange "corrugated substantially throughout its depth." The eighth claim embraces a sealing cap "having a flange adapted to be bent into locking contact" with an annular engaging shoulder of a bottle-head provided with a sealing disk, etc., and the ninth claim embraces a "continuous or unbroken flange bent or indented circumferentially."

The specification is so elastic and so fertile in its suggestive and qualifying matter that it is difficult to define with exactness what particular form of cap is embraced by the terms of a particular claim. It seems to have been the effort of the draftsman to frame the specification and claims so that any desirable limited or broad construction may be placed upon several of the claims, and thus defeat a defense of anticipation or of noninfringement. It is apparent, however, that the patent is expressed with a view of securing to the patentee a monopoly of various forms of sealing caps—one (the best form) being a cap with a flange continuous and unbroken, and corrugated vertically substantially throughout its depth; another, a cap with a slotted flange corrugated similarly; another, a cap having a flaring flange with only its lower portions corrugated; another, a cap having a flaring flange not corrugated at all, but irregularly bent in corrugations or radial indentations as the result of bending it into position upon the bottle; and perhaps other forms which are slight variations from any of these. In all of these the cap is claimed "in combination" with other parts, but, as will hereafter appear, all of these parts were old and had been used collectively with a metallic sealing cap; and, if their enumeration serves any purpose except to point out the adaptability of the cap to use with such parts, it can only be to so restrict the claim that the making of the cap, or its use without them, would not infringe the patent. Specifically, read in the light of the recitals, and without reference to the prior art, except as therein referred to, claim

1 covers a metallic cap of any kind having a flange that can be bent into locking contact over the bottle shoulder, and a projected edge. The flange may be slotted or continuous, corrugated, and possibly uncorrugated; and the cap may be of metal of varying degrees of hardness, provided it is resilient. Claim 2 covers a "hard-metal" cap (and must refer to the caps of Figs. 14 and 15) not corrugated, except by the bending process, and having a projecting edge; and claim 3 covers a hard-metal cap not corrugated, except by the bending process, and having no projecting edge.

The question of the validity of the claims in controversy, in view of the prior art, lies at the threshold, and should be the first one considered. So far as appears by the record, the date of Painter's earliest invention in bottle stoppers is to be deemed as of November 5, 1889, the date of his application for patent No. 468,259. That patent shows a sealing cap with an integral continuous corrugated flange, adapted to be bent into locking contact with a bottle head having an annular shoulder, and in the drawings (Figs. 1, 2, and 3) shows the "best form" described in the specification of the patent in suit. This patent also shows and describes a cap having a slitted flange. Claim 5 is for "a bottle sealing cap having a flange corrugated in line with the axis of the cap and slitted at intervals, the corrugated portion of the flange being adapted to be bent into locking contact with an annular shoulder on a bottle head, substantially as described." Notwithstanding the application for this patent was the earlier one, we are of the opinion that it was a later patent, and what was described and claimed in it has no bearing upon the validity of the claims of the patent in suit. Where two patents are issued on the same day by the Patent Office, and there is no other evidence of seniority between them than such as appears from their several numbers, the earlier in number must be regarded the senior and the earlier in publication. Upon the same consideration, No. 468,226 must be regarded as an earlier patent than No. 468,258. But the former does not claim the invention of the latter. The specification contains the following recital:

"My present caps, in their best forms, have outwardly flared edges, and the heads of the bottles below their locking shoulders are of such form and diametric dimensions that when the cap is locked upon the bottle there is ample space below and at the rear of the flange to admit of free insertion of any pointed or thin-edged device capable of serving as a bottle opener by prying the flange outwardly from the locking rib at several points, and thus releasing its hold thereon. The projected edge of the cap so applied also enables the use therewith of special bottle openers operating as levers, as with my prior caps. * * * It will also be readily understood that the form and character of the corrugations are immaterial to my present invention, inasmuch as they may be long, short, large, small, straight, or spiral, because in either case the flanges are to be always kept in locking contact with the annular shoulder of the bottle head in such a manner as to fit the annular space, this being wholly independent of the corrugations."

The claims cover a cap having a flaring edged flange in combination with the locking shoulder and sealing disk. What is described in an earlier patent to the same inventor has no greater efficacy in defeating the novelty of the subject-matter of a later patent to

him than it would have if it had been described in an earlier patent to a different inventor. In either case such descriptive matter has no effect upon the patentable novelty of the earlier invention. If, however, the invention of the later patent is patented by the earlier one, the earlier must, of course, invalidate the later, for there cannot be two valid patents for the same invention, and the later patent is therefore void.

In considering the prior art, it should be said preliminarily that the degree of hardness, thinness, or resiliency of the metal of the patented cap is of no consequence in its bearing upon the question of patentable novelty, nor is the depth of the flange, as these were matters of mere mechanical modification and adaptation. The recitals in the patent sufficiently show this. They also show that no invention could have resided in using a cap with a bottle having an annular shoulder, or in locking a metallic cap into tight contact with such a shoulder, nor in the use of caps with sealing disks interposed over the orifice of the bottle, instead of corks or plugs. Nor was there any novelty in locking the cap so firmly around the bottle shoulder as to require a special instrument for releasing and removing it readily, and this appears by the Livermore patent of 1866, which shows a detaching lever for that particular use.

The cap of the Whittlesey patent, which has been referred to, was intended for use on cans and fruit jars. It shows a projected edge formed by the corrugations in the flange. While it was not designed to be pressed into contact with a shoulder upon the jar, it was as well adapted to this purpose as the cap shown in Fig. 10 of the patent, and is as easily removable as such a cap; and, if a similar cap is covered by the first claim of the patent in suit, the Whittlesey cap completely negatives its novelty. Whittlesey did not see fit to describe the degree of resiliency which he deemed desirable, nor to detail the advantages incident to his cap, but to those skilled in the art this was unnecessary. The brevity and simplicity of his specification and claim do not detract from the merit and validity of his patent, and are a refreshing contrast to the verbosity of the patent in suit.

The patent to Butler of 1872 shows a sheet-metal cap for sealing bottles with a flange projecting downward entirely around the top of the neck of the bottle. The flange has on its lower edge a succession of short slits to assist in turning in the lower edge of the flange more readily when the cap is in place upon the bottle. In this cap the top is formed with an annular channel intended to surround the neck of the bottle, and to be filled with wax or some other adhesive or plastic sealing medium.

The Berthoud-Gedge English patent of 1878 is for an improvement in the art of hermetically closing bottles, jars, etc., by the aid of a strong metal cover or capsule. It describes a cap stamped out of sheet iron, tin, or any suitable metal. An elastic washer is used as a sealing medium. The bottle is shown with an annular ring or shoulder at the top of the neck. The cap is formed with depending sides or flanges to extend below the bottle shoulder. It also describes a machine for applying the cap to the bottle with

rapidity and accuracy. In sealing the bottle the washer is interposed between the cap and the orifice, and both are subjected to a powerful vertical pressure, which, bearing upon the cap, firmly compresses the sealing disk. To open the bottle, the cap is raised by inserting a pointed instrument beneath the flange. The patent shows another form of cap in which a tongue is left depending from the flange for the purpose of unsealing the bottle with greater ease. When the cap is placed upon the bottle, this tongue lies against the neck; and, to unseal the bottle, the tongue is slightly raised by inserting an instrument beneath it, and the metal can then be torn from part or the whole of the cover. If the flange of the cap first mentioned were corrugated, this patent alone would negative the novelty of the first and third claims of the patent in suit.

The English patent to Thompson of 1885 shows a tin cap for sealing a cylindrical tin can. The can is provided near the top with an annular groove. The cap (called the "lid") is flanged, is formed slightly conical to fit over the top of the can, and its flange is provided with a bead at the edge. The patent points out that, if it is desirable to make the lid extremely tight, this can be done by pressing the bead into the groove, while, if the bead is not pressed into the groove, the lid can be easily pried off. It is essentially the cap of the eighth claim of the patent in suit.

The patent to Goulding of July 9, 1889, for a bottle stopper, shows a cap made of elastic metal, struck out of stiff tin or sheet metal, from which depend a number of flanges (termed "arms") turned in at the lower end to grasp the shoulder neck of the bottle, and provided at such lower and inturned ends with longitudinal corrugations to stiffen the arm in the direction of strain, and thus to resist unbending distortion and breaking in use. The description states that without the corrugations the engagement of the holder with the shoulder would not be so secure. This cap is not intended for use with a sealing disk; but with a bottle which has been corked in the ordinary way; but this circumstance does not detract from its value as an anticipatory reference as showing a cap with a slotted and corrugated flange.

Further references to the prior art will serve no useful purpose. Those which have been cited show that while there may have been, and doubtless was, improvement in what was done by Painter, there was no invention. He improved the Berthoud-Gedge cap by corrugating the flange, but Whittlesey and Goulding had shown him in their patents; one the continuous corrugated flange, and the other the slotted corrugated flange. That the corrugated flange of these caps would have a projecting edge when the caps were fastened upon the bottles is obvious, and must have been obvious to those skilled in the art when Painter utilized the feature and incorporated it into his caps. The advantage of the corrugations in securing a more effective locking engagement upon the bottle shoulder had been distinctly pointed out by Goulding. If there was novelty in corrugating the flanges substantially throughout their depth, this was merely a change of form, which it is clear from the patent was not essential, but was preferential only, and the claims in contro-

versy are not limited to that feature of the improvement. In introducing into the flange of the old caps the corrugations like those of Whittlesey and Goulding, Painter merely assembled together parts which were old, and which performed no new work in their new location. It is urged that the great commercial success which has attended the introduction of the patented cap is persuasive that it supplied a want long felt, and which previous inventors had not been able to meet, and is therefore evidence of its patentable novelty. Such an argument is always legitimate, but in this case has not the usual force, first, because the caps put upon the market seem to have been made according to the earlier Painter patent, in which the cap is provided with a flaring flange; and, secondly, because the success is largely attributable to the machine used for fastening the caps on the bottles, and which enables it to be done with great rapidity and efficiency. The cap made by the defendant differs as much from any of the caps shown in the drawings of the patent as these caps do from those claimed in the earlier and the later Painter patents, closely resembles the Goulding cap, and is substantially the cap of the patent to Patterson, granted September 17, 1901. The cap of the Patterson patent is made of nonresilient metal, and its depending flange is provided with an engaging section to lock it upon the bottle shoulder; the engaging section being formed by bending the metal upon itself longitudinally so as to form a fold. The cap is as completely adaptable as is Painter's cap to be locked into place upon a bottle quickly and efficiently, and is fastened upon the bottle by a machine which apparently does its work as perfectly and quickly as that employed in fastening Painter's caps. We cannot resist the conviction that all the claims in controversy are void for want of patentable novelty, and, having reached this conclusion, deem it unnecessary to consider the question of infringement.

The second patent in suit is so clearly invalid that it requires very brief consideration. The specification describes the alleged invention as follows:

"My said improvements relate to hard-metal flanged sealing caps adapted to be used in connection with sealing disks and with bottles provided with an annular locking shoulder; and my invention consists in providing the cap flange at its edge with an integral bead formed by turning the metal upon itself in such a manner that when the cap is placed with its sealing disk upon a bottle, and the disk properly compressed, the beaded portion of the flange upon the cap may be bent inwardly against the bottle head beneath the locking shoulder, and make a firm and reliable locking union of the flange with the bottle head."

The two claims of the patent cover a cap having such a flange. The patentee merely employs the beaded flange of the Thompson patent of 1885. Thompson locked it in an annular groove in the neck of the bottle, while Painter locks it beneath an annular shoulder upon the bottle. It is true, Thompson contemplated using it with a tin vessel instead of a glass one, either with or without an annular groove. It could not involve invention to use the flange on a glass vessel instead of a tin one, or to press it into contact with

an annular shoulder instead of an annular channel. It does the same work with either material and with either contact contrivance.

The decree is reversed, with costs of this court, and with instructions to dismiss the bill, with costs in the court below.

COXE, Circuit Judge. I dissent from so much of the opinion of the court as holds that the claims in controversy of letters patent No. 468,258 are invalid for lack of invention.

RIES et al. v. BARTH MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1905.)

No. 1,051.

1. PATENTS—INFRINGEMENT—EFFECT TO BE GIVEN TO LATER PATENT.

Where a complainant patentee has accomplished a new result by a new means, a defendant cannot escape the charge of infringement by showing a later patent. Whether the defendant devised an independent means for accomplishing the same result, or merely added supplementary devices, or improved details of the primary invention, using the same principles of operation, is a question to be determined from the proofs; there being no presumption either way.

2. SAME—CIRCUIT-CLOSING APPARATUS.

The Ries patent, No. 356,963, for an electric circuit closing apparatus, the general purpose of which is to secure the application of the actuating current gradually, with continuously increasing strength, to avoid injury to the parts from sudden strain, covers an invention of a primary character, which embodies a new combination of old devices to accomplish an entirely new result; and its claims are entitled to a broad construction in accordance with their terms, covering any similar combination of equivalent devices. Claims 4, 7, and 9 held infringed by the apparatus of the Dillon patent, No. 676,426.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

Appellants' bill for infringement of letters patent No. 356,963, February 1, 1887, to Ries, was dismissed for want of equity.

The claims relied on are these:

"(4) An electric-current transmitting or circuit closing apparatus provided with a primary lever for closing an electric circuit, a secondary lever arranged to be operated to gradually increase the flow of current through the said circuit, and actuating mechanism designed to automatically operate the secondary lever to increase the current strength upon the closing of the circuit by means of the primary lever, substantially as and for the purpose set forth."

"(7) In an electric-current transmitting apparatus, the combination of one or more series of contact points or surfaces, a contact arm or lever designed and adapted to come into electrical contact with said series of contact-points, an adjustable stop to limit the travel or sweep of said contact arm or lever, and a suitable speed governing or regulating device to control its rate of motion, substantially as and for the purposes set forth."

"(9) In an electric-current transmitting or circuit-closing apparatus, the combination, with a series of contact-points, of an arm or lever designed to be operated to come into successive contact with said contact-points, and an adjustable governing or speed-regulating device whereby the sweep of the con-

tact arm or lever over the series of contact-points is completed in a predetermined space of time."

The following prior patents, among others, are set forth in the record: No. 205,303, to Sawyer and Man (1878); No. 237,655, to Wright (1881); No. 239,313, to Brush (1881); No. 248,429, to Edison (1881); No. 251,541, to Edison (1881); No. 255,973, to Hahn (1882); No. 270,352, to Van Depoele (1883); No. 287,524, to Edison (1883); No. 289,918, to Kuhmaier (1883); No. 295,454, to Sprague (1884); No. 316,092, to Weston (1885); No. 353,987, to Sperry (1886). The Stanley patent, No. 325,376 (September 1, 1885), is not in the record, but counsel were permitted to refer to it at the argument.

Appellee's device is made according to letters patent No. 676,426, to Dillon (1901).

M. Frank Brown, for appellants.

W. Clyde Jones, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge (after stating the facts). The general nature and the object of Ries's invention are thus stated in the specification:

"This invention relates to certain improvements in circuit-closing apparatus, whereby the actuating-current to the brake or other devices is applied gradually and with continuously increasing strength, so as not to subject said devices to the rapid wear and tear due to the sudden strain upon them when, as has heretofore been customary in operating such apparatus, the entire strength of the current is applied at once.

"It further relates to certain improvements whereby the amount of current supplied to the brake or other devices can be regulated and controlled at will, so that the operation of such devices and the extent to which they are applied is at all times under perfect control.

"The general object of this invention is to afford a simple, practical, and efficient means for automatically controlling the supply of current from a secondary battery, dynamo-electric machine, or other source of electricity, to one or more translating devices, in such a manner that said devices and the mechanism connected with and operated thereby are protected from sudden shocks or strains when the circuit leading to such devices is closed.

"It further has for its object the more perfect and efficient application of the whole or any desired portion of the entire available current to such devices, for the purpose of better governing and controlling their operation and preventing any excess or waste of power.

"The invention is especially intended for use in such cases where the translating devices require currents of high potential, and, from the nature of their service, demand more or less frequent applications of the current—such, for example, as in the case of electric or electro-magnetic brakes, electric elevators, electric motors, and other electrical machinery."

The device, so far as it is embodied in the claims in suit, works this way: A primary lever, under the control of the operator, is used to close the circuit. This act of closing the circuit, immediately, in and of itself, releases a secondary lever, which thereupon, by means of actuating mechanism, is moved automatically across the contact points of resistance coils, whereby the current is admitted gradually to the motor. (The particular actuating mechanism shown in the drawings and detailed in the description is a solenoid, which is covered specifically by other claims.) When the primary lever is turned by the operator to its initial position, and the circuit is thereby broken, the secondary lever is carried by the primary

lever back across the contact points, so that the resistance is reinserted in the circuit to protect the motor when the current is again turned on. After the operator closes the circuit, he can hold the primary lever at any point along the resistance, and the secondary lever is held at the same point by contacting with a stop on the primary lever. By means of this stop the operator can adjust the current that is admitted to the motor to the load to be carried by the motor. Opposed to the automatic movement of the secondary lever is an adjustable speed regulating device to control its rate of motion. (An adjustable dashpot is the speed-regulating device specifically described.)

In the unitary, self-contained circuit-closing apparatus described by Ries, the primary and the secondary levers, the actuating mechanism, and the relations of these to turning on the current and cutting out resistance, and to turning off the current and reinstating resistance, are the dominant features of the fourth claim; the adjustable stop to adjust the current to the load, and the speed regulating device to control the rate of motion of the secondary lever, of the seventh; and the adjustability of the speed regulating device, of the ninth.

Ries got together a collection of old elements. Motors, circuits, switches to close circuits, levers, resistance coils, solenoids, and other actuating mechanisms for moving an arm over contact points, dashpots, and (if we look to the Stanley patent and concede appellee's contention) adjustable dashpots, were all old. The prior patents prove this. They show these elements severally, and some in combinations. But none exhibits Ries's combination for any purpose, and none foreshadows Ries's thought. That is, Ries disclosed to the world a new desirable result to be attained, and devised a new means by which the new idea could be put to use. Than this, there is no higher quality of invention. *Morley Sewing Machine Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299, 32 L. Ed. 715.

It will be observed that the claims in suit could hardly be framed in broader terms. Not particular forms of levers with fulcrums and power-points and load-points at particular places, but any "primary lever" and any "secondary lever" so related as to contribute their share to the new results. Not a solenoid to move the secondary lever across the contact points, but any "actuating mechanism" that will coact with the other elements to produce the new results. Not a pin upon the primary lever to stop and hold the secondary lever, but any "adjustable stop" that will serve the purpose. Not a dashpot or an adjustable dashpot to regulate the rate of motion of the secondary lever, but any "speed regulating device" that will perform the same function in connection with the operations of the other elements. When the Patent Office questioned his right to claims of such breadth, Ries replied:

"With respect to the form of claims in this case, the Examiner is informed that these claims are intended to cover not only the specific construction of the circuit closing apparatus shown, but any circuit closing apparatus that, with the arrangements of circuits and other elements mentioned in the claims, will operate as, and produce the results, set forth therein."

And as we have already indicated, there is nothing in the prior art to discredit the examiner's accedence to Ries's demands.

The defendant's device has a primary lever, under the control of the operator, which is used to close the circuit, and which, upon the closing of the circuit, releases a secondary lever. By means of a weight upon the secondary lever, it is moved across the contact points of resistance coils. That is, defendant uses a gravity engine instead of a solenoid as the "actuating mechanism" for the automatic movement of the secondary lever. But the claim covers any actuating mechanism that performs the same function as the solenoid in bringing about the new result; and furthermore, even if the Ries invention were not of a primary character, the gravity engine, before Ries's time, had been used as the mechanism for actuating a contact arm across the points of resistance. By means of a pin and a link the primary and secondary levers of defendant are so related that the operator, through his direct control of the primary lever, can stop the automatic movement of the secondary lever at any desired point of resistance, and thereby adjust the current to the load. The adjustable stop of defendant is therefore practically identical with Ries's. The adjustable speed regulating device to control the rate of motion of the secondary lever is the same in both apparatuses—an adjustable dashpot. These elements that are brought together in defendant's self-contained apparatus have the same relations of movement and time, perform the same offices, and accomplish the same results, as in Ries's apparatus.

What effect is to be given to the fact that defendant's apparatus is made in accordance with the specifications of the later Dillon patent?

Where neither a new result nor a new principle of operation in producing the result has been achieved, and the patentee has merely improved upon the old way of accomplishing the old result, the presumption is that his patent is not infringed by a later patent for improvements upon the same old way of accomplishing the same old result. That is, presumably, each is an independent improver in a field that was as open to the one as to the other—presumably the thought of the one has not overlapped the thought of the other. But the presumption is not conclusive, and, even in the cases of the narrowest patents, it is always open for the complainant to show that the defendant has appropriated his property.

Where a new result has been attained by some patentable mode of operation, the patentee cannot have a monopoly of the new result. It is open for any one to devise and patent a new means of producing the same result—a means that has a different principle of operation—and one who succeeds in doing this is not an infringer of the older patent.

But where a complainant patentee has accomplished a new result by a new means, a defendant cannot escape the charge of infringement merely by showing a later patent. The field covered by the primary patent is not free for defendant's plowing without the owner's consent. True, the defendant may have devised an inde-

pendent method of arriving at the same result; but it is also true that he may merely have added supplementary devices, or improved some details of the primary patent. There is no presumption either way. The facts are to be taken from the proofs. And the facts in this case being, as we find, that the Ries invention is primary, that Dillon accomplishes the same result by the same principles of operation, we think infringement is established. *Consolidated Valve Co. v. Crosby Valve Co.*, 113 U. S. 157, 5 Sup. Ct. 513, 28 L. Ed. 939; *Morley Sewing Machine Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299, 32 L. Ed. 715; *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.*, 106 Fed. 693, 45 C. C. A. 544; *Crown Cork & Seal Co. v. Aluminum Stopper Co.*, 108 Fed. 845, 48 C. C. A. 72; *Lamson Consolidated Store Service Co. v. Hillman*, 123 Fed. 416, 59 C. C. A. 510; *Western Telephone Mfg. Co. v. American Electric Telephone Co. (C. C. A.)* 131 Fed. 78.

Whether Dillon displayed invention in adding supplementary devices or in improving certain elements in Ries's combinations is irrelevant to the question of infringement. *Store Service and Telephone Cases*, *supra*.

The Circuit Court, having found that Ries devised a new combination of elements that produced a new result, was in error, we believe, in limiting the complainants to the solenoid and other specific features covered in other claims, and in denying them the range of equivalency that properly inheres in the broad terms of the claims in suit.

Inasmuch as the patent has expired pending the determination of this suit, the mandate will be—

Decree reversed, with the direction to the Circuit Court to enter a decree in complainants' favor for an accounting.

KELLEY et al. v. DIAMOND DRILL & MACHINE CO.

(Circuit Court of Appeals, Third Circuit. April 27, 1905.)

PATENTS—VALIDITY—COIL-CLASP.

Permission granted a defendant to apply to the trial court for leave to file a supplemental bill in the nature of a bill of review to bring forward new evidence tending to show the invalidity of the Jackson patent, No. 433,791, for a coil-clasp.

In Re Petition for Leave to File Supplemental Bill in the United States Circuit Court.

See 132 Fed. 978; 131 Fed. 89; 130 Fed. 893; 129 Fed. 756, 64 C. C. A. 284.

Horace Pettit, for petitioners.

Wm. C. Strawbridge, for respondent.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This was a suit in equity in the Circuit Court of the United States for the Eastern District of Pennsylvania, brought by the Diamond Drill & Machine Company against Frank Kelley et al., trading under the firm name of Kelley Bros. & Spielman, for infringement of letters patent No. 433,791, bearing date August 5, 1900, for an improved coil-clasp, granted to Calvin Jackson, of whom the complainant is assignee. At the hearing of the cause upon the pleadings and proofs the Circuit Court adjudged that the patent was valid, and that the defendants had infringed the seventh claim thereof. 120 Fed. 282. Upon appeal by the defendants, this court on June 29, 1903, affirmed the decree of the Circuit Court. 123 Fed. 882, 59 C. C. A. 370. Subsequently the mandate of this court was issued, and was filed in the court below on May 6, 1904. On February 24, 1905, written notice signed by the solicitor and counsel of the appellants was served upon the solicitor and counsel of the appellee that at the opening of the March term, 1905, of this court, on March 7, 1905, or as soon thereafter as counsel could be heard, an application by petition would be made by the appellants to this court for leave to file a supplemental bill in the nature of a bill of review in the Circuit Court, for the reasons and purposes set forth in the petition; and a copy of the petition and copies of certain supporting affidavits were also served in connection with said notice, and at the same time, upon the solicitor and counsel of the appellee. Accordingly at the opening of the term the appellants presented such petition to this court.

The petition, after reciting the various proceedings in the cause, sets forth that during or about the month of June, 1904, the petitioners discovered new matters, then for the first time known to them, which were important and material, and which proved the invalidity of said letters patent No. 433,791. These matters are recited with particularity, and consist of alleged newly discovered evidence of two prior uses, which may be briefly designated as, first, the Maier use of belt-fasteners at the Trenton Spring Mattress

Company's factory; and, second, the wire-cloth fastener used at the De Witt wire cloth factory and elsewhere. The prayer of the petition is as follows:

"Your petitioners therefore pray that they may be granted leave by this honorable court to make application to the Circuit Court of the United States, in and for the Eastern District of Pennsylvania, and more particularly to the Honorable R. W. Archbald, District Judge, who rendered the decision in said court, for leave to file in said court against the said Diamond Drill & Machine Company a supplemental bill, in the nature of a bill of review, to bring forward the aforesaid new matters, in order that the evidence of such new matters may be taken in the cause, and the same adjudged as equity and good conscience may require."

It is insisted on the part of the appellee that the appellants are precluded from maintaining this petition by reason of the delay in presenting the same to this court after the discovery which was made in the month of June, 1904. But in view of all the circumstances, we are not willing to hold that the petitioners are thus estopped. Mr. Pettit, the counsel of the petitioners, states in one of his affidavits that while "he first had knowledge of the new evidence in June, 1904, at the time of the interview with Franz J. Maier referred to, it was not until about four months afterwards that the defendants learned that they had sufficient corroborative proofs of the prior use by Maier, and of the De Witt wire cloth anticipation, such as would warrant the petitioners in filing this petition." We think that it is a fair conclusion from Mr. Pettit's two affidavits that the information which came to the petitioners in June, 1904, was incomplete; that such partial information as they then acquired was followed up by reasonably diligent efforts on the part of the petitioners to ascertain the facts; and that the necessary information upon which to base an application to this court for leave to file a supplemental bill in the Circuit Court was not fully obtained until the middle of October, 1904. Therefore we will overrule the objection based on lapse of time to our entertaining the petition, and will make an order in compliance with the prayer thereof.

It is ordered that permission be, and the same is hereby granted to the petitioners to make application to the Circuit Court of the United States, in and for the Eastern District of Pennsylvania, within 30 days after the entry of this order, for leave to file in said court against the Diamond Drill & Machine Company a supplemental bill, in the nature of a bill of review, for the purposes set forth in said petition, and in accordance with the prayer thereof. And the Honorable R. W. Archbald, who tried and decided the case originally, is designated and appointed to hold the Circuit Court, and hear and act upon said application, and to act in all proceedings in the cause which may ensue.

AMERICAN SODA FOUNTAIN CO. v. SAMPLE.

(Circuit Court of Appeals, Third Circuit. April 27, 1905.)

PATENTS—SUIT FOR INFRINGEMENT—POWER TO GRANT REHEARING AFTER DECISION ON APPEAL.

Where the Circuit Court of Appeals has adjudged invalid the claims of a patent in issue in an infringement suit, reversing the Circuit Court, and issued its mandate directing the entry of a decree in conformity with its opinion, the authority of the Circuit Court is limited to the entry of a decree executing the mandate by dismissing the bill, and it has no discretion to grant a rehearing on the ground that complainant has filed a disclaimer in the Patent Office which avoids the grounds of invalidity found by the appellate court, unless by leave of the latter court.

On petition for a writ of mandamus to enforce the mandate of the court in the case of the American Soda Fountain Company and another against George W. Sample.

Joshua Pusey and Walter C. Pusey, for petitioner.

W. G. Henderson, for Sample.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. George W. Sample brought his bill of complaint against the American Soda Fountain Company and Alfred H. Lippincott in the Circuit Court of the United States for the Eastern District of Pennsylvania for the alleged infringement of letters patent No. 498,962 for an improvement in draft tubes for soda-water fountains, and, the cause having been heard upon the pleadings and proofs, the court made a decree adjudging that the first and fifth claims of the patent were valid, and that the defendant, the American Soda Fountain Company, had infringed these claims. 126 Fed. 760. Upon appeal by the said defendant, this court held that the first and fifth claims of said patent were invalid for want of patentable novelty, and we reversed the decree of the Circuit Court. 130 Fed. 145, 64 C. C. A. 497. On the 16th day of December, 1904, the mandate of this court was issued to and filed in the Circuit Court, directing that court to enter a decree in conformity with the opinion of this court. Undoubtedly, the mandate required the entry by the Circuit Court of a decree dismissing the bill. Before the court had acted upon our mandate, the complainant below (Sample), on December 30, 1904, presented his petition to the Circuit Court, setting forth that on December 27, 1904, he had filed a disclaimer (copy of which was attached to his petition), and prayed that the court "give further consideration to this cause, in view of said disclaimer being made a part of the patent in suit." On January 15, 1905, the Circuit Court granted a rehearing, upon condition that the petitioner pay all costs that had accrued both in the Circuit Court and in the Court of Appeals. In the opinion (134 Fed. 402) announcing the allowance of a rehearing, the court describes the disclaimer as one by which the complainant "seeks to restrict the claims in controversy" so as to "avoid the effect of the anticipating devices referred to by the Court of Appeals." And then, after recognition of the rule that the Circuit

Court has no power, upon the ground of newly discovered evidence, to reopen a question which has been finally decided by the Court of Appeals, without the permission of the appellate tribunal, the opinion proceeds thus:

"But in the present case the complainant's patent, as it now stands, has never been before the Circuit Court of Appeals, and has therefore never been considered. It is in effect a new patent, and the subject of its validity or invalidity has never been decided by any tribunal."

Do these considerations justify the action of the Circuit Court in granting a rehearing without leave of this court?

The decisions of the Supreme Court require a negative answer. That court has held repeatedly that the authority of the court below extends only to executing the mandate. *Ex parte Sibbald*, 12 Pet. 488, 492, 9 L. Ed. 1167; *Ex parte Dubuque & Pacific Railroad*, 1 Wall. 69, 17 L. Ed. 514; *Stewart v. Salamon*, 97 U. S. 361, 362, 24 L. Ed. 1044. In the last-cited case the court, speaking by Chief Justice Waite, said:

"This is an appeal from a decree entered upon our mandate. No complaint is made as to its form, and it seems to be in all respects according to our directions. The effort of the appellant was to open the case below, and to obtain leave to file new pleadings introducing new defenses. This he could not do. The rights of the parties in the subject-matter of the suit were finally determined upon the original appeal, and all that remained for the Circuit Court to do was to enter a decree in accordance with our instructions, and carry it into effect."

In *re Potts*, 166 U. S. 263, 267, 17 Sup. Ct. 520, 521, 41 L. Ed. 994, the court, speaking by Mr. Justice Gray, said:

"When the merits of a case have been once decided by this court on appeal, the Circuit Court has no authority, without express leave of this court, to grant a new trial, a rehearing, or a review, or to permit new defenses on the merits to be introduced by amendment of the answer."

In view of these controlling decisions, we are constrained to allow a writ of mandamus in accordance with the prayer of this petition.

There is no good reason for withholding (as was done in *Re Potts*, *supra*) the writ of mandamus until the complainant below can apply to this court for leave to file a petition for a rehearing in the Circuit Court. We are unable to see that the entry of the decree directed by our mandate can at all prejudice the rights of the complainant, based on his disclaimer, or prevent any proper proceeding which is now open to him.

It is ordered that a writ of mandamus issue as prayed for.

ATWOOD-MORRISON CO. v. SIPP ELECTRIC & MACHINE CO.

(Circuit Court, D. New Jersey. May 1, 1905.)

1. PATENTS—EVIDENCE OF PATENTABILITY.

The issuance of a patent is of itself evidence of the patentability, usefulness, and novelty of a device.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 53, 62.]

2. SAME—EVIDENCE OF PRIOR USE.

Evidence of prior use, to overcome the presumption of validity of a patent, must be clear and convincing in character and of weight sufficient to overcome every reasonable doubt.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 104.]

(Syllabus by the Court.)

In Equity. Letters patent No. 729,084 sustained on the evidence.

Charles Neave, for complainant.

Edward Q. Keasbey, for defendant.

CROSS, District Judge. The complainant corporation is owner of letters patent No. 729,084, which it alleges in its bill of complaint has been infringed by the defendant, and it asks for the usual relief in such cases. The complainant's title to said patent is unassailed, and its infringement is admitted. Indeed, the proofs show that the defendant copied its device after the complainant's and that they are practically alike. The patent in suit is for certain "new and useful improvements in swift-brackets," and its inventor described its purposes as follows:

"The object of my invention is to provide a bracket for supporting a swift for winding silk, cotton, or other threads or filaments. As commonly used the brackets supporting the swifts are rigid and not capable of adjustment, while the conditions of use require a vertical change of position of the swift in order to obtain the best results. * * * In the form of swift supports commonly used, the arm supporting the swifts is secured rigidly to the frame, and by my invention I have provided means whereby the swifts are adjustably supported in place on the frame, thereby securing better results in the winding operation."

There are five claims in the patent. Of these the complainant relies upon the first, second, and fourth only, as follows:

"(1) In combination in a winding-frame, a swift-supporting rail, a plural number of bases adapted to be secured to the rail, a swift-arm pivoted to each base at or near the rail, each arm having on its outer end means for supporting the ends of two adjacent swifts, and means for locking each arm against pivotal movement.

"(2) In combination with a winding-frame, a swift-supporting rail, a plural number of bases adapted to be secured to the rail and having means of adjustment lengthwise of the rail, a swift-supporting arm pivoted to each base at or near the rail, each arm having at its outer end means for supporting the ends of two adjacent swifts, and means for locking the arm against pivotal movement."

"(4) In combination in a winding-frame, a swift-supporting rail, a series of two or more bases adjustably mounted upon the rail, a swift-supporting arm pivoted to each base at or near the rail, each arm having at its outer end

recessed pockets on opposite sides to receive the swift-bearing of the ends of two adjacent swifts, and means for preventing pivotal movement of the swift-arm."

The patent, it may be said, is a combination of known elements; but this does not affect its validity, if the new combination and arrangement of such elements produces a new and beneficial result. The defendant corporation contends that the patent in suit is invalid because of the prior art, and seeks to show, not only that all of its elements had been embodied in combination in previous patents, but that similar devices had been made and sold for several years prior to the date of the patent in question, and consequently that the invention lacks novelty. In other words, it claims that any mechanic skilled in the art could have done exactly what the complainant's patentee did.

The testimony clearly shows that it is of great advantage to have the brackets which support the swifts adjustable. This is done by the complainant's device in two directions—vertically by having the arm pivoted near the base, and horizontally by means of a slot where it is attached to the rail. Many advantages are attained by the use of these adjustments, among them the following: By the use of the pivoted adjustment the "swifts" can be supported at a height convenient to the operator; swifts of different sizes can be used when skeins of different sizes are to be wound; the axis of each swift can be maintained in a horizontal line, and the axes of all the swifts on the same frame supported at the same height; and by the use of the horizontal adjustment, which may be either a slot in the base of the bracket or a slot in the rail (both being embraced in claim 2), the brackets can be adjusted on the rail to suit the varying widths of the swifts, and, when so adjusted, can be conveniently and securely fastened to the rail.

It is unnecessary to cite authority to show that the issuance of the complainant's patent is in itself evidence of the patentability, usefulness, and novelty of the device, and that such presumption can be overcome only by reliable and certain proof; while as to its utility it is enough to say that it has been adopted and used by the defendant corporation, and this fact is sufficient to establish its utility, at least as against it. *Lehnbeuter v. Holthaus*, 105 U. S. 94, 26 L. Ed. 939; *Young v. Wolfe* (C. C.) 120 Fed. 956, 958.

To show the want of novelty or invention in the patent of the complainant, the defendant has cited a number of prior patents, and has also offered proof to show that the complainant's device was used and sold several years before its patent was issued. Some of the patents cited by the defendant, notably the Betz, Hayes, and Sweett patents, show that an adjustable joint or pivot was old in the art at the time the patent in suit was issued, and this is not denied by the complainant. None of the patents just referred to, however, have anything to do with winding machinery.

The Atkinson and Wrigley patents, issued in 1873 and 1883, respectively, both relate to winding frames in which the silk is wound from "risers" and not from "swifts." These devices, "risers" and "swifts," are unlike each other and have different uses. In the use

of a "riser" the bracket supporting it is not held in a fixed position vertically, but, on the contrary, it is purposely movable, since the bracket must frequently be raised or lowered to increase or decrease the tension of the skein which is being unwound. Furthermore, each bracket supports a single reel, and the adjustment of the lower bracket of a "riser" frame is not at all for the purpose of alignment of all the reels. Again, this bracket has two arms between which the reel is held, one longer than the other, and some of the models show a handle at the end of the longer arm for the purpose of quick and ready adjustment in case the skein should become tangled, which, as said before, is not the case with the swift-arm; for the adjustment of the swift-arm, when once made, is locked to prevent pivotal action in a vertical direction.

Adjustable brackets for "risers," the evidence shows, had been generally known and used for years, yet they do not seem to have suggested the use of adjustable brackets for "swifts"; for Mr. Ryle, the well-known silk manufacturer of Paterson, N. J., testified that swift-brackets were made rigid for 45 years, to his knowledge, and the president of the defendant company admits in his testimony that before he saw the Morrison machines he had never seen a winding machine having brackets supporting adjacent swifts, the brackets being made of a base portion fastened to the rail, and the arm portion attached to the base portion in such a way as to provide for vertical adjustment.

The only anticipating patent offered by the defendant which relates to swift-hangers is the Atwood patent of 1882. Under this patent the bracket or bar was constructed with "upwardly converging slide-ways or slots, and means for holding said bars in said slide-ways or slots," and with the beam to which the brackets or bars were attached movable, so that all the brackets or bars could be adjusted at the same time. But this device is not at all like the complainant's; that is, it does not show a swift-arm pivoted to each base at or near the rail, nor was there any means of adjustment of each arm separately, lengthwise of the rail, or means for locking each arm separately against pivotal movement. Other patents have been cited, but it is unnecessary to discuss them. The Atwood patent seems to be the only one at all like the patent in suit, and even this, when considered in detail, is, as we have shown, wholly unlike it.

The defendant, however, has not rested his case upon the patents cited, but has endeavored to show prior use and sale of the device in question. To maintain this position, the courts require that the proofs shall be clear, satisfactory, and beyond reasonable doubt. The burden of proof rests upon the defendant, and every reasonable doubt should be resolved against him. In the case of *Young v. Wolfe* (C. C.) 120 Fed. 956, 959, the following rule is laid down:

"In approaching the defense of prior use the rule of evidence applicable thereto should constantly be borne in mind. The defense must be established beyond a reasonable doubt. The reason for the rule is obvious. It is so easy to fabricate or color testimony which lies almost wholly in the control of the person producing it, the infirmities of the human memory are so great,

and the liability to mistake so manifest, that the court is never justified in permitting such testimony to outweigh the presumption of validity which attaches to the patent, unless it be of such a character as to carry a clear conviction and remove every reasonable doubt. This court has frequently had occasion to consider this defense, and it is, therefore, unnecessary to repeat what has been often said heretofore. *Thayer v. Hart* (C. C.) 20 Fed. 693; *Mack v. Spencer* (C. C.) 52 Fed. 819; *Lalance Co. v. Habermann Co.* (C. C.) 53 Fed. 375; *Singer Mfg. Co. v. Schenck* (C. C.) 68 Fed. 191.

"One of the alleged prior uses took place in 1871, over 30 years before the date of the witnesses' testimony; the other uses began in 1876, and have continued since that date; but the occurrences principally relied upon took place in 1887 and 1888, over 14 years prior to the date of the testimony."

Many cases of similar purport could be cited, but it seems unnecessary to protract this discussion for that purpose. The witnesses for the defendant, who testified upon the question of user, relied upon their memory to give details of what they say was made and sold from 12 to 15 years or more before the time when they testified. Under such circumstances the memory, even when untrammelled by self-interest, is liable to betray and mislead. In considering the testimony upon this point, it will be observed that it is not cumulative. The witnesses are testifying to different transactions occurring at different times. There is no corroboration, certainly no sufficient corroboration, and yet, if these devices were made in the numbers and used with the frequency that some of the witnesses would have us believe, full and ample corroboration could have been readily obtained, either from mechanics, manufacturers, or users.

Attention has already been called to Mr. Ryle's testimony, and to the testimony of the president of the defendant company, as tending to show that the complainant's device was not used as claimed by the defendant. It is worthy of consideration, moreover, that the testimony in this case was largely taken in the city of Paterson, N. J., which might properly be called the home of the silk manufacturing industry, and where we might naturally expect to find every known device of the character in question in daily use; and yet the evidence furnished, and upon which we are asked to rely to overthrow the complainant's patent, is stale and uncorroborated. Then, too, the models exhibited by the defendant do not, in our opinion, show the elements in combination which the complainant's device shows, and, if any one of them can be said to closely resemble the complainant's, it will, upon inspection, be found to be crude, imperfect, and deficient, and apparently the result of chance rather than of design. "Mere accidental use of some of the features of an invention, without recognition of its benefits, does not constitute anticipation." *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658; *Wickelman v. A. B. Dick Co.*, 88 Fed. 264, 31 C. C. A. 530.

In this connection, too, it may well be asked why, if the complainant's device had been well known for years, as the defendant would now have us believe, was it made by the defendant just after, rather than long before, its introduction by the complainant; and why was it necessary, when the defendant did make it, to use

the complainant's device as a model? Upon the whole case we think the patent in suit should be sustained, since the presumption existing in its favor has not been overcome by reliable and certain proof.

A decree will be entered pursuant to the prayer of the bill.

F. W. WEBB MFG. CO. v. J. L. MOTT IRONWORKS et al.

(Circuit Court, D. Massachusetts. April 29, 1905.)

No. 1,947.

PATENTS—INFRINGEMENT—WATER-CLOSETS.

The Chadbourne patent, No. 461,734, for an improved construction of the bowl and seat in water-closets, is valid and entitled to a liberal construction. Claim 1 also construed, and *held* infringed.

In Equity.

William A. Macleod, for complainant

W. P. Preble, Jr., for defendants.

HALE, District Judge. In this bill in equity the complainant charges infringement of letters patent of the United States No. 461,734, dated October 20, 1891, granted to Anne Gurley Chadbourne, for an improvement in water-closets. Claim 1 of the patent, alleged to be infringed, is as follows:

"(1) In water and other like closets or articles, the combination, with the seat thereof, having its main opening extended to form a cut-away portion or opening extending through the front part of the seat, of the bowl constructed to also form a front passage, and to stop or close the forward part of the front cut-away portion or opening in the seat when the seat is closed, substantially as and for the purposes herein set forth."

In the specification the patentee says that the invention consists in a novel construction of the bowl and the seat, and that the object of the invention is to prevent contact of the body with the front portion of the seat and bowl—especially with the front part of the seat; that it is also to avoid constant care; and that it is to exclude escaping odors. From the drawings it appears that the specification and claims were drawn with reference to a closet boxed in, and not of modern construction. Under the claim the features of construction are a seat of usual construction and material, except that the main opening is extended through the front part of the seat; the seat being U-shaped or horse-shoe shaped. The bowl is constructed to form a front passage below the above-described opening in the seat. The front part of the wall of the bowl is made with an upwardly projecting portion, which extends across the gap at the front of the seat, and completely fills the space between the two front ends of the seat; coming substantially to the level of the top of the seat. The complainant gives three important reasons for this construction: First. Danger of contagion is prevented; such danger being due to the contact of the person with the

seat, and the front portion of the bowl being composed of porcelain or other nonabsorbent material, which is readily kept clean. Second. The upwardly raised projection at the extreme front of the bowl fills the space between the ends of the seat, and prevents the projection of matter in a substantially horizontal line over the front top of the hopper. This result is accomplished by the patentee without leaving any crevice or capillary space between the seat and the hopper. Third. A tight closure is formed when the invention is embodied in the oldfashioned closet or box construction.

The inventive thought of the patentee seems to have been a combination, with a seat having a cut-away portion extending clear through the front portion, of a hopper extended forward, and having a projection thereon co-operating with the cut-away portion of the seat, and closing it.

The defense presented with much force and ability by the defendants is that, if the patent is valid at all, it is so limited in its scope by the prior art as not to include the defendants' device. The argument in respect to the limitation of the scope of the claim is founded in some measure upon examination of the file wrapper at the Patent Office. It appears that in the original draft of the claim the words "or opening extending" were not in the claim. The clause containing those words read, "with the seat thereof having its main opening extended to form a cut-away portion through the front part of the seat." It is urged that these words were inserted by the direction of the Patent Office, the claim having been rejected before their insertion, by reason of the Smith patent of 1882; the drawing of that patent showing that its invention consisted in an opening in the seat extended forward, but not entirely through the front part of the seat. An examination of the drawing of the Smith patent makes it clear that this opening did not extend through the front part of the seat, but only well forward into the seat, leaving the front portion of it intact. By inserting the words "or opening extending," the Chadbourne patent was prevented from possible interference with the Smith patent, as by these words the meaning was made clear that the opening must be cut away, and must extend through the front part of the seat.

The argument based by the defendants upon this is that a horse-shoe seat, with the opening merely cut away through the front, and with no forward extension of the bowl, does not come within the claim of this patent. The prior art is invoked to show that the seat, with the front cut away to form a crescent-shaped seat, is old; that the researches at Rome and Pompeii show just such seats; and that other examples are found in certain British patents and in American patents. The prior art with reference to bowls has been fully examined and brought to the attention of the court. Many seats are found in the prior art which show bowls or hoppers of various shapes, with elongated fronts to prevent the projection of matter over the front. These are found in combination with seats, for the evident purpose of preventing contamination. Bowls

are produced which show a rib or projection formed upon the upper edge of the bowl. A bedpan is found in the Gilbert patent which presents a clear instance of a bowl extended forward, and of a seat cut away to prevent contamination; the forward extension of the bowl being apparently for a similar purpose to that of the Chadbourne patent. While this device shows the opening extending through the front part of the seat, it does not show a bowl in co-operation therewith, provided with a projection integral with the bowl, which fills the cut-away space in the seat. We find in the prior art no bowl with a raised lip in front, in combination with a seat having its main opening extended to form a cut-away portion or opening extending through its front part.

The device of the defendants is a closet made with open plumbing, in which all woodwork and casings are eliminated. It has the cut-away seat, and the projection on the hopper filling the opening in the seat. The device has the main opening extended through the seat at the front. The bowl is not elongated so far forward as the bowl of the patent in suit, but it is formed with a rib or lip in front to close the cut-away portion of the seat. It seems to the court to present the distinguishing characteristics of the construction forming the subject of the Chadbourne patent. It has the seat with the main portion extended or cut away through the front part. It has the bowl, which in the main part of its upper margin stands beneath the seat, having an upwardly projecting portion at the front, which spans the opening in the seat, and rises substantially to the level of the upper portion of the seat. The fact that this bowl does not extend forward so far relatively as the bowl of the Chadbourne patent does not, in our opinion, relieve the defendants' device from being an offending device. The bowl does have some forward extension, and it distinctly presents the seat having its main opening extending through it at the front, combined with the bowl having a raised lip in front, filling the whole cut-away space in the seat.

The inventive thought of the patentee in the patent in suit was, as we have said, the combination of a seat having the front portion completely cut away and projecting forward, with a bowl in co-operation with the seat, extending forward, and provided with a projection which fills the whole cut-away space in the seat. We think the device of the defendants is an infringement upon this inventive idea of the patent in suit. We do not think that the Chadbourne patent should be limited to any particular form of seat or to any particular form of bowl, so long as the main opening extends forward through the front part of the seat and is combined with a bowl having some forward extension, and constructed with a lip to form a front passage, which closes the forward part of the cut-away portion of the seat. Although the defendants' device does not have the forward portion of the bowl and seat extended so far relatively as is shown in the patent in suit, we think it is structurally within the inventive idea of that patent. We think that the patent is not limited in its scope by the prior art. We

must decide that the invention in the mind of the patentee includes the device of the defendants. The court is of the opinion that the patent in suit is valid, and that it is infringed by the device of the defendants.

Decree to be entered for the complainant, for an injunction and an accounting.

E. REGENSBURG & SONS v. JUAN F. PORTUONDO CIGAR MFG. CO.

(Circuit Court, E. D. Pennsylvania. April 4, 1905.)

No. 29.

1. PATENTS—VALIDITY—CIGAR BANDS—NOVELTY.

Patent No. 715,512, for an improved cigar band, one end of which is wider than the other to facilitate adjustment and prevent the gummed end from adhering to the wrapper of the cigar, *held* void for want of novelty.

2. TRADE-MARKS.

Complainant patented a paper cigar band, wider at one end than the other, of brown color, on which was printed the words, "Trade-mark, Pat'd Dec. 9, 1902, E. Regensburg & Sons." *Held*, that neither the color, shape, nor material of the band alone or in combination was sufficient to constitute a valid trade-mark, since it did not point to the source from which the goods on which the bands were used were derived.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, §§ 19-21.]

3. SAME—INFRINGEMENT.

Plaintiff's band was not infringed by a band of similar color and shape, on which the only lettering was an inscription of the name "Juan F. Portuondo" in script, evidently imitating an autograph.

4. SAME—UNFAIR COMPETITION.

Where defendant's cigar band was selected with no reference to complainant's, or intention to imitate it, and defendant's band did not resemble complainant's so closely as to deceive a person of ordinary intelligence and observation, defendant was not guilty of unfair competition.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, §§ 79-81.]

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

In Equity. Final hearing.

Briesen & Knauth, for complainant.

C. Andrade, Jr., for respondent.

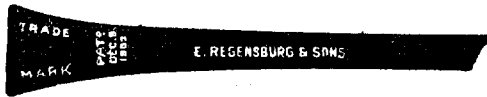
J. B. McPHERSON, District Judge. The complainant, a New York corporation engaged in the manufacture and sale of cigars, seeks to restrain the defendant from using a certain kind of band around its cigars, on several grounds:

(1) Because the defendant's band infringes the complainant's patent for a similar device.

(2) Because the defendant's band infringes the complainant's trade-mark, namely, the same band for which the patent was taken out.

(3) Because, in view of the prior use of the complainant's band, the defendant is guilty of unfair competition by the use of its own device.

Both bands are dark brown, differing very little from the color of a cigar wrapper, and the lettering upon both is white. The following figure shows the complainant's band:



And the defendant's band, which differs in shape and lettering, is shown upon the following reproduction:



1. The complainant is now the owner, by assignment, of patent No. 715,512, granted to M. Regensburg on December 9, 1902, upon an application filed on March 19th of that year. The subject of the invention is an improvement in "cigar bands made of paper or like material, one end of which is provided with an adhesive substance, so as to adapt it to be pasted upon the other end of the band." The object of the invention is stated to be "to provide an improved cigar-band of the above-indicated class, which will be so constructed as to protect the cigar-wrapper from contact with the adhesive portion of the band, and to materially reduce the time and labor necessary for applying the band to a cigar." The specification describes the band in the following language, and recounts the advantages that may be expected therefrom:

"The improved cigar-band, as shown in detail in Fig. 2, consists of a strip of paper or like flexible material, A, which at one end, A³, is narrow and provided with a coating, A¹, of any adhesive, such as mucilage, while that portion upon which the said adhesive is adapted to come when the band is folded around the cigar, as shown in Fig. 1, is materially wider than the portion carrying the adhesive A¹. This wide portion, which may be tapering, as shown, is indicated at A², * * * indicating two acute-angled side pieces of this tapering portion. In the particular construction shown in the drawings the adhesive, A¹, is located at the extreme end of the band, and the enlargement, A², is likewise located at one end of the band. I desire it to be understood, however, that such location is not absolutely essential, the main object being to provide an enlargement at that portion of the band which comes in contact with the portion carrying the adhesive, A¹.

"In applying my improved cigar-band the wide portion, A², is first placed upon the wrapper of the cigar, and then the band is folded around the cigar, so as to bring the portion with the adhesive, A¹, upon the wide portion, A². The connection is made in the usual way by moistening the adhesive.

"A material advantage of constructing the cigar-band as above described resides in the fact that there is no danger of pasting the portion with the adhesive even partly upon the cigar-wrapper, since on account of the enlargement, A², it is not absolutely necessary to place the adhesive or coated end in an exactly central position. This of course also enables an operator to perform the work of applying the bands much more rapidly and with a certainty of satisfactory results. With the adhesive cigar-bands as generally made there is always some danger of pasting the adhesive portion of the band

partly on the cigar-wrapper, and the result is that the mucilage or other adhesive may impart an unpleasant flavor to a portion of the cigar. Besides, since a portion of the band adheres to the wrapper there is danger of injuring the wrapper when removing the band. All this is avoided by my invention, and as there is no need of exercising great care in pasting the adhesive end actually upon the center of the other end portion of the band the operation can be performed much more rapidly than with the usual style of cigar-band.

"Another advantage of my improved form of cigar-band is that it may be very readily torn off a cigar without injuring the wrapper. This will be clearly shown by reference to Fig. 1. Those portions of the band which project sidewise from the adhesive portion, A¹, can be readily taken hold of and lifted from the wrapper, so as to enable the user to tear the band without any danger of damaging the wrapper."

The claim is as follows:

"As a new article of manufacture a laterally-flexible paper cigar-band one end of which is broader than its body and than the other end, the narrow end carrying adhesive substance on its inner side, so that it may overlap the broad end and be secured thereto, the broad end allowing the adhesion with the narrow end within a considerable radius and furnishing projections extending laterally for detaching or destroying the band."

Evidently, under this claim, nothing is material except the shape of the band. Its color is of no importance, and neither is the width of its body. In the complainant's argument much stress was laid upon the words "laterally flexible" in the claim, and it was insisted that this phrase necessarily implies that the body of the band must be very narrow, because a wide band cannot be "laterally flexible." I think it would be a fair reply to say that the difference in lateral flexibility between a wide band and a narrow band is comparative only, and that not a word is said in the specification about the narrowness or width of the body of the band. All that is emphasized in the specification is the capital importance of having one end narrower than the other; but, if this difference in width exists, the description in the specification and the claim are both satisfied whether the band be an inch wide or only a quarter of an inch. But, without laying any weight upon this consideration, it seems clear to me that the patent is invalid for want of novelty. There are no prior patents, but there is clear and satisfactory evidence that narrow bands, and bands having one end narrower than the other, had been in public use at least as early as 1895, 1898, and 1899. I shall not repeat the evidence upon this point, but content myself by referring to what the witnesses have said concerning the Seidenberg, the Marguerite, and the Tom Keene bands. In addition to these private bands, there were several varieties of public bands—that is, such as could be bought by any dealer who desired them—whose ends differed in width, and had been used as early as 1898. These bands were publicly used to secure the same advantages that are described in the patent; and while they may perhaps have lacked something of the efficiency that is to be found in the complainant's band, still they disclose the essential idea, and, in my opinion, therefore, the patent cannot be sustained.

2. The trade-mark to which the complainant lays claim is the band described in the patent, to which is added the brown color

and the white lettering displayed thereon. The mark is not registered, and its common-law validity need not, I think, be discussed. Assuming that the field was clear for its adoption, and conceding that it was put into use in June, 1900, while the defendant's band was adopted in 1903, I am unable to see sufficient evidence of infringement, even if the complainant's mark be given its widest lawful scope. Certainly the color alone could not be appropriated by the complainant as a trade-mark, nor the shape alone, nor the material alone; and even the combination of these three elements could not make a valid trade-mark, because neither singly nor in combination do they point to the complainant as the source from which the goods are derived. Something more is needed to supply this defect, and this is found, if at all, in the lettering upon the band. But, after this is added, and assuming that a valid trade-mark has now been produced by combining the four elements referred to, it remains to inquire whether the defendant's band infringes; and upon this point I think that an inspection, which need not be minute, shows plainly that the differences are apparent to an ordinarily careful observer. The defendant's band contains nothing but a name in script, evidently imitating an autograph, while the complainant's band contains a firm name in block letters, the words "Trade-Mark, Pat. Dec. 1902," and the initials "E. R. & S." It is likely enough that a near-sighted man, or a man with impaired vision, unaided by glasses, or a man in so much of a hurry as to be unwilling to stop for a careful look, might mistake one band for the other, but these classes may be disregarded in applying the test of similarity. Certainly an ordinarily intelligent man, able to see and to read, and willing to take a few seconds' time to examine the two bands, would inevitably discover that one of the banded cigars was made by the complainant and the other by the defendant. And, if this is so, it is clear that the charge of infringement has not been established. The complainant's evidence concerning confusion of the two bands is too slight to support the charge.

3. The averment of unfair competition has still less to support it. The defendant's band was selected with no reference to the complainant's, and with no intention to imitate it, even remotely. In point of fact, as already stated, it does not resemble it so closely as to deceive a person of ordinary intelligence and powers of observation, and, so far as they have two features in common—a brown color and white lettering—the resemblance was not intended, and was not adopted with any design upon the complainant's trade.

A decree may be entered dismissing the bill at the costs of the complainant.

EXPANDED METAL CO. et al. v. BRADFORD et al.
(Circuit Court, E. D. Pennsylvania. March 30, 1905.)

No. 14.

1. PATENTS—INFRINGEMENT—PROCESS.

While there may be a patent for a machine to perform a process patented by another, its use in the practice of such process constitutes an infringement of the process patent.

2. SAME—PROCESS OF EXPANDING METAL.

The Golding patent, No. 527,242, for a process of making open or reticulated metal work by slitting and expanding sheet metal, covers a novel and useful process, and discloses invention. Also held infringed.

In Equity. On final hearing.

Ernest Howard Hunter, for complainants.

E. Hayward Fairbanks, for respondents.

HOLLAND, District Judge. This bill was filed April 30, 1903, alleging that the defendants infringed letters patent No. 527,242, for a new and useful improvement in the art of expanding sheet metal, issued to John F. Golding October 9, 1834, subsequently assigned to the Expanded Metal Company, and Chess Bros. under it became exclusive licensees of this patent in Pennsylvania and a number of other states. The defendants, in their answer, deny infringement, and allege invalidity of the patent, for want of utility, lack of patentable subject-matter as a method or process, and anticipation and lack of invention, in view of the prior art.

The method of making the old and well-known metallic screening in use for a great number of years was described in the Long patent issued in England in 1862, and the Golding patent issued in this country in 1884, and was as follows:

"In the manufacture of slashed metallic screening, a blank piece of sheet metal is taken, of the required size and thickness, and at intervals it is slashed or cut; the slashes or cuts in each line of the cuts being opposite to the spaces between the slashes or cuts of the adjoining line or lines. These slashes or cuts are made of the required length to form the proper sized meshes. After the metallic sheet is cut or slashed as above described, it is stretched in line transversely to the length of the slashes or cuts, thus forming meshes. The act of stretching causes the metal forming the boundaries of each mesh to take an oblique position, amounting nearly to a perpendicular line, thus presenting the cut edges of the metal to the surface of the screening. Between the ends of the slashes or cuts are spaces of metal uncut which hold the strands or meshes together."

The Golding patent issued in 1884 for this process of manufacturing metallic screening was passed upon by the Circuit Court of Missouri in 1900, and held to be anticipated by the Long patent issued in England in 1862. *Expanded Metal Company et al. v. Board of Education et al.* (C. C.) 103 Fed. 287. This finding was sustained by the Circuit Court of Appeals of the Eighth Circuit in 1901, but the patentability of the process was not questioned. 111 Fed. 395, 49 C. C. A. 406.

By this process of manufacturing expanded metal, the stretching was frequently irregular, and the slashed sheet, while enlarged or

expanded in width, was very materially shortened in length, and the product was not a success commercially.

Golding subsequently applied for a patent for a new and useful process for manufacturing slashed metallic screening, and letters patent were issued to him in 1885 for this process, which consisted in cutting successive slashes or incisions in the sheet, beginning at one side and near the corner thereof, and pressing the strips thus partially disconnected from the sheet successively away from the sheet in a direction oblique thereto, but otherwise in a plane perpendicular to said sheet, or substantially so; the two operations, as well as the further operation of bending the connected material and giving form and set to the meshes, being effected by the simultaneous operations of slashing and pressing. By this method, however, the expanded product is shortened in length to the extent of 15 or 20 per cent. The meshes are not at right angles to each other, and the sheet, when expanded, is of an irregular form, and could not be economically and conveniently used in square iron frames without a waste of material and cutting through the meshes in fitting it to such a shaped frame. Commercially this product was a little more successful than its predecessor.

In 1894 Golding applied for a patent for a new and useful improvement in the art of expanding sheet metal, and the patent in suit was issued to him, wherein he described the process as follows:

"In the manufacture of what is now generally known as expanded sheet metal, it has been customary to first cut the slits in the sheet metal at short distances apart, and to open the metal at the cuts thus formed by bending the severed portions or strands in a direction at right angles, substantially, to the plane of the sheet. It has also been made by simultaneously cutting and opening the metal by means of cutters set off or stepped relatively so as to make the slashes or cuts in different lines, in the manner set forth in patent No. 381,230 or No. 381,231, of April 17, 1888. In both of these methods the product is somewhat shorter and materially wider than the original sheet, but practically no stretching or elongation of the metal forming the strands is caused. In my present invention I seek to avail myself of the ability of the metal to stretch or distend, as well as of its ability to bend under strain or pressure, and the invention consists in the improved method of making expanded metal, viz., by simultaneously cutting and opening or expanding the metal at the cuts by stretching the severed portions. In the practice of the invention, I prefer to make a series of slits in a straight line across the edge of the sheet, and at the time of cutting the slits, and as a continuation of that operation, to depress or stretch the severed metal (i. e., those portions of the sheet lying outside of the cuts) in a direction at right angles to the sheet, without any contraction from the length of the original sheet. This operation is then repeated after the sheet has been fed forward, the slits being made opposite the portions unsevered at the previous operation, and so on until the entire sheet is expanded. My invention allows the use of a single, straight underknife, which, of course, does not need to be shifted in changing the location of the cuts; and the upper cutters are also arranged in a straight line, but their acting edges represent a corrugated form of alternate transverse projections and recesses, adapted to coact with the underknife in cutting the slits at the proper intervals and to stretch the severed strands, and either the upper cutter or the sheet is shifted back and forth between the operations, as will be understood.

"In the accompanying drawings, Fig. 1 is a perspective of a sheet, a part of which has been expanded by my invention. Fig. 2 is an elevation of the preferred form of cutters used in manufacturing it. Fig. 3 is a section on line 3-3 of Fig. 2. Fig. 4 is a plan of the sheet, showing the first line of

slits in dotted lines. In the drawings, A represents the sheet from which the expanded metal is formed, B represents the series of upper or moving cutters, and C is the lower knife, which may be, and preferably is, stationary. The lower edges of the cutters, B, are so shaped as to form alternate transverse projections, b, and recesses or intervening openings, c; the projecting portions being adapted to coact with the lower knife in forming the slits. They are also adapted to force or carry downward the severed portions of the metal, at the same operation, to the position indicated by the broken lines, m, at Fig. 2. It will be noticed that at the time the bend is imparted to the severed portion there can be no contraction in the product from the length of the sheet, A, because the ends of the severed portion or strand are still integral with the sheet, and will not permit it. The sheet is then fed forward, and the slitting and stretching operation is repeated. One line of slits across the sheet is formed at each operation, and the upper cutters or the sheet may be shifted, and the sheet be fed forward between the operations, so that the slits are in every case made back of the portions left unsevered at the preceding operation, or, in other words, the slits and unsevered portions alternate in position at successive operations. The bend given to the severed portion, or strands, as they are usually called, is in a direction at right angles to the plane of the sheet; and, as there is no contraction in the length of the metal, it necessarily follows that the expansion is obtained from the stretch, distension, or elongation of the severed strands.

"I claim the herein-described method of making open or reticulated metal work, which consists in simultaneously slitting and bending portions of a plate or sheet of metal in such manner as to stretch or elongate the bars connecting the slit portions and body of the sheet or plate, and then similarly slitting and bending in places alternate to the first-mentioned portions, thus producing the finished expanded sheet metal of the same length as that of the original sheet or plate, substantially as described."

The open or reticulated metal work made by this process accomplishes something entirely new. By this novel process Golding was able to expand his metal into a reticulated metal work, and produce an expanded sheet of the same length as the ordinary blank metal plate. It was stronger, and the meshes regular in form and appearance, and exactly at right angles with each other. A line through the intersection of the meshes in one direction is exactly at right angles with a line drawn through the intersection in the other direction. From this it results that the expanded sheet is not only regular in form and appearance, but has the maximum possible strength afforded by the thickness of the metal and size of the mesh, and, as a commercial product, it can be put to many additional uses than the slash metallic screening theretofore manufactured. This process is a new and useful method not theretofore known or used in the prior art. It is a mode or treatment of metal, as distinguished from the machinery or means by which the result is accomplished. In the language of the patent law, it is an art, and just as patentable as a piece of machinery. *Cochrane v. Deener*, 94 U. S. 780, 24 L. Ed. 139; *Tilghman v. Proctor*, 102 U. S. 707, 26 L. Ed. 279.

While I am of the opinion that the process is patentable, yet it does not follow that the making of a machine such as that invented by the defendants is an infringement of the plaintiffs' patent. One may discover a new and useful process by which metal may be expanded, irrespective of any particular form of machinery or mechanical device, and another may invent a labor-saving machine

by which this operation or process may be performed; and each may be entitled to his patent. *Corning v. Burden*, 56 U. S. 252, 14 L. Ed. 683. There is no claim in the plaintiffs' patent for any particular machine by which this process of expanding metal is accomplished, and we see no reason why the means of performing the process patented by the plaintiffs cannot be embodied in a machine and patented by the defendants. *Cochrane v. Deener*, supra. So that, in so far as the plaintiff's bill relies upon the mere creation of the machine by the defendants to perform the process which he has patented, as an infringement, it must fail, as the defendants would have a right to construct and patent such a machine. It is entirely separate and apart from the process which the machine is intended to accomplish. *Robinson on Patents*, §§ 904, 925. The evidence, however, is that the defendants infringed the plaintiff's patent in using its process, and expanded metal, to some extent, was produced by their machine by the same process covered by the plaintiff's patent, and without its permission. To that extent the rights of the plaintiffs in the patent in suit were infringed. The metal manufactured under the process of the plaintiffs' patent was produced here in Philadelphia prior to the bringing of this suit, and whether it was produced by a perfect machine, or not, can make no difference. The patented process was used, and the infringement complete.

The plaintiffs' bill is therefore sustained, and a perpetual injunction awarded.

RUMFORD CHEMICAL WORKS v. NEW YORK BAKING POWDER
CO. et al.

(Circuit Court, S. D. New York. January 3, 1905.)

PATENTS—CONTRIBUTORY INFRINGEMENT.

One who manufactures and sells an element in an infringing baking powder to be used by the purchaser in making such baking powder is a contributory infringer, and liable equally with the purchaser for the profits or damages resulting from the sale of the infringing article.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 402.

Contributory infringement of patent, see note to *Edison Electric Light Co. v. Peninsular Light, Power & Heat Co.*, 43 C. C. A. 485.]

In Equity. On motion for modification of decree.

Antonio Knauth, for the motion.

C. A. L. Massie, opposed.

LACOMBE, Circuit Judge. It seems unnecessary to alter the phraseology of the decree, which does not now require an ascertainment of the profits made by the Provident Chemical Works in manufacturing the phosphatic-acid element. As to acid made by it and sold to the New York Baking Powder Company it is a contributory infringer, and is liable equally with the baking powder company for profits or damages resulting from the sale of baking powder in which the acid contributed by it has entered as an element.

MILLS v. RUSSELL MFG. CO.

(Circuit Court, D. Connecticut. April 4, 1905.)

No. 1,157.

PATENTS—INFRINGEMENT—CARTRIDGE BELTS.

The Mills patents, Nos. 756,177 and 756,178, for cartridge belts, construed, and held not infringed.

In Equity. Suit for infringement of letters patent Nos. 756,177 and 756,178 for cartridge belts, granted to Anson Mills March 29, 1904. On final hearing.

Marcellus Bailey, for complainant.

H. A. Seymour, for defendant.

PLATT, District Judge. This is a suit charging infringement of two letters patent granted to complainant for improvements in cartridge belts—Nos. 756,177 and 756,178—both dated March 29, 1904, and capable of conjoint use in the one belt. The infringement complained of is based upon a contract with the government dated May 2, 1904, entered into by the defendant, to manufacture and sell certain belts, similar to a sample belt marked "B," which was submitted with the bid and made a part of the contract, which plaintiff claims contains the invention of the patents in suit. This is substantially the same as the belt which on October 24, 1904, was pronounced satisfactory, and which will be made and delivered under the contract; the only difference being that Sample B is handmade, and not quite as neat and uniform as the latter. On all the issues, it would seem immaterial which belt shall be made the basis of discussion. The latter is Exhibit Russell Manufacturing Company's 1904 Cartridge Belt. When preparing to bid, defendant found at the War Department a sample belt like complainant's Exhibit Sample Belt. It refused to follow the sample, giving as the reason that the construction of the pocket on that belt was patented, but guarantying one equal, if not superior, to the sample, and one more presentable and useful; but nothing was said about the narrow end which forms the subject of the other patent.

The defenses are: (1) noninfringement; (2) lack of patentable invention; (3) lack of novelty.

It is imperative to set forth the somewhat peculiar history connected with the belt of patent 756,177, before it is possible to construe the claim with any accuracy. The outlines alone will be sketched in. Prior to 1902 complainant had enjoyed the privilege for many years of furnishing the government with service belts for carrying individual cartridges, which were known as single or double loop belts. In 1902 a new rifle was adopted, which required cartridges in clips; five cartridges being held together by each clip. Since this model could not at once displace all the service rifles, it followed naturally that a belt was required which should not only retain the clips when the belt was carelessly handled, but should be so constructed as to prevent single cartridges

from slipping out in like circumstances. In February, 1903, Gen. Mills, the complainant, was asked to submit a suitable belt to meet the emergency. He complied, but on March 28, 1903, the board of ordnance condemned all the samples which had been submitted, giving divers reasons for such action, and offered suggestions as to what was needed. From these we find that the board suggested that the belt to be satisfactory must have (1) ten pockets instead of eight; (2) pockets must be without thimbles, aprons, or partitions; (3) the flaps must be of single thickness and as short as possible; (4) that part of the body of the belt having no pockets should be reduced in width to $1\frac{3}{4}$ inches immediately after the end pockets; (5) the two ends of the belt must be secured by a bronze buckle, which should always remain equally distant from the end pockets, and the belt should be capable of easy and quick fastening. Both complainant and defendant submitted samples and bids in accordance with the suggestions contained in the board's report. The defendant's bid was far below that of complainant, but was rejected, without giving any reason, so far as appears. Complainant's bid was rejected because it was excessive, although the department had known in advance what the bid was to be, and had suggested no reduction. When the unfavorable report of March 28, 1903, was handed to complainant by Capt. Gibson, it appears by Gen. Mills' testimony that Capt. Gibson told him a narrower buckle was advisable, and asked him if he could not prolong the belt from the last pocket on either side 13 inches, so as to have two narrower webs or billets at each end, to which the narrower buckle could be adjusted. After the June bids were rejected, proposals were again issued on July 25, and the bids were opened on August 25, 1903. Complainant submitted again the samples offered at the June bids, materially reducing its price on belts and suspenders: the defendant offering no belt, but submitting suspenders with prices. Complainant's bid was accepted, and the sample with equal width until the very end is reached was adopted, and the contract with the government signed, October 19, 1903.

The original application for patent 756,177 was filed August 12, 1903, which was, as will be seen, during the suspense between the proposal for bids of July 25 and their opening on August 25, 1903. As filed, it covered both narrowed ends and pockets. It was divided, and the divisional application was filed October 14, 1903, five days prior to signing the contract under which the long billet ends were not accepted. This application, viewed from any angle which the observer may desire, is an exceedingly interesting production, and deserves careful examination. Time is too precious to permit me to dissect and analyze the proceeding as minutely as it warrants. The drawings of the original application present the precise construction suggested by the March 28, 1903, report. One element of the combination in the claims is the "narrow end portions, A'." The specification states that "the pockets stop short of the ends of the belt, and these ends are reduced in width as shown; this being for the comfort and convenience of the wearer, and to permit of the use of fastening devices of small dimensions." It will be remembered

that Capt. Gibson, from the board, had told Gen. Mills soon after the March 28th report that a narrower buckle was advisable, and asked him if he could not prolong the ends, with that idea in view. The specification then proceeds to explain how to form the narrow ends with selvedge edges, and protect the place where the reduction in width occurs at the shoulders, c, by metallic binders, d. In all this the thought clearly is to get long, narrow ends, so that the fastening buckle can be narrow, and to prevent raveling where those ends begin to be narrow, by housing with metal the threads which were cut off in the loom where the width of the selvaged webbing was suddenly reduced. The purpose of the shoulder, c, is obvious. It is further explained in the specifications how the narrow ends can be "bent back on themselves" to hold "buckles, clasps, or other fastening devices." The inference is irresistible that on October 14, 1903, when the divisional application was filed, the long, narrow end was a feature of the belt which was believed to have found favor in the eyes of the authorities, and was worth nurturing and protecting.

The application of October 14, 1903, which has just been partially explained, was allowed November 9, 1903. In the meantime the government had entered into the contract with complainant for belts like the other sample, on which no long, narrow end appeared. It would seem to have taken a few days for the patentee to recover from the shock which the changed condition of things produced. At any rate, he invested no additional funds when notified of the allowance. On the contrary, a request to amend the application, under rule 78, without withdrawing the case from issue, was recommended by the examiner, and approved by the acting commissioner. In accomplishing this extraordinary feat, the patentee not only took out the old specifications and claims, and inserted new ones, reducing the claims to one, on account of surplusage, but canceled the old drawing and substituted a new one; saying as he did so:

"This new drawing is furnished because of the oral suggestion of the examiner that the construction which is the subject of the application, although clearly set forth in the specifications, is somewhat obscure in the original drawing."

I am constrained to applaud the acumen of the examiner. The original drawing shows ten pockets. The unpocketed portion is materially reduced in width immediately after the end pockets. The long, narrow ends are shown as bent back upon themselves. The amended drawing shows nine pockets. Vide contract of October 19, 1903. The unpocketed part is only slightly reduced in width, and that reduction does not take place immediately after the end pockets, but considerably beyond that place. The attempt to show the ends bent back upon themselves is weak, and in Fig. 2 what little, narrow end does exist is pretty much all cut away. The specification undertakes to convey the idea that the narrowed ends are devised to permit the use of narrow fasteners, which, by bending back, may be engaged with eyelets between the pockets

on the under portion of the belt. The narrow center buckle idea of the original application has vanished into thin air.

With this monstrosity allowed in December, the final cash investment was deferred until March 7, 1904, and on March 10, 1904, the department sent out proposals for the bids of April 9, 1904. The patent was issued March 29, 1904, and 11 days later the bids were opened. The proposals of March 10th called for a belt of uniform width throughout its length, and provided with nine pockets. The defendant's bid was accepted, and we now come back to the question of whether the belt which it proposes to furnish is an infringement of the patent in suit No. 756,177.

In connection with my story of the divisional application, I have, I think, commented sufficiently to show that my conclusion obviously must be that the "narrowed ends" of the patent in suit must be the "narrow end portions, A'," of the original application, shown in both specification and drawing, and appearing again in the drawing of the patent, and that, since no such narrowed end can be found in defendant's proposed belt, there can be no infringement found in this respect. In the patent in suit another limiting feature shown, is that the cartridge pockets on the belt are "formed integral therewith." Patents 399,924 and 666,687 are referred to in the specifications, and from them we can obtain light on the meaning of those words. Both of the patents referred to show a belt in which the two sides and bottom of the pockets are woven integral with the body of the belt, and compel us to so construe them now. The defendant's pockets are not woven integral with the body of the belt in the three necessary directions. They are formed by weaving long loops, integral with the belt so far as the sides go, but open at both ends. The lower end is then firmly stitched into the belt, and in this way a pocket is made. This is a small matter, but is worth noticing. There is a determined effort made by complainant to sustain his theory of the narrow end fastening invention, by claiming that the wide end fastenings, which hooked over the two sides of the belt, and which have been used since 1889 in the army, under complainant's patent of March 4th of that year, and are still in large use, mutilated, chafed, abraded, and horribly tortured the soldiers. Complainant's wide army experience, and that of his expert, are placed in high light for the purpose of bringing out the most effective contrast. If one could believe that a kindly government had permitted such horrors to continue for such an unreasonably long time, with wider, tighter, and unsuspended belts, it is impossible to be satisfied that the suffering must continue as long as the hook-over fastenings are used, now that the belts are narrower and looser, and are largely sustained by the shoulders, from which they practically hang by the suspender. The picture of the tortured soldier is, in my opinion, an elusive fantasy. The board of ordnance complained about the hook fastenings because they wore out the edges of the webbing, and said no more. The original specifications failed to invoke this "field service" argument. I cast it aside.

Having reached the conclusion indicated, it would be wasteful to follow the various elements of the claim to the last analysis, as sur-

veyed with the prior art in view; but I am bound to say, in passing, that I have enjoyed my study of that question, and that, aside from the narrow end, as I construe the claim, with its selvaged edge, I can find no patentable novelty or invention therein.

We turn now for a moment to No. 756,178. This is the single claim:

"A woven cartridge-belt having cartridge-receiving pockets, and covers therefor, of greater width than the pockets to which they are applied, attached to the back wall of their pockets, and prolonged below their point of attachment as loose strips of similar width, which extend substantially to the bottom of their respective pockets, as and for the purposes hereinbefore set forth."

By the drawings and specifications we find that the belt of the patent in suit has covers wider than the pockets, and of substantially the same width throughout their length. The cover or flap is secured to the back wall of the pocket at only one point, which is by three eyelets near the top, and is prolonged beyond the point of attachment, as a loose strip of similar width, to the bottom of the pocket, whereby a curl is produced on each side of the pocket for its entire depth. This curl has two uses: First, to prevent the escape of loose cartridges; second, to prevent the drawing out of the loose depending end as cartridges are being withdrawn by hand. In defendant's belt we find that the outer and upper portion of the interior part of the cover is of the same width as the pocket, while the lower and inner portion is tapered, so that it becomes somewhat narrower at the bottom, and narrows for almost the entire depth. The upper portions are secured to the pocket by three eyelets, but the lower, narrower ends are firmly stitched to the back wall of the pocket. That portion of the cover which comes over from the top is slightly wider than the pocket, to prevent the escape of loose cartridges, but the lower interior part is narrower than the width of the pocket, thus leaving more available space within the pocket. This difference in construction appears to be due to the fact that complainant's pocket was woven integral with the belt on three sides. It was therefore impossible to narrow the strip on the inside of the pocket and sew it down, so that it might not be caught up in pulling cartridges out. The only thing left to do was to let it go to the bottom of the pocket with its extra width, and depend upon the curl or corrugation to prevent the catching up while extracting cartridges. Defendant's construction cannot be pulled out in any circumstances, and adds considerably to the roominess of the pocket by eliminating the cumbersome curls or corrugations. When the introduction of the cartridge clips demanded a new style of pocket, the requirements of the board were that the depending end of the flap should be effectively secured in place, and not form a shoulder to obstruct the ready withdrawal of the clips. Gen. Mills accomplished this as best he could, in view of his integral pocket. Mr. Fisher did a better thing, because he was not hampered by Gen. Mills' integral construction at the lower end of the pocket. I cannot follow the complainant in his contention that his patent broadly covers wide flaps fastened inside the

pockets to prevent the escape of loose cartridges. In both cases, if any invention exists, it is of the narrowest kind, and must be limited to the precise construction claimed.

I will not dabble with the prior art on paper, except to say that it has been long common to cover pockets with a flap wide enough on the outside to prevent the escape of small articles, but the question here turns upon the disposal of that portion of the flap which goes down into the pocket. This portion of defendant's construction is made in conformity with letters patent 764,803, dated July 12, 1904. The issuance of this patent so soon after the complainant's patent in suit raises a presumption that there is a patentable difference between them, and I can see nothing which rebuts that presumption.

The general conclusion reached is that defendant's construction does not infringe either of the claims in issue, and the bill must be dismissed.

UNIVERSAL WINDING CO. v. FOSTER MACH. CO.

(Circuit Court, D. Massachusetts. April 10, 1905.)

No. 1,607.

1. PATENTS—INFRINGEMENT—COP-WINDING MACHINES.

The Wardwell patent, No. 506,959, for an improvement on the cop-winding machine of patent No. 480,157 to the same patentee, claims 6 and 7, cannot be given the broad construction required by their terms, but must be limited to the specific, independent means shown in the specification for producing an increment of motion in the thread-guide actuating shaft or in the cop shaft, or the mechanical equivalent of such means. As so construed, *held* not infringed.

2. SAME—TENSION DEVICE FOR COP-WINDING MACHINE.

The Wardwell patent, No. 509,413, for a tension device for cop-winding machines, claim 1, is for a new combination which produces an improved result in the winding art, and is entitled to a fairly liberal construction. Also *held* infringed.

3. SAME.

The Wardwell patent, No. 562,263, for a cop-winding machine specially adapted to the winding of conical cops, claim 3, construed, and *held* not infringed.

In Equity. Suit for infringement of letters patent No. 506,959, dated October 17, 1893, No. 509,413, dated November 28, 1893, and No. 562,263, dated June 16, 1896; all relating to cop-winding machines, and granted to Simon W. Wardwell, Jr. On final hearing.

Dickerson, Brown, Raegener & Binney, for complainant.
Roberts & Mitchell, for defendant.

COLT, Circuit Judge. In this bill the complainant charges infringement of three patents issued to Joseph R. Leeson, assignee of Simon W. Wardwell, Jr.—No. 506,959, issued October 17, 1893; No. 509,413, issued November 28, 1893; and No. 562,263, issued

June 16, 1896. These patents relate to cop-winding machines, and they cover improvements in an advanced art. Patent No. 506,959 relates to the increment and adjustable mechanisms, patent No. 509,413 to tension devices, and patent No. 562,263 to means for winding a conical cop as distinct from a cylindrical cop.

Upon a comparison of the Wardwell machine with the defendant's machine, there is manifestly a wide difference in the specific means employed. It is clear that the defendant has not embodied in its machine the forms of mechanism disclosed in the Wardwell patents. The complainant therefore does not rely upon the claims of the patents covering the specific devices shown in the drawings and described in the specifications, but upon the broad claims in which general descriptive terms are employed.

From the evidence and brief of counsel, the complainant seems to rest its case largely on the underlying proposition that Wardwell solved the problem of laying a Fiji wind, which differs essentially from all other kinds of wind; that he was the first to invent a machine capable of producing this wind; that such machine possesses an accuracy of operation and a capacity for nice adjustment which differentiate it from all other winding machines; and finally that the Wardwell machine marks a distinct and revolutionary advance in the art.

With respect to this position the complainant is met at the outset by the difficulty that this broad issue has already been adjudicated in the case of Universal Winding Company v. Willimantic Linen Company (which arose in the Second Circuit) 82 Fed. 228, affirmed 92 Fed. 391, 34 C. C. A. 415. In that case this complainant brought suit upon three earlier Wardwell patents, covering respectively the machine for winding a Fiji cop, the process, and the product. It was there decided that the method and product patents were void for want of patentable novelty. As to the machine patent, it was held that it must be limited to the kind of means described, and that it did not embrace unequal cone pulleys as an equivalent of such means; that, since the patent described means whereby there are produced two sources of motion, or two distinct speed relationships between the thread-guide operating shaft and the cop shaft, it was not infringed by a machine wherein the means operated to produce only one such source of motion, or a single speed relationship; in other words, that the increment mechanism, such as the arms, pawl, cam, gears, etc., disclosed in this Wardwell patent, was not infringed by an increment mechanism composed of adjustable tapering pulleys and belts, although both devices accomplished the same result.

The Wardwell patent in suit, No. 506,959, states that it is for improvements in the machine of patent No. 480,157, which was the machine patent before the court in the Second Circuit. The specification says:

"My invention relates to mechanism for winding cops and bobbins in the manner set forth in my letters patent No. 480,157, dated August 2, 1892, and my invention consists of certain improvements of the apparatus."

These improvements relate essentially to the different specific means employed for securing the necessary increment of motion in the thread-guide actuating shaft or in the cop shaft. These means are shown in figures 1 and 2 of the patent in suit, and in figure 5 of the earlier Wardwell patent. The invention covered by the patent in suit, therefore, is merely for improved means for doing the same thing as was done in the earlier patent. This view is corroborated by a reference to the file wrapper and contents. The first six claims of the original application were rejected by the Patent Office on reference to the earlier Wardwell patent, No. 480,157. The claims of the patent as issued are substantially like these claims, though claim 6 of the application has become claim 7 of the patent. In reply to this rejection, the patentee's solicitor, Mr. Foster, who is the expert witness for the complainant, and was the solicitor for both these Wardwell patents, wrote:

"Regarding claims 1 to 5, we have to point out that in this case the increment of motion is obtained positively by a variation in the relative positions of the gears to each other and to the shafts. In Wardwell's prior patent the gears and shafts always maintain their relative positions, and the increment of motion is obtained by feeding the spool holder, which has proved to require very nice operating mechanism, that can be avoided by the particular mechanism now claimed. In view of the fact that this particular mechanism is all that is claimed, and that it is not shown in the reference, we submit that the claims should be allowed. As regards claim 6, it is admitted that the prior patent shows devices which will accomplish the same object as those specified in claim 6, but they are not combined with the gears so as to shift the position of the gears. In view of the fact that it is common in various kinds of mechanism to drive one part from another through the medium of a disk and a friction wheel bearing with its edge against the disk, it would seem unnecessary to file the model to demonstrate the efficiency of such a contrivance."

This communication shows that at the time the patent was granted the patentee regarded the essence of his invention to lie in the production of the increment of motion by means of "a variation in the relative positions of the gears to each other and to the shafts," or in devices "combined with the gears so as to shift the position of the gears," as distinguished from the increment devices of his earlier patent, which have "proved to require very nice operating mechanism, that can be avoided by the particular mechanism now claimed."

With respect to claim 6, which has become claim 7 of the patent, and is one of the two broad claims now relied upon, it is stated that the "prior patent shows devices which will accomplish the same object as those specified." Further, that the shifting gear arrangement is of the essence of this invention is made clear by the observation in this letter that it is a common form of mechanism "to drive one part from another through the medium of a disk and a friction wheel bearing with its edge against the disk." These are the means described in the patent for effecting "a variation in the relative positions of the gears to each other and to the shafts," and similar devices are shown in the Malin patent of 1886, No. 342,702. This feature of obtaining the necessary increment of motion by imparting to one of the gears an additional rotary movement

independent of the shaft is found in varied forms of expression in the first five claims of the patent. For example, claim 1 reads as follows:

"(1) The combination of the winding shaft, a, thread-guide shaft, b, and connections for imparting reciprocation to the thread-guide, gears connecting the two shafts, and means for imparting to one of said gears an additional rotary movement independent of that of the shaft, substantially as set forth."

The present suit is brought upon claims 6 and 7, which are much broader in their language:

"(6) In a machine for winding cops, a revolving holder, a reciprocating thread-guide, and means for varying the relative movement of the holder and guide at each rotation, and adjusting devices for regulating the extent of the varying movement, substantially as described.

"(7) The combination of the winding shaft, the shaft driving the thread-guide, gears connecting the two, means for imparting an additional rotary movement to one of the shafts, and adjustable devices for regulating the extent of said movement, substantially as set forth."

With respect to the last element in these claims, "adjustable devices for regulating the extent of the varying movement," the specification says, "Any suitable means may be employed for shifting the wheel, 15—for instance, a screw shaft, q, having a knob, r." This has reference to the means for adjusting the friction wheel upon the disk, and this feature involved no invention, in view of the prior art as exhibited, for instance, in the Malin patent already referred to.

The real question in this case is the breadth of construction which should be given to the second element in claim 6, "means for varying the relative movement of the holder and guide at each rotation," and the third element in claim 7, "means for imparting an additional rotary movement to one of the shafts." Notwithstanding the broad language in which this element of the claims is expressed, the claims must be limited to Wardwell's actual invention over his prior patent; in other words, to the improved increment mechanism accomplished by a variation in the relative positions of the gears to each other and to the shafts, as distinguished from the somewhat complicated and less precise increment mechanism of the prior Wardwell patent.

A brief reference to the mechanical principles which lie at the foundation of all winding machines, and to the different types of machines, will throw light on the general subject under consideration, as well as on the true position which the Wardwell patent in suit occupies in the art.

In a winding machine, from the very nature of the mechanical laws involved, the character of the wind will always depend upon the speed relation between the winding spindle and the thread-guide, and this speed relation must remain constant throughout a given wind. In machines for laying the ordinary spool wind, each layer of thread in the spool is wound in a continuous helix, and the successive coils are laid side by side. At the end of each layer the helix is reversed, thus forming a succession of layers one above the other. In these machines, from the very character of

the work, the reciprocation of the thread-guide is slow, in comparison with the rotation of the winding spindle. In order to secure a close wind in machines where both coarse and fine threads are to be laid, it is apparent that this speed relationship must be capable of slight adjustment. We have then in these machines what may be termed a normal speed relationship between the winding spindle and the thread-guide, and a necessary variation of this relative movement in order to wind threads of different sizes. In these machines the shoulders or heads on the spool support the ends of the thread mass.

In machines for winding self-binding cops on a quill or tube, it is obvious that the relative movement of the thread-guide to the winding spindle must be more rapid than in the ordinary spool wind, in order that the end coils of thread may be bound down, and so retained in their proper places. In this class of machines a normal speed relationship between the thread-guide and the winding spindle—as, for example, when the thread-guide makes one reciprocation to four complete revolutions of the winding spindle—will manifestly lay a cop in which the successive coils of thread will lie one above the other. In order to lay what is called a close-wound cop, in which the successive coils are laid side by side, we must have a modification of this normal relative movement; in other words, the thread-guide must either gain or lose a fraction during each reciprocation, or the winding spindle must either gain or lose a fraction during such reciprocation. This variation of relative movement is known as the increment or gainage. This increment or gainage is also subject to another slight adjustment where any change is made in the size of the thread. We have then, in close cop-winding machines, first, a normal speed relationship between the winding spindle and the thread-guide; second, a variation of this relative movement to secure the requisite increment; and, third, a still further slight adjustment in case a different size thread is to be laid. This whole problem, therefore, simply resolves itself into the speed relationship between the winding spindle and the thread-guide.

Winding machines may be conveniently divided into the cone-pulley type of mechanism and the gear type of mechanism. If we take two cone pulleys of unequal size, and mount the thread-guide shaft upon the larger pulley and the winding shaft upon the smaller pulley, we can get a relative or normal movement between the shafts of two to one, or three to one, or four to one, etc., according to the relative size of the pulleys; and, if we attach to the machine a device for shifting the pulley belt, we can vary this relative movement so as to obtain an additional movement or increment of motion for the purpose of laying the coils side by side, and we can further regulate or adjust the extent of this varying movement in order to accommodate the machine to different sizes of thread. If we take two gear wheels of unequal size, the larger having a correspondingly greater number of teeth, and so organize them in a machine that the larger wheel actuates the thread-guide shaft and the smaller wheel the spindle shaft, we can obtain a relative or

normal movement between the shafts of two to one, three to one, or four to one, etc., according to the relative size and number of teeth in the wheels. If now we wish to vary this relative or normal movement so as to obtain an additional movement or increment of motion in one of the shafts, it must be done by some independent mechanism.

The cone-pulley type of winding machine is illustrated in the Smith patent, No. 146,210, issued January 6, 1874, although it may never have been used practically to make a Fiji cop. The prior Wardwell patent, No. 480,157, and the Wardwell patent in suit, No. 506,959, are illustrations of the gear type of machine, with independent means for varying the relative or normal movement of the two shafts. The cone-pulley type seems a more simple and less cumbersome form of mechanism, and it appears to have largely supplanted in the market the gear type.

Starting with a system of gears which produces a certain relative movement between the spindle shaft and the thread-guide shaft, there are disclosed in the earlier Wardwell patent independent means, comprising levers, pawls, disks, cams, rock-shafts, etc., for adding an increment of motion to the spindle shaft. Again, starting with a system of gears which produces a relative movement between the spindle shaft and the thread-guide shaft, there are found in the Wardwell patent in suit independent means for adding an increment of motion to the thread-guide shaft, comprising additional gears and means (a disk and friction wheel) for shifting the position of the gears. There are also provided means for adjusting the friction wheel (screw shaft and knob), whereby the extent of the increment is regulated.

We have then, in the first Wardwell patent, a machine for winding a cop, composed of a system of gears and independent mechanism for giving the requisite increment of motion to the spindle shaft; such increment or gainage being necessary in order to lay the strands side by side instead of one above the other. We have in the second Wardwell patent which is in suit a machine for doing the same work by the same class of independent instrumentalities, with this addition, however: that means are employed for adjusting the extent of the increment so as to accommodate the machine to different sizes of thread.

Coming now to the question of infringement, I find that the fundamental distinction between the defendant's machine and the machine of these Wardwell patents is that the former is built, broadly speaking, upon Smith, or upon the cone-pulley type of mechanism. The defendant, in view of the prior art, had the right to obtain the requisite relative or normal movement between the spindle shaft and the thread-guide either by the use of pulleys or of gears; and, in a machine so organized, the defendant was also privileged to vary such relative movement for the purpose of obtaining the proper increment or gainage by the use of pulleys and a shifting device. On the other hand, the defendant was prohibited from employing any independent means for this purpose, such as are disclosed in the Wardwell patent in suit. A careful investiga-

tion of the prior art, and the lines along which it has reached its present high stage of development, shows that the Wardwell patent in suit must be limited to his specific independent means for producing the increment of motion, or to such independent means as are fairly the equivalent of those described in the patent, and that the use of other means which are not independent in the sense of the Wardwell invention, and which were well known in the art, is not an infringement. Since there are employed in the defendant's machine essentially different means for obtaining the increment of motion, that machine does not infringe either claim 6 or claim 7 of the Wardwell patent.

Wardwell Tension Patent, No. 509,413.

The Wardwell patent, No. 509,413, is for improvements in tension devices, whereby a uniform tension is maintained throughout the winding. The specification says:

"It has been found that in certain classes of winding machines—as, for instance, in machines for building up or winding cops of elastic thread, such as silk—if the tension upon the thread is maintained uniform throughout the winding, the stricture upon the outer layers of thread in the cop, acting upon the elastic body beneath, causes the cop to bulge out at the ends. I have discovered that this may be corrected by gradually decreasing the tension as the cop increases in size, and my invention consists of means whereby such decrease in tension may be automatically effected."

The description of the apparatus shown may be summarized as follows: The tension device proper consists of a wheel around which the thread passes from the source of supply to the winding spindle, the tension being produced by frictional resistance to the rotation of the wheel. The device for varying this frictional resistance is a brake composed of a pair of tongs, the jaws of which bear upon opposite sides of the shaft to which the wheel is secured. The pressure exerted by the tongs on this shaft is regulated by an adjustable weight suspended from the tongs. By adjusting this weight lengthwise of the tongs, the leverage of the weight, and consequently the braking action of the tongs, is correspondingly varied. The weight is connected with a carriage, which is supported to travel on a stationary guide. The shifting of the carriage and weight along the guide varies the tensional effect of the wheel through the brake. The patent shows a bearing which constantly bears upon the surface of the cop, and which is connected with the carriage by suitable levers so arranged that, as the cop increases in size, the weight is shifted lengthwise of the tongs and toward the tension wheel, and so diminishes the tension on the traveling thread. The specification says:

"It will be evident that different kinds of variable tension devices for retarding the feed or movement of the thread may be used. * * * In order that the weight may be properly moved toward the pivot of the tongs in proportion as the cop increases in size, I combine with the weight certain appliances of any suitable character whereby it may be shifted according to the increase in the size of the cop. * * * Any suitable form of brake or friction brake may be employed, together with means for reducing its action in proportion as the size of the cop increases. * * * It will be evi-

dent that different shifting devices, altered in position as the cop increases in size, will, if connected with the movable weight, W_1 , act with like effect."

This patent was applied for at the same time as patent No. 506,959, and in figure 4 of the latter patent is shown a detailed and practical illustration of one of the forms in which this tension device may be embodied. The specification of this latter patent says:

"I do not here claim the tension and thread take-up devices illustrated in figure 4 hereof, as the same constitutes the subject of a separate application for letters patent, serial No. 451,386," which is the tension patent in suit.

Only the first claim is in issue:

"(1) The combination with a tension device adapted to receive and act on a traveling thread, and means for varying the action thereof, a cop to which the thread passes, a movable bearing supported to be shifted on the increase in the size of the cop, and connections between said bearing and the means for varying the action of the tension device, substantially as set forth."

This claim is for a new combination. It accomplishes a new, or at least an improved, result in the winding art. No one before Wardwell had ever regulated the speed of the thread, or controlled the friction upon it, as the cop increased in size, without decreasing the speed of the cop rotation, with a consequent loss of winding capacity.

The essence of the Wardwell invention lies in the conception of an independent tension device, or a tension device which is separated from the cop mechanism, and which regulates the tension upon the traveling thread, as the cop increases in size, by means of a bearing or arm which rests either directly upon the cop, or, what is in effect the same thing, upon the sliding thread-guide carriage, in which case the thread-guide causes the carriage to move backward as the cop increases in size. In the operation of this device, the growing cop, either directly, or indirectly through the thread-guide and sliding carriage, shifts the movable bearing or arm, which, through its connections, actuates the tension device, thereby securing a uniform speed of the thread as it is delivered to the growing cop. The specification does not limit the invention to any particular form of tension device or movable bearing, or connections between them. The sole limitation imposed by the specification, the claim in issue, and the proceedings in the Patent Office upon the original application, is that the connection between the cop mechanism and the tension mechanism must be by means of a movable bearing, or a bearing of some such character as is described and shown, as distinguished from any kind of shifting devices. During the winding operation the thread-guide and spindle must of necessity gradually separate as the thread mass increases in size. To this end, either the thread-guide or the spindle may be mounted on a sliding carriage. In the Wardwell machine the thread-guide is mounted on a sliding carriage, and the movable bearing or arm which actuates the tension device rests on a lug of the sliding carriage. In the defendant's machine the cop is mounted on a sliding carriage, and the movable bearing or arm

rests on a projection of the sliding carriage. This is the only distinction between the two structures, aside from the difference in the specific form of the tension device and connecting mechanism. There can be no question that the defendant has embodied in its machine the Wardwell conception of an independent tension device, which is only connected with the cop mechanism by means of a movable bearing, and which, through this bearing, regulates the tension upon the traveling thread as the cop increases in size.

The position which this patent occupies in the art entitles the first claim to a fairly liberal construction. The Wardwell conception of a tension device was new, and the extensive presentation of the prior tension art in the present record only emphasizes its novelty and utility as applied to the winding art.

Claim 1 includes the following elements: (1) A tension device adapted to receive and act on the traveling thread. (2) Means for varying the action of the tension device. (3) A cop to which the thread passes. Although the defendant's tension device and the means for varying the action thereof are different, it has employed in its machine well-known equivalents of these elements. (4) A movable bearing supported to be shifted on the increase in the size of the cop. In defendant's machine there is found a movable bearing or arm supported to be shifted on the increase in the size of the cop, which rests upon a projection of the sliding cop carriage, and which has the identical function of the Wardwell bearing. (5) Means for varying the action of the tension device. While differing in specific form, the equivalent of this element is found in the defendant's machine.

Upon full consideration, I am satisfied that the defendant's machine infringes claim 1 of this Wardwell patent.

Wardwell Conical Cop Patent, No. 562,263.

The Wardwell patent No. 562,263 is for improvements in cop-winding machines, and relates especially to conical cops. The specification says:

"It is considered advantageous for many purposes, and especially for those in which use is made of cotton yarns, to employ cops of yarn of a conical shape. It is more difficult and expensive to wind such cops in the ordinary manner because of their unequal size at the opposite ends, of the necessity, in some cases, of having solid conical blocks for winding the thread upon, and the ordinary modes of winding such cops are apt to result in laying the thread irregularly, so that the cop is not of a uniform character throughout. The objects of my invention are to wind such cops with the same facility as the ordinary cylindrical cops, to adapt my improved means of winding to existing machines without material alteration thereof or preventing their use for winding cylinder-cops, and to enable me, in winding tapering or conical cops, to make use of the mode of winding set forth in my letters patent Nos. 480,158 and 486,745."

In a machine for winding cylindrical cops, the winding shaft is always straight, and therefore always remains parallel with the path of the thread-guide. In a machine for winding conical cops, the winding shaft is bent, with the result that one of its sides is always parallel to the path of the thread-guide. It is apparent that a

cylindrical-cop machine, with its straight winding-shaft, is not adapted to wind conical cops, and that a conical-cop machine, with its bent winding-shaft, is not adapted to wind cylindrical cops. In the patent in suit, Wardwell first describes a conical-cop machine with a bent winding-shaft, and this is illustrated in Fig. 1 of the drawings. The cylindrical-cop machines were in common use, and could not be adapted to wind conical cops without an alteration in their construction, whereby a bent winding-shaft was substituted for a straight winding-shaft. In order to avoid the necessity of making this change in construction, Wardwell conceived the idea of building a conical cop-holder which could be operated upon the straight shaft of the old cylindrical machines. He accomplished this by means of a stationary conical support having an opening parallel with one of its sides, which was placed upon the spindle of the old machines. The cop-holder was then superimposed upon this support, and connecting means were provided, whereby the cop-holder was rotated with the winding shaft. The specification says:

"The arrangement illustrated in Fig. 1 would necessitate a special construction of machine, and, as it is desirable in many instances to adapt my improvement to machines already in use, I have provided means whereby in such machines the conical holder may be arranged with one side parallel to the path of the guide, and yet be positively driven from the ordinary winding-shaft, which is also parallel to the path of the guide in existing machines. In such case I provide a hollow conical holder, B¹, Figs. 2 to 6, which I arrange upon a conical support, K, which is suitably secured to the frame, H¹, of the machine; the winding end or spindle, t, of the shaft, A¹, extending through an opening in the support, K, which is parallel to one side of the support; the latter being arranged so that the said side is also parallel to the path of the guide. The holder, B¹, is placed upon the support, K, and is provided at the larger end with an annular rack, f, for engaging the pinion, g, upon a spindle, h, turning in a bearing of the frame, H¹, and having a pinion, i, engaging a toothed pinion, J, upon the shaft, A¹. As the shaft, A¹, revolves, it turns the holder, B¹, through the intermediate gears, thereby rotating it positively in relation to and in unison with the movements of the reciprocating guide, B, and obtaining the same result as shown in Fig. 1, except that the support, K, and conical holder may be removed whenever it is desired to wind a cylindrical cop. In Fig. 3 a gear-wheel, j¹, connected detachably to the spindle, t, by a set screw, engages a gear, f¹, at the end of the holder, which is prevented from turning by a pin, m. In the construction shown in the remaining figures of the drawings, the frame, H², cam, X, shaft, A¹, expansion wheel or pulley, G, pulley, F, belt, C, swinging frame, L, supporting a reciprocating bracket, M, to which the guide, D, is secured, are all substantially such as set forth in my aforesaid patent, No. 536,672, and operate in like manner, and need not here be particularly described."

Claim 3 is alone in issue:

"The combination in a winding-machine of a guide, and means for reciprocating the same, a stationary support for a cop-holder, a cop-holder with one side parallel to the path of the guide, and means for rotating the same upon the support, and means for securing a variation in the relative movements of the holder and guide, substantially as set forth."

This claim is composed of the following elements: (1) A guide. (2) Means for reciprocating the guide. (3) A stationary support for the cop-holder. This is the conical support, K, with an opening extended through it which is parallel to one of its sides. (4) A

cop-holder with one side parallel to the path of the guide. This is the hollow conical holder, B¹, which is placed upon the stationary support, K, and which has one side made parallel to the path of the guide by virtue of the support, K. (5) Means for rotating the same upon the support. (6) Means for securing a variation of the relative movement of the holder and guide. These latter means are specifically set forth in the Wardwell patent, No. 536,672.

The essence of the invention covered by this claim resides in the conical support, K, and the claim must be limited to a device which includes such a support. The prior art forbids any broader construction of the claim, since it was old to wind conical cops by mounting a winding spindle so as to maintain one side of the cop always parallel with the path of the thread guide. In defendant's machine, the stud or nonrotating bearing which supports the conical cop or spindle is bent, just as the winding shaft is bent in Fig. 1 of the Wardwell patent, so that one of the sides of the spindle is always brought parallel with the path of the thread-guide. The defendant's machine therefore does not contain the conical support, K, of the Wardwell patent; in other words, there has been eliminated from this machine the very substance of the Wardwell invention.

A decree may be drawn for complainant with respect to claim 1 of patent No. 509,413, and dismissing the bill as to patents No. 506,959 and No. 562,263. The question of costs is reserved.

UNIVERSAL WINDING CO. v. FOSTER MACH. CO.

(Circuit Court, D. Massachusetts. April 10, 1905.)

No. 1,606.

PATENTS—VALIDITY—COP-WINDING MACHINES.

The Morse patent, No. 572,309, for a cop-winding machine, claim 2, construed, and *held* void because too broad in its terms, in view of the prior art.

In Equity. Suit for infringement of letters patent No. 572,309, for a winding machine, granted to Alfred B. Morse December 1, 1896. On final hearing.

Dickerson, Brown, Raegener & Binney, for complainant.
Roberts & Mitchell, for defendant.

COLT, Circuit Judge. This case is between the same parties, relates to the same general subject-matter, and was heard at the same time as the preceding case, in which an opinion has been handed down this day.

The present suit is brought upon the Morse patent, No. 572,309, dated December 1, 1896, which has been assigned to the complainant. This patent is for improvements in winding machines of the Wardwell type, which were the subject of consideration in the other case. At the time of the application for this patent the larger

problems in the winding art had already been solved. Nor is there anything which shows that the inventions covered by the numerous claims of the patent have proved highly useful or practical, or have made any special impression on the art. The specification says:

"This invention has for its object to provide an improved machine for winding thread, string, yarns, and the like on to cops, cones, or other equivalent or well-known forms. My invention comprehends a rotatable spindle upon which the quill, cone, or other core which is to receive the yarn or string is mounted to swing about an axis, and a thread-guide also preferably mounted to swing about an axis, and means to move this movable thread-guide in such manner as to cause it to maintain a substantially fixed line of travel relatively to the swinging spindle. My invention comprehends a novel variable tension for the string or yarn, and other features, which, with the foregoing, will be hereinafter fully described, and particularly pointed out in the claims."

From this description it would seem that the main improvement sought to be covered by this patent, as it lay in the inventor's mind, consisted in combining with a swinging spindle a swinging thread-guide; the thread-guide having a swinging movement in order that it may always maintain substantially a fixed line of travel relatively to the swinging spindle. I am not aware that this particular arrangement is found in the prior art, nor has it been pointed out that it possesses any special utility over other organizations. The other improvement which the inventor saw fit specifically to refer to is a novel tension device, while the remaining improvements are summarized in the general term "other features."

The inventions described in the 19 claims of the patent may be summarized as follows: (1) Improved means whereby the thread-guide is kept in fixed relation to the axis of the winding spindle; (2) improvements in mounting a cop-spindle, whereby the always positively rotating spindle may be moved away from the thread-guide; (3) improvements in stop mechanism; (4) improvements in stop motion; (5) improvements in the construction of cop-spindle; (6) improvements in tension devices; (7) improvements in gear device mechanism.

The defendant is charged with the infringement of the second claim:

"In a machine of the class described, a frame, a thread-guide, a winding-spindle moving bodily from said thread-guide during the winding of the thread thereupon, a support for said bodily-movable spindle, and mechanism to positively rotate the said spindle in any of the positions into which it is moved during the winding operation, substantially as described."

This claim is broad in its terms, and includes the following elements: (1) A frame; (2) a thread-guide; (3) a winding-spindle movable bodily from the thread-guide during the winding; (4) a support for the movable spindle; (5) mechanism to rotate positively the spindle in any of the positions into which it is moved. Morse came too late in the development of the winder art to entitle him to the comprehensive invention embraced in this claim. It was old to move the spindle bodily away from the thread-guide during the winding, while at the same time the spindle is positively or axially rotated. In fact, all the elements of the claim, as well

as the combination itself, are found in prior patents. For this reason, Morse is manifestly not entitled to a monopoly of every structure which comes within the broad terms of the claim.

Mechanically speaking, there may be said to be four obvious ways of separating the thread-guide and spindle as the thread mass increases in size during the winding operation: (1) The thread-guide may slide away from the spindle; (2) the thread-guide may swing away from the spindle; (3) the spindle may slide away from the thread-guide; (4) the spindle may swing away from the thread-guide. All these methods are illustrated in the prior art. The defendant's machine has a sliding spindle, and a thread-guide adapted to slide in fixed bearings. It does not contain either the swinging spindle or the swinging thread-guide, which are the peculiar features of the Morse patent. Yet notwithstanding this difference, the defendant's machine is clearly within the language of claim 2 of the patent. This case affords an apt example of the comprehensiveness of this claim, which could only be held valid on the theory that it covered a highly novel and meritorious invention, and solved for the first time an important problem in the winding art.

For these reasons, I must hold claim 2 of the Morse patent invalid because of its breadth.

A decree may be drawn dismissing the bill.

NATIONAL AUTOMATIC WEIGHING MACH. CO. v. DAAB et al.

(Circuit Court, D. New Jersey. May 5, 1905.)

PATENTS—WEIGHING APPARATUS—INFRINGEMENT.

Letters patent No. 387,285, for an improvement in indicators for weighing apparatus, sustained, and patent No. 733,059 held to infringe claim 1 of the former; the device used in the infringing patent being the mechanical equivalent of that adopted in the patent in suit.

(Syllabus by the Court.)

In Equity.

A. Parker-Smith, for complainant.

Leon Abbett and J. R. Littell, for defendants.

CROSS, District Judge. The patent in suit is No. 387,285, dated August 7, 1888, upon application filed July 19, 1886, for "a new improvement in indicators for weighing apparatus," which is owned by the complainant, the National Automatic Weighing Machine Company. The patent was granted to one Henry Fairbanks, and by mesne assignments transferred to the complainant, which corporation has filed its bill of complaint against the defendant, alleging, among other things, that they are infringing the above patent, and asking the usual relief. The patent under which the defendants are operating, the use of which it is alleged infringes the complainant's, is No. 733,059, dated July 7, 1903, issued to one Magee.

The only claim involved in the suit is No. 1 of the Fairbanks patent, and is as follows:

"(1) The combination of a disk adapted to be rotated under the force or weight applied to the apparatus, an inclosing case, its front having an opening through it to expose the graduations on the disk, a passage adapted to receive a coin of certain size, a cover for said opening, and an obstruction in said passage in connection with said cover, substantially as described, and whereby the coin so introduced will strike the said obstruction, and by its weight remove the cover from said opening and expose the graduations on the disk."

The invention of the complainant consists of an indicating device for weighing machines, operated, and only operated, by inserting a coin in a slot adapted for the purpose, and comprises a rotative dial or disk set in a casing having an opening through which the figures on the dial opposite the opening may be seen when the shutter normally closing said opening has been removed, and with a passage connecting with the slot to receive the coin there introduced, and an obstruction so located with reference to the passage of the coin through a duct called a "coin passage" that the coin will strike the obstruction in said duct, and by its weight move the same, and through other mechanism remove the shutter from in front of the opening, and expose the figures on the dial or disk. The figures on the dial in front of the opening, and which are exposed by moving the shutter, show the weight of the person or object on the scale.

Counsel for the complainant and defendants agree that the only point in difference between the parties is as to the construction which should be put upon the expression, "an obstruction in said passage in connection with said cover," as found in claim 1. The construction on the part of the defendants is that the "obstruction" is tied down by claim 1 and the specifications and the prior art to an "obstruction" in said passage—that is to say, that it means, as applied to the device of the complainant, a lever whose end projects through the side of a duct of a size sufficient to carry a designated coin, and down which the coin passes, striking in its passage the end of the lever or "obstruction"; and that, as the defendants' device has a cup, or "coin receiver," as it is called in their patent, attached to the end of a similar lever, which cup the coin, in falling, strikes, and wherein it then rests, but which is at the bottom or lower end of the coin passage, it does not infringe the complainant's patent. The defendants' main argument therefore is designed to show that they do not infringe the complainant's patent because the obstruction in their case is at the bottom of the "coin passage" or tube, while the complainant's is located in the coin passage. In both cases, however, the coin strikes an obstruction, and in consequence of the blow, coupled with the weight of the coin itself, a lever is moved, the shutter pushed aside, and a section of the disk disclosed.

The defendants also contend that the complainant's patent is a combination of several elements, all old in the art, and that by the state of the prior art its patentee was compelled to make his claim narrow in order to show novelty, and that consequently his claim

cannot be enlarged, but must be strictly construed; and in support of their position they have cited several patents as anticipations of the complainant's, the larger part of which, however, need not be considered, as they were issued subsequently to the complainant's. The patents to Brice and Brown do not in any way anticipate the combination upon which the complainant's patent is based. The former is an advertising device, operated by means of a coin dropped in a slot falling upon a weighted lever, which by means of connecting mechanism releases an advertising card. The latter is for a toy bank or safe similarly operated by a coin falling against the end of a lever, thereby registering the number of coins thus dropped into the bank. The Smith patent is for a toy money box, the weight of a coin dropped into a slot causing the exposure of a picture or emblem. The patent to Everitt shows a coin-operated weighing machine, which acts, however, on a principle entirely different from the complainant's patent. The dial of the Everitt machine is exposed, and does not rotate, but instead an index finger moving in front of the dial is made to rotate by means of the weight of the coin dropped in the slot. Its combination is radically different from that of the complainant's machine, as it has no aperture in the case, no shutter, and no rotating dial. In the case of the Everitt machine the index finger rotating on the face of an open dial points out the weight of the person, while in the complainant's the dial itself rotates, although not visibly, and upon the withdrawal of the shutter from the opening in the case, the portion of the dial indicating the weight of the person is disclosed. The machines are alike only in this: that both are coin-operated weighing machines. These are the only anticipating patents which it is necessary to discuss.

We will next consider whether the complainant, by claim 1, is limited to an obstruction in the coin tube or passage, so that he cannot allege infringement on the part of the defendants, who use an obstruction at the foot or bottom of the coin passage. It is clear, as before stated, that the defendants' structure, consisting of the end of a lever with a cup thereon, normally placed at the foot of the coin passage, performs the same function in practically the same way that the obstruction in the coin passage does in the complainant's device. In our opinion, the cup neither adds to nor takes away from the function of the device, but has rather to do with the ultimate disposition of the coin. So far as the function to be performed by the falling of the coin and the weight of the coin is concerned, the devices could be readily exchanged, and the work equally well performed.

In *Union Paper Bag Co. v. Murphy*, 97 U. S. 121, 24 L. Ed. 935, it is said:

"Except where form is of the essence of the invention, it has but little weight in the decision of such an issue, the correct rule being that in determining the question of infringement the court or jury, as the case may be, are not to judge about similarities or difference by the names of things, but are to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it, and to find that one thing is substantially the same as another if

it performs substantially the same function in substantially the same way to obtain the same result; always bearing in mind that devices in a patented machine are different in the sense of the patent law when they perform different functions, or in a different way, or produce a substantially different result. Nor is it safe to give much heed to the fact that the corresponding device in two machines organized to accomplish the same result is different in shape or form, the one from the other, as it is necessary in every such investigation to look at the mode of operation or the way the device works, and at the result as well as at the means by which the result is attained."

And in *Union Steam Pump Co. v. Battle Creek Steam Pump Co.*, 104 Fed. 342, 43 C. C. A. 560, it is said that the mere change of the location of the parts of a combination, if the parts still perform the same duty and by the same mode of operation, will not take the structure out of the bounds of the patent.

The difference between the two devices under consideration does not appreciably affect either the principle of operation or the result of the operation. These are substantially identical. While it is true that the language of claim 1 of the complainant's patent indicates the "obstruction" as located in the passage, still it is evident that the patentee did not regard this as essential. He apparently placed it there with the additional object of having the coin in its fall operate at the same time another lever on the opposite side of the coin passage from the "obstruction" for the purpose of disposing of the coin itself. He did not regard this second lever, however, as material, for he says that it may be dispensed with, and that the side of the coin passage may be "fixed," evidently meaning thereby continuous or unbroken. If we then dispense with the second lever opposite to which the "obstruction" was to be located, it is obvious that the "obstruction" can be raised or lowered to any point in the coin passage, and still be quite within the terms of claim 1. Without doing any violence to the language of the claim then, we do not see why the obstruction cannot be carried to the foot of the coin passage, which is practically the very thing the defendants have done, and which constitutes the alleged infringement. To show that this construction of claim 1 is not unreasonable or forced, we have only to refer to the testimony of an expert witness called by the defendants, who, in speaking of the Brice patent, says: "The Brice patent clearly shows an obstruction in the coin passage, which construction consists of the lever, D, having one arm projecting into the coin passage, and operated by the gravity action of the coin." An examination of the Brice patent will show, however, that the arm of the lever upon which the coin acts extends across the bottom of the tube or coin passage. The same witness uses the same expression with reference to an obstruction in the coin passage in the Tabony, Brown, and Ryfenburgh patents, in all of which the obstruction likewise consisted of levers at the bottom of the coin passage. We are thus shown by the defendants' own witness that in the natural and ordinary use of language he, as an expert, considers an obstruction which actually is placed at the bottom of the coin passage as being in the coin passage. We do not, therefore, strain the meaning of the language used by the complainant's patentee in claim 1

if we place the obstruction at the bottom of the coin passage, rather than in the side thereof.

Furthermore, Pumphrey, an expert witness for the complainant, has made some illustrative drawings of the defendants' device, which were used on his examination, and which manifest very clearly that the defendants' device infringes the complainant's. For instance, he shows that the coin cup of the defendants' device may very properly be considered as merely an extension or continuation of the coin passage itself, for an inspection of the drawing attached to the defendants' patent shows that the coin cup is located up to and against the very bottom of the coin passage, and in claim 1 of their patent it is described as "located normally under the end of the coin way." Referring again to the Pumphrey drawings, he makes it quite apparent that the coin cup could be extended upward to the very slot or opening in which the coin is dropped, so that the coin cup thus extended would in reality make the coin passage of the complainant's device; the effect of which would be that the defendants, by simply calling the coin passage a "coin cup," could infringe the complainant's patent at will. The fact that the coin cup and the ordinary lever struck by the coin were recognized equivalents at the date of the Fairbanks invention is proven by the Everitt patent, which shows a cup, and the other patents, which show the ordinary lever used to produce the same result. Hence, under the doctrine of equivalents, the Fairbanks claim covers the defendants' device. For these, among other reasons, we deem the devices are mechanical equivalents accomplishing the same function in practically the same way.

As said by Judge Dallas in *Rood v. Evans* (C. C.) 92 Fed. at page 373, invasion of the rights of a patentee may be avoided, however nearly approached, if the subject-matter of the grant be not substantially taken; but, if the principle of the invention be appropriated, liability for infringement cannot be evaded upon the ground that the mechanism employed by the infringer does not, in form and structure, precisely correspond with that described in the patent. There can be no question that, if the Magee patent were the earlier in the art, it would be a complete anticipation of the complainant's. This is a fair test, and one often applied by the courts.

The defendants have sought to interpose the nonuse of the Fairbanks patent as a defense, but it has been decided in many cases that it is not. *Fuller v. Berger*, 120 Fed. 274, 277, 56 C. C. A. 588, 65 L. R. A. 381, and authorities there cited.

A decree will be entered in conformity with the views herein expressed.

UNITED STATES v. MITCHELL

(Circuit Court, D. Oregon. April 25, 1905.)

No. 2,902.

1. GRAND JURY—QUALIFICATION OF JURORS—STATE LAW—FEDERAL COURTS—APPLICATION—ASSESSMENT ROLL.

Rev. St. § 800 [U. S. Comp. St. 1901, p. 623], requires that grand jurors in federal courts shall have the same qualifications as jurors in the highest court of law in the particular state. B. & C. Comp. § 965, prescribes the qualifications of jurors, but does not require that their names shall be on the assessment roll. Section 970 requires the county court at its first term in each year to make a jury list from the last preceding assessment roll of the county containing the names of persons to serve as grand and trial jurors; and sections 971 and 972 require such list to contain the names of not less than 200 qualified persons, if there be that number of qualified jurors on the assessment roll, and not more than 600. *Held*, that the requirement that the names of jurors selected should be on the assessment roll was merely a provision relating to the mode of selecting jurors, and that the fact that the name of a grand juror selected in the federal courts was not on such roll did not disqualify him for service.

2. SAME—INDICTMENT—OBJECTIONS.

B. & C. Comp. § 1349, provides that an indictment must be set aside on motion of the defendant when not found or indorsed and presented as prescribed in title 8, c. 7, of the Code, and when the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment as indorsed thereon. *Held*, that the effect of such statute, in the absence of any other provision for setting an indictment aside, was to limit the disqualification of grand jurors to such grounds, and to prevent pleas in abatement based on objections not going to the qualifications of the grand jurors, but merely to the regularity of the proceedings by which the jury was organized.

3. SAME—EXCUSING JURORS.

The court has jurisdiction to discharge a grand juror for cause, and the possible or probable effect of the absence of such juror on subsequent proceedings of the grand jury does not admit of inquiry.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Grand Jury, § 28.]

4. SAME.

Where the record shows that certain grand jurors were discharged "for good cause shown to the court," such finding is conclusive as to the sufficiency of the cause.

5. SAME—GRAND JURORS—APPEARANCE—SWEARING.

Where a grand juror does not report until after the jury has been sworn and charged, and there are enough grand jurors without him, he may or may not be sworn, in the discretion of the court.

6. SAME—NUMBER OF GRAND JURORS.

The fact that more than 24 persons were summoned to appear as grand jurors is immaterial, and does not affect the validity of an indictment.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Grand Jury, § 4.]

7. SAME—DISTRICT ATTORNEY—COMPETENCY.

Where a United States district attorney was appointed by a court having authority to make a valid appointment, and he was in the undisputed and unquestioned exercise of the powers of such office at the time an indictment was returned, he being a de facto officer, it was no objection to the indictment that the appointment was invalid on the ground that such attorney was not a permanent resident of the district.

8. SAME—PREJUDICE—PRESENCE BEFORE GRAND JURY.

Mere general objections that a United States district attorney who obtained an indictment against defendant was very prejudiced against him,

had actively worked up feeling against him, and had been present in the grand jury room while the jury were deliberating on the indictment, etc., were insufficient to authorize the vacation of the indictment.

9. SAME—FEDERAL COURTS—IMPANELING GRAND JURY—OBJECTIONS TO INDICTMENT—DISCRETION.

Rev. St. § 800 [U. S. Comp. St. 1901, p. 623], provides that federal courts may, by rule or order, conform the designation and impaneling of juries, in substance, to the laws and usages relating to jurors in the state courts. B. & C. Comp. § 1269, provides that no challenge shall be allowed to the panel from which a grand jury is drawn, unless made by the court for want of qualification, as prescribed by section 1268, which declares that, before accepting a person drawn as a grand juror, the court must be satisfied that the person is duly qualified to act, but, when drawn and found qualified, he must be accepted, unless excused by the court; and section 1349 only authorizes an indictment to be set aside when not found, indorsed, and presented as prescribed by title 18, c. 7, and when the names of witnesses are not indorsed thereon. *Held*, that under Rev. St. U. S. § 722 [U. S. Comp. St. 1901, p. 582], providing that when the laws of the United States are not suitable, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses, the common law, as modified by the Constitution and laws of the state, shall govern, the requirement of section 800 was imperative, so that an indictment in the federal court sitting in Oregon could not be set aside on grounds other than those specified in section 1349, except in the discretion of the court.

10. SAME—ALIENAGE.

Under B. & C. Comp. § 1269, providing that no challenge shall be made or allowed to the panel from which a grand jury is drawn, nor to an individual juror, except when made by the court for want of qualification as prescribed in section 1268, an objection that a grand juror was disqualified by reason of alienage, as provided by section 965, cannot be raised on objection to an indictment.

Francis J. Heney, U. S. Dist. Atty.
A. S. Bennett, for defendant.

BELLINGER, District Judge. The defendant pleads to the indictment that the grand jury returning the same was not regularly organized or impaneled, but was irregular and void, by reason of the fact that upon the impaneling of the jury on October 18, 1904, it included W. E. Robertson and Carl Phelps, who were qualified and lawful jurors; that on October 19th Robertson was excused for the term by order of the court, without cause, and on January 27th following Carl Phelps was, by order of the court, excused, although he had been taking part in the investigation of this charge; that one George Peebler was added to the grand jury on October 25th; that, the grand jury having partially investigated the charge against the defendant, on the 19th of December Fred G. Buffum was, by order of the court, added to the panel; that both of the jurors so added continued as members of the jury until its final discharge, and voted upon the finding of the indictment—all of which is alleged to have been to the defendant's prejudice. For a further answer and plea, it is alleged that George Guistin, a member of the grand jury, was not a qualified juror, by reason of the fact that he was not a citizen of the United States, but was and still is a citizen of some foreign country. For a still further answer and plea, it is alleged that the names of Frank

Bolter and Joseph Essner, who were members of the grand jury, were not upon the preceding or any assessment roll of any county in the state at the time they were sworn in as jurors, and that, as defendant believes, neither of them was a taxpayer in the county of his residence. For the last answer and plea, it is alleged that the district attorney, Francis J. Heney, was and is not a resident in this district, and that because of such nonresidence he could not be legally appointed to the office of district attorney; that he is very prejudiced against the defendant, and has been very active in working up feeling against him through the newspapers and otherwise, both in and out of court; that defendant is informed, believes, and alleges that said Heney was very vindictive and bitter in his prosecution of the charge against defendant before the grand jury, and greatly influenced the jury to find this indictment; and defendant alleges that, if said Francis J. Heney had not so unlawfully appeared before said grand jury, this indictment would not have been brought—all to the defendant's substantial prejudice. It is further alleged, upon information and belief, that said Francis J. Heney remained with the grand jury and was present "when they were deliberating on the evidence and on the charge," and that he greatly prejudiced the defendant by arguments and denunciations against the defendant, and by threats and intimidations towards all or a portion of the grand jurors, all to the defendant's further substantial prejudice.

The questions of the alleged disqualification of the jurors Bolter and Essner, of the regularity and legality of the organization of the grand jury, of the authority of Francis J. Heney to act as district attorney, and those which relate to his conduct in the matters complained of, will be first considered; leaving the further questions as to whether the impaneling of the grand jury by the court does not involve a final decision as to the qualifications of the individual jurors, and finally whether any of the objections made can be urged by plea or otherwise, except such objections as are addressed to the sound discretion of the court.

Section 800 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 623] provides that:

"Jurors to serve in the courts of the United States in each state respectively, shall have the same qualifications and be entitled to the same exemptions as jurors of the highest court of law in such state may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned."

The qualifications of jurors under the state law are prescribed in section 965 of the Code (B. & C. Comp.). That section provides that:

"A person is not competent to act as a juror unless he be (1) a citizen of the United States; (2) a male inhabitant of the county in which he is returned, and who has been an inhabitant thereof for the year next preceding the time he is drawn or called; (3) over twenty-one years of age; (4) in the possession of his natural faculties and of sound mind. Nor is any person competent to act as a juror who has been convicted of any felony, or a misdemeanor involving moral turpitude."

It is made a ground of challenge that a person has been summoned and attended court as a juror at any term within one year prior to the challenge, or that he has served as a juror within such time.

There is no other positive disqualification for jurors provided by the laws of Oregon. It is not a disqualification by this statute that the name of a juror is not on the last preceding county assessment roll, and that he is not a taxpayer in the county; and, unless such a disqualification can be implied from the provisions of the law for selecting jurors, it does not exist. The law which provides the manner of selecting jurors requires the county court of each county to make, at its first term of each year, or, in case of omission or neglect to do so, then at any following term, from the last preceding assessment roll of the county, a list, denominated a jury list, containing the names of persons to serve as grand and trial jurors until the following year, or new lists are made. B. & C. Comp. § 970. It further provides (section 971) that, "in preparing the jury list, the names of those persons only must be selected who are known or believed to be possessed of the qualifications prescribed in section 965." The jury list so made is required to contain the names of not less than 200 persons, if there be that number of names of qualified jurors on the assessment roll, nor more than 600 names. Section 972. From this list the county clerk is required to take the names that are placed on the ballots to be deposited in the box from which jurors are drawn.

The question is therefore presented, does the state law, which requires a jury list to be made by the county court from the assessment roll, operate to make it a qualification for jury service that the juror's name shall be upon such roll?

In the case of *State v. Carlson*, 39 Or. 23, 62 Pac. 1016, 1119—an appeal from Multnomah county—there was a motion to set aside an indictment on the ground that, when it was found, one of the grand jurors was not, and had not been for a year preceding, an inhabitant or taxpayer of the county, but was a resident of the state of Washington, and that his name was not on the assessment roll of Multnomah county for the year preceding January 31, 1900. It was admitted that his name was on the assessment roll for the year 1898. The court found, as a matter of fact, that the juror's name was taken from the list made by the county court at its first term in 1899 from the last preceding assessment; that being the assessment from which it should have been taken. Whether it is required that a juror's name shall be upon the assessment roll, to qualify him for jury duty, was not decided; and the inquiry was not material, in view of the court's decision that the acceptance of the juror at the time the jury was impaneled was necessarily a conclusive decision upon the question, not subject to contradiction or review.

It has never been decided in this state, so far as appears, that a property qualification is necessary to the competency of a juror. A person may be a property owner and taxpayer, whose name is

not upon the particular roll mentioned in the section in question. There may be a sheriff's assessment of property subsequent to the making of the list by the county court from the assessor's roll, and equally conclusive of the fact that the party assessed is a taxpayer. Furthermore, it is common knowledge that many of the largest property interests are assessed in the names of corporations or of trustees. If the names of the stockholders and beneficiaries are not upon the assessment roll, nevertheless they are under the bonds of self-interest to maintain good government equally with those whose names are there.

The provision which requires the county court to make a jury list from names on the assessment roll does not prescribe a property qualification for jurors, but a mode of selecting them. If it becomes a qualification for jury duty that the juror's name shall be upon the assessment roll, because the jury list is required to be made from such roll, then it is also a requisite to his qualification that his name shall be upon the jury list, since the names that are placed in the jury box by the clerk are required to be taken from that list. There is as much to be said in this connection for the list as for the roll. The names upon the jury list are required to be taken from the roll, and the names to be placed in the box are required to be taken from the list; and so, as already stated, if a juror must be upon the roll to be qualified, for the same reason he must be upon the list. Furthermore, there are various requisites as to the list necessary to its legality. If the list should contain the names of more than 600 persons, or less than 200 when there were that number on the roll, it would be an illegal list; and, if the qualification of a juror depends upon the place where his name is found, such a juror would be disqualified. The mode provided for the selection of jurors in section 970 is adapted to the requirements of section 965 relating to the qualifications of such jurors. It is, by the latter section, a positive requirement that the person selected shall be over 21 years of age, and an inhabitant of the county for the year preceding the time he is drawn. These requirements are more likely to be found upon the county assessment roll for the preceding year than they would be in a list prepared at haphazard from among those found in the county, since it is safe to assume that, as a very general rule, those whose names are upon the assessment roll are, and for the year preceding have been, inhabitants of the county, above the age of 21 years. If the Legislature intended that a person should not be qualified to sit on a jury unless he is a taxpayer in the county or his name is on the county assessment roll, it must be presumed that these disqualifications would have been included with those specified in section 965; that the framers of the law would have added to the requirements specified in that section, that a juror must be for the preceding year an inhabitant of the county, the words, "and his name must be on the county assessment roll for such year," or would have inserted after the word "inhabitant" the words "and taxpayer." "Enumeration weakens as to things not enumerated,"

and, when two or more things are so related that one necessarily suggests the other, the failure to enumerate as to one is conclusive of an intention to exclude. It must be borne in mind that section 965, as it originally stood, and that relating to the making of the jury list from the assessment roll, were enacted at the same time, and were within the scope and purpose of a single act. It is clear that the positive disqualifications enumerated by one section of such a law cannot be added to by the mere implication of another section. Furthermore, the section in which the qualifications of jurors are enumerated was re-enacted, by way of amendment, in 1882—20 years subsequent to the original enactments—so as to add the provision which makes it a ground of challenge that the juror has been summoned and attended court within one year. In effect, therefore, this section is a new enactment, long subsequent to that which provides for the making of a jury list from the assessment roll, and the enumeration therein of the qualifications of jurors and grounds of challenge must be held to include all grounds of disqualification and challenge existing at the time. It is obvious that these objections do not go to the qualifications of the juror, but to the regularity of the proceedings by which the jury is organized. And in this connection I quote from the opinion of Judge Thayer in the case of the *United States v. Eagan* (C. C.) 30 Fed. 612:

"If the point to be decided by the court was to be determined solely with reference to the common law, and without reference to local laws, the better opinion seems to be that no objection to an indictment ought to be allowed, based merely on an irregularity in the manner of selecting a part or the whole of the grand jury which found the bill, if in all other respects they were duly qualified jurors. Thus in *Thompson & Merriam on Juries* it is said that the only objection which can be taken to the grand jurors by plea in abatement, after they have been sworn and made presentments, 'must be such as would disqualify the juror to serve in any case. In other words, the plea must show the absence of positive qualifications demanded by law,' and not merely an irregularity in the method of selection."

In the case of *United States v. Reeves*, Fed. Cas. No. 16,139, 3 Woods, 199, the court distinguishes between the absolute disqualification of a juror, and objections that constitute a ground of challenge. The case arose under section 812 of the Revised Statutes [U. S. Comp. St. 1901, p. 627], which provides that no person shall be summoned as a juror more than once in two years, and makes the fact that he has been so summoned and attended a ground of challenge. The court, after stating that pleas in abatement, being dilatory, are not favored, cites a number of cases to show how reluctant courts are to interfere with the indictments of a grand jury by reason of the unfitness of one or more of the grand jurors, and lays down the rule that courts will only interfere after indictment "where there has been a positive disqualification imposed by statute."

In the case of *People v. Jewett*, 3 Wend. 321—one of the cases referred to in the case last cited—the defendant was indicted for aiding in the abduction of William Morgan. It was objected to the indictment that one of the grand jurors had, before the finding

of the indictment, in repeated conversations, declared that the defendant was guilty of aiding in the carrying off of Morgan; that he was guilty of the crime, and ought to be punished therefor. The defendant did not know that any charge would be made against him before the grand jury. The court, while admitting the force of the argument that the defendant should be allowed an exception to a partial grand juror, overruled the objection "from the consideration of the great delays and embarrassments which would attend the administration of criminal justice" if the course proposed was allowed.

In *Munroe v. Brigham*, 19 Pick. 368, also cited in the *Reeves Case*, Chief Justice Shaw remarks:

"Upon general grounds, unless presumptively required by statute, it would be inconsistent with the purposes of justice to allow such an exception to a juror. * * * Where no other incapacity exists, and no injustice is done, nothing but a positive rule of law would seem to require that a verdict should on that account be set aside."

The case of *United States v. Benson and others* (C. C.) 31 Fed. 896, involved questions identical with those in this case. The opinion of the court is by the late Justice Field, with whom were associated in the trial of the case Circuit Judge Sawyer and District Judge Hoffman. The defendants were indicted for an alleged conspiracy to defraud the United States. Each interposed a plea in abatement upon the ground that the names of some of the grand jurors who found the indictment were not on the assessment roll. The laws of California, where the case arose, prescribe among other qualifications for a juror that he shall be "assessed on the last assessment roll of his county on property belonging to him." The California Penal Code provides that challenges to an individual grand juror may be interposed for one or more of the certain enumerated causes only. The causes of challenge so enumerated do not include the objection that the juror was not assessed, etc. The California law further provides that an indictment may be set aside on motion when, among other things, "the defendant had not been held to answer before the finding of the indictment, on any ground which would have been a good ground for challenge either to the panel or to any individual grand juror." The court held that the provision disqualifying persons to serve on juries, whose names were not on the assessment roll, did not apply to grand jurors, because it was not included in the only grounds of challenge which the law permitted to be made to such jurors, and, unless it was a ground of challenge, it could not be a ground for setting aside an indictment under the section of the Penal Code relating to that subject.

The effect, then, of the statute prescribing the grounds upon which an indictment may be set aside, is to limit the disqualification of grand jurors to such grounds. Now, the Oregon statute does not permit pleas in abatement to indictments upon any ground. It provides for setting an indictment aside upon motion upon certain specified grounds, and the grounds so specified do not include any of those upon which the pleas in abatement are based

in this case. So, in the Benson Case, a positive disqualification of "jurors" imposed by statute was not available to a defendant in a proceeding like this, the statute not having made it a ground upon which to set aside the indictment, while in this case there is neither a positive disqualification by statute, nor a ground urged upon which the statute permits the indictment to be set aside. In the Benson Case the court goes on to state a further fatal objection to the plea, as follows:

"In this case the objections to some of the grand jurors, that their names were not among the list of taxpayers on the last assessment roll of their respective counties, is technical only. There is no allegation in the plea that the jurors were not in all respects, as to ability and knowledge, fully qualified for the duties imposed upon them, or that the defendants were in any respect prejudiced by the absence of their names from the assessment roll. In these circumstances, the objection must fall under the general rule of the federal courts that omissions which do not impair any substantial right or prejudice the defense of the accused must be disregarded, unless otherwise required by positive statute. Section 1025, Rev. St. [U. S. Comp. St. 1901, p. 720], declares that 'no indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected, by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.'"

In this case, as in that, the particular objection, as well as the other objections urged, with the possible exception of that which relates to the citizenship of Guistin, are of the character mentioned in the above quotation; and, although the objections in question are answered in this statement of the law, nevertheless I shall briefly consider them upon the facts stated.

It is alleged that the grand jury was not regularly organized or impaneled at the time the indictment was returned, but was an irregular "and void" grand jury, in this:

"That on the 18th day of October, 1904, said grand jury was impaneled and organized, consisting of 21 persons including, among others, W. E. Robertson and Carl Phelps; and the said grand jurors were sworn, and said W. E. Robertson appointed foreman. That said Carl Phelps and W. E. Robertson were qualified and lawful jurors to sit as grand jurors in said court and had each and all of the qualifications required by law, and that said grand jury retired and commenced their investigation. That thereafter, and on the 19th day of October, 1904, said Robertson was excused for the term without cause. That nevertheless said grand jury continued to perform their duties and to investigate cases before them until the 25th day of October, 1904, when one George Peebler, who had never been a member thereof, was added to said grand jury by an order of this honorable court, and was impaneled and sworn as a grand juror, and took his seat with said grand jurors, and from that time, up to and including the finding of this indictment, acted with said jurors, and took part, as such pretended grand juror, in the finding of the indictment in this case. That thereafter the said pretended grand jury continued to transact business as such grand jury, and to investigate charges against divers and sundry persons, and, among the rest, as this defendant believes and alleges, partially investigated the charge against this defendant, upon which this indictment is brought, and heard testimony therein until about the 19th day of December, 1904, when one Fred G. Buffum, who was not one of the grand jurors originally impaneled, and who had not acted with said grand jury up to that time was, by order of this court, added to said pretended grand jury, and impaneled and sworn as one of said grand jurors, and that he continued to act with said grand jurors

as one of said grand jury up to the time that this indictment was returned into court, and took part in the investigation of this charge (which had then been partially investigated by the grand jury) from that time up to the finding of this indictment, and voted upon the finding thereof. That thereafter, and on the 27th day of January, 1905, and before this indictment was voted or returned into court, the aforesaid Carl Phelps was excused from such grand jury by order of this court, although he had been taking part in the investigation of this charge and had heard the testimony therein, and that he never thereafter acted as such grand juror—all to the substantial prejudice of this defendant."

Upon the argument the objection relating to the discharge of Robertson was waived by the attorneys for the defendant, and doubts were expressed by them as to the validity of the objection relating to the discharge of the juror Carl Phelps. The record shows that these jurors were discharged "for good cause shown to the court." Since there was necessarily an affirmative vote of 12 jurors to find a bill, the absence of these jurors could not have affected the result. It was suggested that they might, if present, have influenced a change in the affirmative vote by persuasion, but it goes without saying that there is no presumption against the indictment that these jurors would have endeavored to exert such influence, or would have succeeded in so doing; and, before the court can consider any objections made, it must at least appear, not from the belief expressed, but from the facts stated, that the defendant has suffered some impairment of a substantial right or some prejudice, or that the things complained of violate the requirements of a positive statute. Moreover, the power of the court to discharge a juror for good cause shown is undoubted, and the possible or probable effect of the absence of such a juror on the subsequent proceedings of the grand jury does not admit of inquiry. In the language of the court in *United States v. Belvin* (C. C.) 46 Fed. 383: "That the court may, in its discretion, excuse the foreman or any member of the grand jury from further service, without invalidating the jury, is too obvious to need demonstration." The cases are so numerous and uniform in support of this authority that further citations are needless. "Whether," as stated in *State v. Ward*, 60 Vt. 142, 14 Atl. 187, this right "comes to us as a part of the common law," "need not be determined. It has been the recognized right of the court, as practiced, so far as revealed by the reported decisions, and so far as the memory of the oldest practitioners can inform us, for nearly a century." And it is equally well established that the legality of the excuse for which a grand juror was discharged will be presumed, and, if the record recites that good cause was shown to the court, the presumption will be conclusive, as the record cannot be contradicted by oral testimony. *Ter. v. Barth* (Ariz.) 15 Pac. 673; *Wallis v. State*, 54 Ark. 611, 16 S. W. 821; *Williams v. State*, 69 Ga. 12; *Burrell v. State*, 129 Ind. 290, 28 N. E. 699; *State v. Brown*, 12 Minn. 538 (Gil. 448); *Cotton v. State*, 31 Miss. 504; *Epperson v. State*, 5 Lea (Tenn.) 293.

The record of the court shows that the jurors Peebler and Buffum were summoned at the same time with the other jurors. It also contradicts the allegation of the plea that the grand jury had "par-

tially investigated" the charges upon which this indictment was found before these jurors were sworn in. The record shows that on October 25, 1904, Peebler was sworn in; that the grand jury on that day reported to the court that it had "completed all business brought to its attention," and that it was therefore excused until such time as it should be reconvened by order of the court; that thereafter, and on December 19, 1904, the grand jury was reconvened; and that, so being, Buffum was duly sworn in, after which the grand jury retired. So that the grand jury, having on October 25th, after Peebler was sworn in, "completed all business brought to its attention," began on December 19th the consideration of matters not theretofore brought to its attention; Buffum being sworn, and retiring from the courtroom, with the other jurors, for that purpose. The indictment in question was returned on the 1st day of the following February. Phelps was excused on the 27th of January. With the exception of Phelps, the personnel of the grand jury was not changed during the period covered by its investigation of the charge in question, nor thereafter up to the time of its final discharge. These facts do not admit of contradiction. *United States v. Terry* (D. C.) 39 Fed. 353. They are shown by the record, and they are within the knowledge of the court.

A grand juror who reports after the jury have been sworn and charged may or may not be sworn, in the discretion of the court, when there are enough grand jurors without him. *Findley v. People*, 1 Mich. 234; *People v. Lauder* (Mich.) 46 N. W. 964. In the latter case the court says that it has been very usual, when delinquent jurors have come in on the same day after the jury have been impaneled, sworn, and charged, to have them sworn and sent to their fellows. "If," says the court, "it may be done that day, then it may be done any time during the session of the grand jury. It is a matter entirely within the discretion of the court, and circumstances such as the absence of a part of those impaneled, from sickness or other cause, might make its exercise very proper."

The summons in this case was for 30 jurors, and it is suggested, rather than argued, that this fact may operate to invalidate the grand jury. Experience has shown that it is necessary, and it has therefore become the practice in this court, to issue the venire for a greater number than the maximum required, inasmuch as not all of those summoned will be found, and among those found some will be entitled to exemption, and others will be disqualified, through sickness or otherwise, for jury service. In the present case, of those summoned, 19, not including Robertson, who was exempt, reported for duty. This number was afterwards increased, by the presence of Peebler and Buffum, to 21. If the venire had been only for the maximum number required, it is doubtful if a quorum could have been had at the time appointed for the organization of the grand jury. The practice which has resulted in the particular complaint is founded in necessity, and I have no doubt of its legality and propriety. It is immaterial, and does not affect the legality of the grand jury, if more than 24 persons are summoned to appear as jurors. *Stevenson v. State*, 69 Ga. 68; *Turner v. State*, 78 Ga.

177; *People v. Harriot*, 3 Parker, Cr. R. 112; *State v. Watson*, 104 N. C. 735, 10 S. E. 705; *Lowrance v. State*, 4 Yerg. (Tenn.) 147.

The ground of the fourth plea is that Francis J. Heney is not a permanent resident of this district, but resides in the state of California, and that because of such nonresidence he could not lawfully act as district attorney. The principle is settled that there is a presumption from the undisturbed exercise of a public office that the appointment to it is valid. In the present case it is not questioned that the court had authority to make a valid appointment to this office, and that it did appoint Mr. Heney, and that during the performance by him, as district attorney, of all the acts and things complained of, he was in the undisturbed and unquestioned exercise of that office. His right to the office cannot be attacked collaterally. Whether he is in fact ineligible to hold the office is not material to the purposes of this inquiry. He is a *de facto* officer, and is entitled to continue in the office until it is judicially declared by a competent tribunal, in a proceeding for that purpose, that he has no right to it. 8 Ency. of Law, 788, citing a large number of cases. In the case of *In re Manning*, 139 U. S. 504, 11 Sup. Ct. 624, 35 L. Ed. 264, a conviction is upheld which was had in a trial before a *de facto* judge of a court *de jure*. The case was from Wisconsin, where the rule is recognized in a long series of decisions that "if the office has been lawfully established and a person exercises the functions thereof by color of right, but whose election or appointment thereto is illegal, his official acts therein cannot be successfully attacked in collateral proceedings, but in all such proceedings will be valid and binding until the officer is ousted by the judgment of a court in a direct proceeding to try his title to the office." The rule is required by public policy. As stated by Justice Story in the *Bank of United States v. Danbridge*, 12 Wheat. 64, 6 L. Ed. 552: For the purpose of "upholding transactions intimately connected with the public peace and the security of private property," the law indulges in its own presumptions; "thus it will presume that a man acting in a public office has been rightfully appointed; that entries made in public books have been made by the proper officer," etc.

As to the other grounds of objection to the indictment—that Mr. Heney has been very prejudiced against the defendant, and very active in working up feeling against him, and has been very vindictive and bitter in his prosecution of this charge—these are matters of which this court cannot take cognizance. A prosecuting officer may not infrequently appear active against a defendant, and bitter and vindictive, in and out of court. The feelings and interests of a defendant tend to create in him an unfavorable opinion respecting the attitude of the prosecuting officer towards him. What is alleged is a mere matter of opinion, and as to the effect of the conduct attributed to the district attorney by that opinion, no opinion is expressed; and, if there was in fact evidence of the facts to which the opinion relates, it could not affect the legality of what has been done, or afford ground for setting the indictment aside. The officer may, as alleged, have "greatly influenced the grand jury

to find this indictment." It is not stated how this influence was produced—whether by the production of evidence before them, and pertinent suggestion respecting it, or otherwise. It is stated that, "if said Francis J. Heney had not so unlawfully appeared" before the grand jury, this indictment would not have been found. All this cannot be other than mere opinion. If he had "lawfully" appeared before them, the presumption is that the same result would have followed. In other words, Mr. Heney's influence with the grand jury cannot possibly be said to have been affected by his residence, and that is the ground of his alleged disqualification to hold the office. All these matters, and those which relate to his alleged presence while the grand jury was deliberating—to his arguments, denunciations, intimidations, etc.—are indefinite and vague. The district attorney may explain both his case and his law to the jury. *United States v. Cobban* (C. C.) 127 Fed. 713. If he went beyond this, his acts may constitute an irregularity; but the case must be extreme before the court will try the district attorney or the grand jury, or both, in order to determine whether it will try a defendant. Instead of conclusions and opinions, there must be something tangible, justifying a presumption of injury to the defendant in a substantial right, before the court will interfere; assuming that it ought to do so upon any state of facts of the character indicated.

Similar questions to those presented upon this ground of the plea were considered by Judge Deady in *United States v. Brown*, 1 Sawy. 533, Fed. Cas. No. 14,671, and in that case the court said:

"Neither the motion to set aside nor the motion to quash will lie where the objection does not appear or arise upon the face of the indictment, or perhaps the records of the court. This being so, the affidavits of the defendants impugning the conduct and judgment of the grand jury cannot be considered upon the hearing of this motion. If the contrary practice were established, there would be no need of grand juries, and the court would necessarily assume both the function of indicting and trying criminals, for it is safe to presume that in most cases the defendant would object to being tried upon the indictment, and support such objection by his affidavit that he believed the grand jury acted upon incompetent or insufficient evidence. The wit of man could not devise a mode of indicting which would not be liable to this objection from the defendant."

It remains to be considered whether the organization of the grand jury and the legality of its proceedings can be attacked on the grounds alleged, as a matter of legal right.

Section 800 of the Revised Statutes [U. S. Comp. St. 1901, p. 623] provides that jurors in the United States courts shall have the same qualifications as jurors of the highest courts of law in the state where the court is held, and they shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries then practiced in such state court, so far as such mode may be practicable, by the courts of the United States, and for this purpose the courts of the United States may by rule or order conform the designation and impaneling of juries, in substance, to the laws and usages relating to jurors in the state courts. This section is the act of 1840 (chapter 47, § 5 Stat. 394), with some

amendments not important in this connection. No express rule or order has been adopted in this court, conforming the designation and impaneling of juries to the laws and usages of the state courts, although this court has conformed its practice in that respect to state laws and usages since its organization. It is not left, however, to the discretion of the United States courts, to conform their practice respecting the organization of juries to state laws. The requirements of the act of 1840 (section 800) are imperative: "And they [juries] shall be designated," etc., "according to the mode of forming such juries" in the state courts. In the case of *United States v. Reed*, 2 Blatchf. 435, Fed. Cas. No. 16,134, tried in the Northern District of New York before Justice Nelson and District Judge Hall, it was held that the state law which abolished challenge to the grand jury panel, and limited the objection that might be made to any particular juror, applied in the federal courts sitting in New York. Nelson, J., delivering the opinion of the court, after explaining the reasons for allowing the challenge to the array at common law, said:

"So that, in point of law, as well as in truth, both the challenge to the favor and the challenge to the array, directly or indirectly, in each case, go to the determination of the proper qualifications of grand jurors, either as individuals or as a panel. And if we are right in our premises, it follows that the two sections in question are directly within the act of Congress of 1840, and are applicable in regulating the selection, summoning, returning, and organization of grand juries in the federal courts."

The court goes on to say that, although challenges have been abolished, it by no means follows that the accused has no remedy in a case where there has been any improper conduct or fraud committed by the public officers in drawing, summoning, or organizing the grand jury. Such proceedings are always under the general supervision of the court. "The court has general power to preserve the pure administration of justice, and its sound discretion will always be exercised freely for the purpose of securing that end."

The *Reed Case* is approved and followed in *United States v. Tallman*, 10 Blatchf. 21, Fed. Cas. No. 16,429. The court held that the state statute having been adopted by the federal statute; and, the state statute having taken away the right of challenging the array, it had the effect, by implication, of taking away the right to raise objection in any form in the United States court.

The case of *United States v. Tuska*, 14 Blatchf. 5, Fed. Cas. No. 16,550, adopts the rule of the foregoing cases. There was a plea in abatement averring that one of the grand jurors was a non-resident. The court, after stating that the case is covered by the decision in the *Reed Case*, goes on to say:

"If, in every criminal prosecution, the accused has the legal right, by a plea in abatement, to raise the question of the residence and the property of each of the members of the grand jury, and require that issue to be tried before a jury, before calling upon him to answer the charge, it is easy to see that, in localities like New York, the practice would substantially render the trial of an offender optional with him, for, in the absence of any better method of selecting juries for courts of the United States than that permitted by

existing laws, it doubtless happens that some one of the grand jury is open to question as to his residence or property."

In the case of *United States v. Eagan*, supra, which was tried before Justice Brewer and Circuit Judge Thayer, the court considered the effect of sections 722 and 800 [U. S. Comp. St. 1901, pp. 582, 623] with reference to the question under consideration. Mr. Justice Brewer, quoting that portion of section 800 which provides that jurors to serve in the courts of the United States, in each state, respectively, shall have the same qualifications and be entitled to the same exemptions as jurors of the highest court of law in the state, says:

"Mr. Conkling, in his treatise on the Practice of the United States Courts, insists that there are cogent reasons for holding that this refers not merely to the mere qualifications as to citizenship, age, residence, etc., but that it extends to all the proceedings for challenging and determining the qualifications of jurors, and to that extent incorporates the laws of the state. Clearly, with these two sections [800, 722] of the federal statute, we have the right, if we are not bound in every case in which there is no express provision of the federal statute, to apply the provisions and the laws of the state in which the court is held; and, applying the laws of Missouri, there can be no question but that this plea in abatement must be overruled."

Judge Thayer, commenting upon the case, stated it as his opinion that under section 722 the court was authorized to conform its rulings to the practice which obtains in the state courts of Missouri, and that, under the practice in the state courts, it was clear, beyond question, that the plea in abatement stated no valid ground of objection to the indictment.

Section 722, referred to in the foregoing opinions, provides, in effect, that the jurisdiction in civil and criminal matters conferred on the Circuit and District Courts by the provisions of title 13 and of title "Civil Rights" and of title "Crimes," for the protection of all persons in the United States in their civil rights and for their vindication, shall be exercised and enforced in conformity with the laws of the United States. But when the laws of the United States are not suitable, "or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed" by the Constitution and laws of the state, shall govern, etc. The defendant upon this hearing contended that the operation of this section was limited to offenses under what is known as the "Civil Rights Act," and that the phrase "civil rights," employed in the section, means only such rights as are provided for in that act. But there is no ambiguity whatever in the provision, and there can be no question as to its general application.

In the case of *United States v. Clune* (D. C.) 62 Fed. 798, Judge Ross held that, there being no provision of the United States statutes regulating challenges to grand jurors, it is proper for the federal court to follow the practice of the courts of the state in which it is held, with reference to such challenges.

In the case of *Crowley v. United States*, 194 U. S. 461, 24 Sup. Ct. 731, 48 L. Ed. 1075, the court held that it was the duty of the

court in Porto Rico to recognize any valid existing local statute relating to the qualifications of jurors. By the local law, challenges were allowed to jurors for the disqualification relied upon in the plea. The question as to whether the objection allowed by the local law to jurors, and by it made a ground of challenge, could be taken by plea in abatement after the return of the indictment, is not, in Porto Rico, controlled by any statute; and the court, therefore, upon "principles of general law," sustained the plea, stating in its opinion that the authorities are not in harmony as to the general law.

In the case of *United States v. Benson*, supra, Justice Field, applying the local law, refused to set an indictment aside when the name of a grand juror did not appear on the last preceding assessment roll. This was a disqualification under the statute, but not a ground of challenge. The court, referring to the state law, said:

"Turning to the causes for which a challenge to the panel, or to an individual grand juror, may be interposed, we find none which embraces the objection taken by the plea in abatement."

I believe there is no case where an objection to an indictment in a federal court has been sustained when the mode employed to present the objection was contrary to the provisions of the local law.

Section 1269 of the Oregon code provides that no challenge shall be made or allowed to the panel from which the grand jury is drawn, nor to an individual grand juror, unless when made by the court for want of qualification as prescribed in section 1268. Section 1268 provides that, before accepting a person drawn as a grand juror, the court must be satisfied that such person is duly qualified to act as such juror, but that, when drawn and found qualified, he must be accepted, unless he is excused by the court, etc. The only plea in addition to the pleas of guilty and not guilty allowed by the statute is the plea of former conviction or acquittal, and there are only two grounds upon which an indictment can be set aside on motion, and neither of these is included in the pleas in question. Section 1349 provides that:

"The indictment must be set aside by the court upon the motion of the defendant in either of the following cases: (1) When it is not found indorsed and presented as prescribed in chapter 7 of title 18 of this Code; (2) when the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment or indorsed thereon."

There is no other provision for setting an indictment aside, and the express mention of this mode is, of course, the exclusion of any other.

In *State v. Whitney*, 7 Or. 388, it was held, that, when a person other than the district attorney appeared before the grand jury and examined witnesses, this was not a ground for setting an indictment aside, inasmuch as it was not within either of the only two cases upon which such action could be taken.

In *State v. Carlson*, 39 Or. 26, 62 Pac. 1016, 1119, it is decided by the Supreme Court of Oregon that challenges to the panel and

to individual grand jurors are abolished in this state (it was previously so held in *State v. Fitzhugh*, 2 Or. 227); that the statute, in effect, interposes a challenge to each grand juror drawn; that the court, in impaneling the grand jury, is presumed to have determined the question of each grand juror's qualifications; and that such determination is conclusive, and is not subject to appeal.

I have not referred to all the cases that support the views contained in this opinion. Those referred to are, in my opinion, conclusive of the questions considered. The rule by which the procedure in the federal courts relating to the organization of grand juries and objections to indictments is made to conform to the local law is too firmly established to admit of question at this late day. It has existed in this court since its organization, with the establishment of the state government, without objection until the present time. And the state court procedure has remained without material change since its adoption, more than 40 years ago, notwithstanding the facility with which laws are amended in the state. It may be safely assumed that it has not been productive of injustice or wrong, and it can never so operate while courts have, in the general supervision and control of their proceedings, power to preserve the pure administration of justice.

It follows from these considerations that all objections to an indictment not provided for as hereinbefore set forth must be addressed to the court, for the exercise of its discretion; and when it is made to appear that there has been fraud practiced, or other acts committed, that impairs a defendant's substantial right, the court, in the exercise of a sound discretion, will grant appropriate relief.

The objections to the several pleas are sustained, and said pleas are ordered dismissed, except as to the plea by which the objection to George Guistin on the ground of alienage is made. The facts alleged in that case constitute a positive disqualification by the state law, and while, under the state court rule, which is a rule of procedure in this court, the objection to this juror cannot now be made, yet, in view of the statement of the district attorney, made on the hearing, that, if the court should decide adversely to the defendant, yet, out of abundant caution, he desired to meet this objection upon the facts, I will afford him the opportunity to do so. This he may do by filing the affidavits offered on the hearing, or by testimony in open court, with the right, of course, on the part of the defendant, to file counter affidavits or to introduce testimony to meet that produced by the government.

As to the other affidavits offered, inasmuch as they cannot, in the view I have taken of the case, prejudice the defendant, and the court on appeal may reach a different conclusion respecting their admissibility from that reached by me, the district attorney has leave to file them if he desires to do so.

In re FRANCIS et al.

(District Court, E. D. Pennsylvania. April 28, 1905.)

No. 2,217.

BANKRUPTCY—RECEIVERS—APPOINTMENT WITHOUT NOTICE.

Under Bankr. Act July 1, 1898, c. 541, § 2, subd. 3, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421], authorizing the appointment of receivers in bankruptcy when absolutely necessary to preserve the estates, to take charge of the property of the bankrupts after the filing of the petition and until it is dismissed or trustees qualified, where it was alleged that the indebtedness for which the alleged bankrupts were liable was created through fraud, that two of them had absconded, and that the other was incarcerated, the appointment of a receiver before adjudication without notice to such incarcerated defendant was not void as a taking of his property without due process of law.

In Bankruptcy. Overruling motion to revoke the appointment of a receiver.

Henry J. Scott, for Stanley Francis.

Edgar J. Pershing, Robert M. Anderson, and George Wharton Pepper, for receiver.

HOLLAND, District Judge. On March 31, 1905, an involuntary petition in bankruptcy was filed in this court against William H. Latimer, Frank C. Marrin, and Stanley Francis individually and trading as the Provident Investment Bureau. On the same day a petition was presented for the appointment of a receiver, in which it is alleged that the "bankrupts have been engaged in procuring money through the mails by fraudulent representations," the method being therein set out. It is further stated that William H. Latimer and Frank C. Marrin are fugitives from justice, and their whereabouts are unknown to the petitioner, and that Stanley Francis, known under his various aliases, which are given in the petition, is now in custody charged with the violation of the laws of the United States relating to the fraudulent and improper use of the mails for the purpose of procuring money. The other necessary averments are set forth in the petition, showing that a receiver is absolutely necessary for the preservation of the estate and to take charge of the property of the bankrupts until a trustee is qualified or the petition is dismissed according to law. A receiver was appointed without first giving notice to any of the bankrupts, and on April 4, 1905, a petition was presented by Stanley Francis asking the court to revoke the appointment of the receiver made on the above-mentioned date for the reason that he was not served with notice and allowed to be heard prior to the appointment having been made. He was, however, served with notice the day after the appointment had been made.

This raises the question whether, under these circumstances, a receiver in bankruptcy can be appointed to take charge of the alleged bankrupt's property without first giving him notice and al-

lowing him to be heard on the question of the appointment before it is made. Counsel for Francis claims that, notwithstanding the facts as stated, such an appointment cannot be made without notice without violating the constitutional provision contained in the fifth amendment, wherein it is provided that "no person shall * * * be deprived of * * * property without due process of law," and that due process of law requires that notice shall be served upon an alleged bankrupt before a receiver is appointed to take charge of his property. By this constitutional guaranty every arbitrary interference with the property of a person is prohibited, and protects every citizen in the possession, enjoyment, and disposition of his property; but it is not intended by this provision to interfere with the government in determining by what remedies or process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for this purpose gives reasonable notice and affords fair opportunity to be heard before the issues are decided. *Iowa Central Railway Co. v. Iowa*, 160 U. S. 389, 16 Sup. Ct. 344, 40 L. Ed. 467; *Simon v. Craft*, 182 U. S. 427, 21 Sup. Ct. 836, 45 L. Ed. 1165; *Leeper v. Texas*, 139 U. S. 462, 11 Sup. Ct. 577, 35 L. Ed. 225; *Ludeling v. Schaffe*, 143 U. S. 301, 12 Sup. Ct. 439, 36 L. Ed. 313. Due process of law has been defined to be "a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property." *Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274. "Law in its regular course of administration through courts of justice." 2 Kent's Commentaries, 10. "A law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial." *Dartmouth College v. Woodward*, 17 U. S. 518, 4 L. Ed. 629 (argument of Mr. Webster). "Lawful judicial proceeding in a court of competent jurisdiction." *In re Curry*, 1 Civ. Proc. R. (N. Y.) 319. "A timely and regular proceeding to judgment and execution." *Backus v. Shepherd*, 11 Wend. (N. Y.) 629. "The application of the law as it exists in the fair and regular course of administrative procedure." *Harbison v. Knoxville Iron Co.* (Tenn.) 53 S. W. 955, 56 L. R. A. 316, 76 Am. St. Rep. 682. "That kind of procedure which is suitable and proper to the nature of cases, and sanctioned by the established usages and customs of the courts." *Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552. "Process due according to the law of the land." *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678. A settled and effective method of procedure is necessary in the administration of remedial law for the assertion of legal rights and the enforcement of legal obligations. A proceeding in bankruptcy, from its commencement to its close upon final hearing and settlement of the estate, is but one suit, and all the steps taken and acts done are part thereof, from which they cannot be separated. *Wiswall v. Campbell*, 93 U. S. 348, 23 L. Ed. 923. As part of the procedure in bankruptcy under the act of 1898, Congress authorized the appointment of receivers, under certain circumstances, either to perform the general duties of receivers in equity, or for

a special purpose, as in this case, under section 2, subd. 3, to take possession of the property that it may be safely kept until finally disposed of by due process of law, that is to say, by the procedure pointed out by Bankr. Act July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421]. The act does not expressly require that notice shall be given the alleged bankrupt before the appointment shall be made, but, as a rule, from the institution of proceedings in a suit until final judgment, every step is preceded with notice, and it is laid down as a general proposition that notice must be served upon the party before a receiver can be appointed, except (1) where the defendants or parties in interest have absconded, or are beyond the jurisdiction of the court, or cannot be found; (2) where there is imminent danger of loss or great damage, or irreparable injury, or the gravest emergency, or when by notice the very purpose of a receiver may be rendered wholly nugatory—as where the property may be removed without the jurisdiction of the court, or it is being collected, and the proceeds wrongfully appropriated. In such cases the court will lay its hand upon the property, through the appointment of a receiver, for the purpose of maintaining the status quo until the issues may be determined as to the right of ownership. *Smith on Receivers*, § 5, pp. 17, 18; *Sanford v. Sinclair*, 8 Paige, 373; *Gibson v. Martin*, 8 Paige, 481; *Sims v. Adams*, 78 Ala. 395; *High on Receivers*, § 113.

The allegation here is that the indebtedness for which the alleged bankrupts are liable was created through a fraud perpetrated upon the claimants in obtaining their property, for which reason two of them have fled the jurisdiction of this court, and Stanley Francis, the third, is under arrest and in prison. A notice, under these circumstances, to Francis, that a receiver was about to be appointed, in all probability would have defeated the very object of the appointment, to wit, to prevent a disappearance of the property belonging to the alleged bankrupts, and in the appointment of the receiver he was only authorized to hold the property pending the determination of the questions involved. It is not depriving the alleged bankrupts of their property without due process of law. It is merely a preliminary step in a proceeding whereby property is taken into custody and safely preserved until the rights of the contending parties can be determined. We find in all systems of procedure similar means of enforcing rights of parties and preserving property—such as the issuance of the writ of replevin, whereby the possession of property is taken by the claimant from an adverse party without notice; and in admiralty libels are filed and vessels attached; and in foreign attachments personal property is seized without notice—and in all these proceedings the object is to hold the property safely until the issues involved can be determined. They are all instituted without notice.

The petition and answer in this case upon the rule to show why the appointment of the receiver should not be revoked further strengthens the position of the creditors against the alleged bankrupts in their right to have a receiver appointed in this case with-

out notice, and for these reasons we do not think the appointment should be revoked. The receiver, however, is only authorized under his appointment to take the personal property of Stanley Francis, one of the alleged bankrupts, into his possession. As to the real estate, the restraining order issued in regard to that is sufficient without more.

The motion, therefore, to revoke the appointment of the receiver as to Stanley Francis in this case, is overruled.

OLD DOMINION COPPER MIN. CO. v. LEWISOHN et al.

(Circuit Court, S. D. New York. February 24, 1905.)

CORPORATIONS—STOCKHOLDERS—FRAUD OF DIRECTORS.

Where promoters of a mining corporation caused the same to be organized with dummy directors, and caused it to purchase certain mining claims of the value of \$5,000 in consideration of 30,000 shares of the corporation's capital stock of the par value of \$25 a share, such promoters were the only stockholders, and the corporation was not thereafter entitled to rescind the transaction.

[Ed. Note.—Acts of corporators and promoters, see note to *Yeiser v. United States Board & Paper Co.*, 46 C. C. A. 576.]

In Equity. On demurrer to a bill of complaint against the executors of Leonard Lewisohn, deceased.

Eugene Treadwell and Edward Lauterbach, in support of demurrer.
Louis D. Brandeis, opposed.

LACOMBE, Circuit Judge. It was conceded by complainant upon the argument that the bill prayed no relief except rescission of a contract for the sale of certain mining rights and a parcel of real estate in Arizona. Irrespective of such concession, the court would be inclined so to construe the bill. Therefore the objection that it is multifarious cannot be sustained.

The demurrer asserts that the complainant has not by the bill stated such a case as entitles it to have such contract and sale rescinded. This sufficiently challenges the equity of the bill. The facts as averred in the bill are as follows: The deceased, Leonard Lewisohn, and one Albert S. Bigelow were the promoters of the complainant company, and caused it to be organized under the laws of New Jersey on July 8, 1895, by seven persons selected and employed for said purpose, none of whom had any actual interest in the corporation, or acted in the formation thereof other than as the representative and agent of the promoters. Forty shares were nominally subscribed and paid for by these persons, but, in fact, all of said subscriptions were made for the benefit and at the request of Bigelow and Lewisohn, and each subscription was paid for by them. The company having been organized, elections for officers and directors ensued, as a result of which, on July 11, 1895, Bigelow and Lewisohn both became directors, and Bigelow the president of the company. Prior to July 11th they had become the

owners of several mining claims and a parcel of real estate in Arizona, which were worth on that day, as the bill alleges, not more than \$5,000. On that day, at a directors' meeting attended by themselves and two of their dummy directors, they sold and conveyed to the corporation the said mining claims and real estate for 30,000 shares of the capital stock of the par value of \$25 a share. Thereafter, at times not specified, additional shares of capital stock (to the amount of 20,000) were from time to time offered and sold to the public at par, to obtain working capital. The bill also alleges a similar sale, for stock, on July 11th, of a mine owned by the promoters, at an excessive valuation, but no relief is prayed as to that transaction. The prayer of the bill is that the sale of the mining claims and real estate be rescinded, the property reconveyed, and the shares of stock returned or accounting had therefor, or, in the alternative of rescission, that the court will ascertain the amount of damages suffered by the complainant, and decree therefor.

Whether the contract for the sale of the real estate was voidable, so as to give the corporation the right to rescind or to demand damages, must be determined under the conditions which existed when it was made. Ordinarily, when a director or promoter contracts to sell property to his corporation, the corporation not being independently represented, it may rescind the contract, upon the theory, of course, that the relation between the parties is fiduciary, and that the other stockholders and subscribers to the stock are to be protected against an abuse of trust. But where there are no other stockholders nor subscribers, there is no one who is deceived, no stockholder or subscriber who is defrauded, since all the profit put into one pocket by the "faithless" directors is taken out of their other pocket as the sole stockholders. This principle is abundantly established by decisions controlling here, so it will be unnecessary to cite numerous authorities from other courts. In *Foster v. Seymour* (C. C.) 23 Fed. 65, which was decided in this court (Wallace, J.), the facts were very similar, except that the sale was for scrip, the stock not having yet been issued. The court said:

"There was no fraud on the corporation. At the time the scrip was exchanged for the mining property, the trustees were all there were of the corporation. There were no stockholders unless they were stockholders. What was done was done by the corporation. By the exchange the corporation got the mining property, and gave it back again to those from whom it got it, divided into 100,000 shares of the nominal value of \$100 each."

And it held that whether or not a subsequent purchaser of stock could recover against those who had misled him—against the corporation or the trustees—"the corporation has no cause of action against the trustees." Subsequently the same question came before the Court of Appeals in this circuit (*McCracken v. Robison*, 57 Fed. 375, 6 C. C. A. 400), where, as the court expressed it—

"When they entered into the contracts they owned the corporation and all its stock, and represented only themselves. While directors in fact, they were principals in name."

It was held that in such a case the rule prohibiting persons in a fiduciary relation from contracting for their own advantage in the name of their beneficiaries had no application.

This demurrer to the bill is well taken, and it is therefore unnecessary to discuss the special demurrer as to defect of parties. The bill is dismissed, with costs.

THE JOHN FLEMING.

(District Court, S. D. New York. March 31, 1905.)

COLLISION—STEAM VESSELS CROSSING—VIOLATION OF STARBOARD HAND RULE.

A tug held solely in fault for a collision with a crossing ferryboat in Hell Gate for failing to keep her course and speed as the privileged vessel, after they had arranged by signal to pass in accordance with the starboard hand rule.

In Admiralty. Suit for collision.

James J. Macklin, for libellant.

Albert A. Wray, for claimant.

ADAMS, District Judge. This action was brought by the New York and East River Ferry Company, the owner of the ferryboat Haarlem, against the steamtug John Fleming, owned by the Brown & Fleming Contracting Company, to recover the damages caused to the former by a collision between the vessels, which occurred in Hell Gate between Little Mill Rock and Horn's Hook on the 2nd day of April, 1904, about 12:30 o'clock P. M.

It appears that the Haarlem was bound from her Manhattan slip, at 92nd Street, to Astoria, and the Fleming was bound from the east side of Blackwells Island to 95th Street, Manhattan. The tide was the strength of the ebb and the current was running at the rate of about 7 miles. The weather was clear.

The Fleming kept along the Astoria shore, intending to pass to the southward and westward of Little Mill Rock. When she saw the Haarlem coming across, she blew a signal of one whistle, to which the Haarlem replied with a signal of one. Both sides argue the case on the theory of its being governed by the starboard hand rule, which required the Fleming to keep her course and speed and the Haarlem to avoid her.

The testimony is quite voluminous, and is conflicting on many of the points involved. The place of collision, for example, is the subject of diverse contentions, it being stated by the Haarlem's witnesses, that it occurred about half way between Little Mill Rock and Horn's Hook, while those on the Fleming place it very much nearer Little Mill Rock and somewhat nearer the Astoria shore. It is not very important, however, to decide this, or other minor controversies. The question is whether the vessels complied with the course agreed upon.

The Haarlem was navigating to pass to the southward and westward of the Fleming and apparently did what was necessary to ac-

comply that result, provided the Fleming kept her course and speed. The latter, however, did not keep her course but sheered to port, ten points, it is contended by the Haarlem, and two points, it is admitted by the Fleming. It appears that the latter was proceeding at full speed but when she struck the strong tide, she slowed to enable her to more easily throw her helm to port to meet its effects. It is urged, and there is testimony to support the claim, that the best way for the Fleming to do this was to lessen her headway temporarily, with the necessary consequence of being somewhat affected by the tide and driven slightly to port. It is further urged on her behalf, that the Haarlem should have known the necessity for such manœuvre and arranged her own navigation accordingly. The difficulty is that the sheer to port of the Fleming was, in accordance with the preponderance of the proof, much greater than could in any way have been expected by the Haarlem, even if she was bound to know that there would necessarily be some deviation on the part of the Fleming by reason of the tide. In all probability, the Fleming failed to take timely measures to meet and overcome the effects of the tide when she left the slack water on the Astoria shore and was thus driven considerably out of her course and into that of the Haarlem, which was properly arranged as required by the governing rule. It is well established by the testimony, that if the wheel of a vessel under such circumstances as the Fleming was navigating in, is not ported in time, the natural and inevitable consequence is just such a sheer to port as the witnesses say they saw her take here.

It appears that the boats came together port to port, indicating that the Fleming was further up the river than the Haarlem and forced down by the tide. This fact also seems to substantiate the Haarlem's claim that she gave the Fleming ample margin to pursue her course in conformity with the rule.

I conclude that the Fleming was solely in fault and there will be a decree for the libellant, with an order of reference.

BUSH et al. v. EXPORT STORAGE CO. et al.

(Circuit Court, E. D. Tennessee, S. D. August 11, 1904.)

No. 808.

1. BANKRUPTCY—PROPERTY PASSING TO TRUSTEE—PROPERTY TRANSFERRED IN FRAUD OF CREDITORS.

The title, which passes to the trustee of a bankrupt under Bankr. Act July 1, 1898, c. 541, § 70a (4), 30 Stat. 566 [U. S. Comp. St. 1901, p. 3451], to "property transferred by him in fraud of his creditors," is limited to such property as might have been recovered by creditors, in whose right the trustee takes, under the laws of the state, and as may be recovered by him under section 70e (30 Stat. 566 [U. S. Comp. St. 1901, p. 3452]), which expressly excludes property which passed into the hands of a bona fide holder for value prior to the date of the adjudication.

2. PLEDGE—CONSTRUCTIVE DELIVERY—WAREHOUSE RECEIPTS.

It is the settled law, by modern decisions, that, with respect to bulky articles or commodities, the delivery to a pledgee of a warehouse receipt

or bill of lading operates as a constructive delivery of the property, good against the world, and which will entitle the pledgee to recover actual possession.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Warehousemen, §§ 34, 37.]

3. SAME.

A corporation engaged in manufacturing railroad cars and equipment, and having an extensive plant, and premises adjacent for the storage of material, executed leases thereon to warehouse companies, by which it undertook to convey to them the right to use for warehouse purposes such part of the premises as was not used by the lessor. The part used for warehousing was in charge of a custodian selected by agreement, and acting on behalf of the warehouse companies, and was used for the storage of material purchased by the manufacturing company, for which the warehouse companies issued receipts used by the manufacturing company as collateral security for loans. It was contemplated by the arrangement that the warehouse companies would sufficiently mark off the premises used by them for storage by placarding or putting up signboards, and by suitably marking, by stakes, cards, and tags, the piles of material for which it had issued receipts. From time to time the manufacturing company used up such material as required in its business, but, until a very short time before its bankruptcy, such material was replaced by new purchases, so that at nearly all times the amount called for by outstanding receipts was on hand. *Held*, that the pledging of such warehouse receipts to banks, who took the same for value and in good faith, carried a valid title to the property covered thereby, or that had been substituted therefor, in the hands of the warehouse companies, as against the trustee in bankruptcy of the manufacturing company, and that the validity of the pledge was not affected by the fact that the warehouse premises were owned by the pledgor, and used by it, jointly with the warehouse companies, for different purposes.

4. SAME—RIGHTS OF PLEDGEE AS BONA FIDE PURCHASER.

While good faith does not make good a pledge unless there has been a delivery of possession, either actual or constructive, it is equally true that where a constructive delivery has been made by the delivery of warehouse receipts representing the property, which was then in possession of the warehouseman, and accepted for value and in good faith, the pledgee is a bona fide purchaser, whose rights cannot be affected by the methods of dealing between the pledgor and the warehouseman, by which a withdrawal of the pledged property, and the substitution of other property of the same kind, are permitted, without the pledgee's knowledge or consent.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Warehousemen, § 36.]

5. SAME—TITLE OF PLEDGOR—SALE OR BAILMENT.

By a contract for the building of railroad cars, the purchaser was given the option to furnish certain parts and equipment for the same, which the builder agreed to accept and pay for at the prices therein named. Such parts were shipped to the builder, and bills therefor were sent, charging it with the same at the contract prices; but, in practice, the price of the parts furnished was deducted from the price of each car when the same was delivered. On receipt of such parts by the builder, it delivered the same to a warehouse company, taking receipts therefor, which it pledged as collateral security for loans, and some of such receipts were outstanding in the hands of the pledgees at the time of its bankruptcy. *Held*, that the contract was plain and unambiguous, and could not be affected by previous negotiations or subsequent dealings between the parties, and shipments thereunder constituted sales, and not bailments of the parts shipped, and that the title to such property as remained in the hands of the warehouseman at the time of bankruptcy was in the pledgees.

In Equity.

Williams & Lancaster and John P. Tillman, for plaintiffs.
Granbery & Trabue, for defendant warehouse companies.
Laurence Maxwell, Jr., for receipt holders.

CLARK, District Judge. This bill is brought by trustees in bankruptcy to have certain warehouse receipts declared invalid and set aside, so far as they are made the basis of a claim to material found on the premises of the bankrupt at the time the bankruptcy proceedings were instituted.

It may be important in this case, in the very outset, to determine the right which the trustees are undertaking to assert and enforce in this case, and the sources from which the trustees derive the right and remedy.

Section 70a of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3451]) provides:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, * * * shall * * * be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, * * * to all * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

The trustee, upon his appointment and qualification, is thus vested, by operation of law, without any deed of conveyance, with the title of the bankrupt, "as of the date he was adjudged a bankrupt." In *re Engle* (D. C.) 105 Fed. 893; *Hewit v. Berlin Machine Works*, 194 U. S. 302, 24 Sup. Ct. 690, 48 L. Ed. 986. In relation to a right or title thus derived by operation of law from the bankrupt himself, it is very true, and is well settled, that the trustee takes just such title as the bankrupt had, and no better or greater title, and subject to estoppel and to all liens or equities to which the title was subject in the hands of the bankrupt. *Loveland on Bankruptcy* (2d Ed.) pp. 367, 368; *Hewit v. Berlin Machine Works*, *supra*.

But this proposition, although well settled, does not meet or dispose of the contention here presented, for the right which is asserted by the trustees in the present suit was not derived by operation of law from the bankrupt, and the remedy being pursued is not one which was available to the bankrupt. The right here asserted, and the remedy adopted to enforce that right, passed, by operation of law, not from the bankrupt itself, but from creditors of the bankrupt; and the trustees are undertaking to enforce the right in the interest of the creditors of the bankrupt, and in their right, and not by virtue of any right or remedy which passed, by operation of law, from the bankrupt. And so this suit does not involve those provisions of the bankruptcy statute which vest in the trustee the right to avoid certain defined transfers declared invalid by the bankruptcy act itself, and to recover the property fraudulently conveyed. Transfers which are deemed fraudulent, in bankruptcy, and so declared by the bankruptcy act itself, are, first, conveyances and transfers by which a creditor obtains a preference of his claim over other creditors; second, conveyances which are intended to hinder and delay or defraud creditors; and, third, (section 67e, cl.

3, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]), transfers void as to creditors under the local law of the several states; but these transfers are prohibited, and authority vested in the trustee to set them aside, only when made within the four-months limitation.

But besides this class of transfers made void by the bankrupt act itself, as being against its policy of equal and fair distribution, the bankruptcy law (section 70a, subsec. 4, 30 Stat. 566), provides that the trustee shall be vested by operation of law with any property transferred by the bankrupt in fraud of his creditors, the precise language of the act being, "transferred by him in fraud of his creditors." There is no four-months limitation on this class of transfers, and this provision includes fraudulent conveyances which are so by the common law, by statute law, and by any other recognized rule of law of the state. Loveland on Bankruptcy (2d Ed.) § 158, and cases cited. Of course, the fraudulent bankrupt is without right to set aside a conveyance made by him in fraud of his creditors. It is valid between the parties, but, by operation of the very terms of the act, the right which before bankruptcy belonged to the creditors passes from them, and is vested in the trustee.

Fraud, actual or constructive, is a necessary element to give the trustee in bankruptcy a right of action; and the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of adjudication.

The language of section 70e (30 Stat. 566 [U. S. Comp. St. 1901, p. 3452]) is as follows:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value."

It is quite obvious enough that the bankruptcy statute has vested in the trustee this comprehensive power to set aside, in favor of creditors, conveyances which the creditors of the bankrupt might have avoided, subject to the qualification or limitation found in section 70e, which provides, in terms, that the trustee "may recover the property so transferred, or its value, from the person to whom it was transferred, *unless he was a bona fide holder for value* prior to the date of adjudication. Such property may be recovered or its value collected from whoever may have received it, *except a bona fide holder for value.*" (Italics mine.) Loveland on Bankruptcy (2d Ed.) § 158; Crooks v. Stuart (C. C.) 7 Fed. 800; Trimble v. Woodhead, 102 U. S. 647, 26 L. Ed. 290.

It seems open to the trustee, under the above statute, to follow the property fraudulently conveyed, or the proceeds of such property, into the hands of whoever may have received it, until a bona fide purchaser is reached, and that the statute makes this a limit, beyond which the trustee may not go, as the bankruptcy act in this respect re-enacts the exception found in the English statute against fraudulent conveyances

(18 Eliz. c. 5). In *re Mullen* (D. C.) 101 Fed. 413, at page 416; *Lansing Boiler & E. Works v. Joseph T. Ryerson & Son*, 128 Fed. 701, 63 C. C. A. 253; *Loveland on Bankruptcy* (2d Ed.) § 158, and cases cited.

It may be affirmed to be true, as a general proposition, that under any state system of jurisprudence it is necessary, in order to set aside a conveyance or transfer of property as fraudulent against creditors, that the fraud must have been participated in by the vendee or purchaser as well as the vendor. If there are some exceptions, or apparent exceptions, they are not important. This rule that, to render a transfer or conveyance fraudulent as to creditors, it is necessary that the transferee or vendee should have participated in the fraud, is the law both of Tennessee and Alabama. But however this may be, as I have just said, the creditor's right is passed to and vested in the trustee by operation of the bankruptcy law, subject to the limitation that the right of a bona fide purchaser or holder must not be disturbed or divested. The purpose to guard the rights of a bona fide purchaser or holder is everywhere manifested on the face of the bankruptcy act, as amended by the act of 1903. This protection of the rights of a bona fide purchaser is necessary in order to uphold sound commercial policy and confidence, and to avoid inflicting upon the innocent the unnecessary and harsh disadvantage of frequent and serious loss. The right which the trustee may enforce in a suit like this is such right as the creditor would have had in regard to the same transaction as it stood at the time of filing the petition in bankruptcy, and prior thereto, and is subject to the limitation found in the common law, and expressly declared in the bankruptcy act—that the transfer may not be set aside, and the property or its value recovered from an innocent purchaser or holder. This is manifestly the doctrine under which the present bill is proceeding and must proceed, and under which the result must be determined.

These preliminary observations have seemed necessary in order to clear away some confusion as to the ground on which the trustee is standing in the assertion of the right here presented, and the remedy which is being pursued under express authority of the bankruptcy statute.

I do not conceive that section 70, subsec. 5, is materially in point in regard to any question here to be considered or decided. That section is concerned only with furnishing a definition and prescribing a test to determine what property shall pass by operation of law from the bankrupt to the trustee, so as to become a part of the estate for administration and distribution among the creditors. Its purpose is to distinguish between what passes and what does not pass, as regards specific property and property rights, without regard to the condition of the property—whether in possession or in action. With reference to its condition, the property might be found in adverse possession of a third person, or to have been fraudulently transferred, or under an invalid pledge or lien, in all of which cases suit by the trustee would or might become necessary in order to bring in the property or its proceeds, but these several conditions were provided for elsewhere and in other sections of the act; and it was provided in subsection 4, immediately preceding subsection 5, that prop-

erty transferred by the bankrupt in fraud of his creditors should pass to the trustee; and section 70e also authorizes the trustee to sue for the property or its value.

Coming back to the test prescribed by subsection 5, it is provided that whatever property was transferable by the bankrupt, or which might have been levied upon and sold under judicial process against the bankrupt, passes to the trustee. This is the whole scope and purpose of subsection 5. For example, exempt property would not pass. A right of dower by a wife is no part of the property, and would not pass to her trustee, and an estate by curtesy in a wife's property does not pass to the trustee of her husband during her lifetime. The effect of this clause is to transfer the greater part of the assets of the bankrupt, and it has been held that a contingent interest in an estate in remainder, and the income of a life estate under a will, or Indian lands under an allotment act of Congress, do not pass. There would have been no reason or motive in Congress, if the power existed, to enact that property or property rights of the bankrupt which were not in any manner transferable or leviable at law should go to the trustee, and constitute a part of his estate for distribution among the creditors, because such property would not be subject to judicial process if bankruptcy had never taken place. Other sections of the bankruptcy act, as clause 4 of section 70 and section 70e, deal with the case of property fraudulently transferred or disposed of under such circumstances as that creditors might have set aside the transaction if bankruptcy had not occurred. These observations seem sufficient to show that the issues here presented for determination do not in any wise arise under clause 5, and do not call for its interpretation or application.

Subsection 4 of section 70 and section 70e may be read in connection with section 1, subsecs. 23 and 25 (30 Stat. 544, 545 [U. S. Comp. St. 1901, p. 3420]). Collier on Bankruptcy (4th Ed.) p. 510; Loveland on Bankruptcy (2d Ed.) pp. 381, 382, 384, and, in regard to clause 5, pp. 394-408. See, also, Brandenburg on Bankruptcy (3d Ed.) § 1146, and particularly sections 1148 and 1152.

Furthermore, such property as the trustee takes under clause 5 of section 70, and whether he takes it in possession or in action, is taken in the "same plight and condition" as it was in the hands of the bankrupt, and affected by any lien or equity by which it would have been affected in the possession of the bankrupt if bankruptcy had not occurred. It is hardly to be doubted that this is so, and that the rule in *Yeatman v. Savings Institution*, 95 U. S. 764, 24 L. Ed. 589, would apply; and, indeed, this must be regarded as expressly so decided in the late case of *Hewit v. Berlin Machine Works*, 194 U. S. 302, 24 Sup. Ct. 690, 48 L. Ed. 986, in which subsection 5 was under consideration. When, however, the trustee is proceeding to assert rights which passed to and became vested in him under the bankruptcy act, not from the bankrupt himself, but from creditors, and as the representative of creditors, under section 70, cl. 4, and section 70e, different considerations and different rules apply, and he may then assert any right which the creditor might have asserted on the facts as they were at the time of the filing of the petition in bank-

ruptcy; and the trustee may impeach or set aside any act or transaction of the bankrupt, and recover property or its proceeds, just as creditors might have done if bankruptcy had not occurred, and the rights and remedies of the creditors had not been vested in the trustee.

While other sections may be profitably read and studied in connection with section 70, cl. 4, and section 70e, we are, in a case like the one at bar, dealing with a creditor's right under the law of the state as it existed before the filing of the petition or adjudication, and which creditor's right vested in the trustee by operation of the bankruptcy act, to be enforced as the representative of creditors; and, as we have seen, the bankruptcy law adopts the law of the state as defining and determining the rights of the creditors. It is quite clear, therefore, that we are mainly and specially concerned with section 70, cl. 4, and with section 70e, under which the law of the state is to furnish the rule of decision, and the bankruptcy act itself, in section 1, subsec. 25, furnishes a definition of such transfers as may be set aside; the act declaring in that regard that:

"'Transfer' shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security."

So, also, I do not think that section 67a is applicable to the contention here, but is limited to transfers invalid under the bankruptcy law itself, when made within the four-months limitation.

The claims made by the defendant banks are not under chattel mortgages, or any other instruments which under the law of Tennessee are invalid for want of registration; and, if their claims can be sustained either as pledges or as equitable liens, they are claims which, under the law of Tennessee, are not required to be recorded, and the want of recordation would not invalidate or affect them. The registration of such a claim would not sustain it, and the failure to do so would not defeat it, under the law of the state. *Ex parte Fitz*, 2 Lowell (U. S.) 519, Fed. Cas. No. 4,837; *Arendale v. Morgan & Co.*, 5 Sneed, 703.

And these remarks lead us up to the question whether or not the warehouse receipts in question in this case were legally sufficient to constitute a valid pledge or equitable lien on the property claimed under these warehouse receipts, and which property it is the object of the present bill to recover, and for that purpose to have the warehouse receipts set aside and declared invalid, and this contention may now be taken up.

The leading facts in connection with these warehouse receipts, and the methods under which they were issued, and the course of dealing with the property subsequent to the issuance of the warehouse receipts, are not, as I think, in serious dispute, and are not facts about which there is any serious question in the evidence. Certainly this may be affirmed to be true in regard to the substantial and important facts found in the record. The relation between the bankrupt car company and the warehouse companies issuing these warehouse receipts at the time the receipts were issued and subsequently will appear by a very brief statement of the facts, and these facts will be

sufficiently suggestive of the system under which it was attempted to carry on the business. The bankrupt company was engaged in the business of manufacturing and selling railway cars and equipment, and for that purpose owned large plants and premises on which to operate and maintain the machinery necessary in such a manufacturing establishment, with large adjacent premises on which to store and place a large accumulation of material, which it was necessary to keep constantly on hand in conducting such a business. By a system of leasing, the bankrupt company undertook to confer upon the warehousing companies the right, by lease, to use any or all of that part of its premises commonly set apart for storing material as a warehouse yard for the purpose of conducting a warehouse business. The effect of the contracts was to vest in each party certain rights in the premises. In the bankrupt company was the right and possession, so far as necessary and proper, for the operation of its machinery and for taking in material and transporting out manufactured products. In the warehouse companies was vested the right to the use of the premises not so needed by the manufacturing company, for the purpose of placing thereon, as a warehousing place, the material in its various form, such as would be required from day to day and from time to time by the bankrupt company in the operation of its manufacturing establishment. The use made of the premises might be said to be joint, for the purposes of each party, or exclusively to each party, so far as its business required, if we speak of the theoretical or abstract right established by these contracts of lease. In point of fact, there was no fence or inclosure around the parts or portions of the premises used for warehousing purposes, which separated them from those parts of the premises occupied by the building and machinery of the manufacturing company, and in the necessary operation of the manufacturing plant in all of its details. Under the system adopted, it was contemplated that the warehousing companies would sufficiently mark off the premises which were to be used by them for warehouse or storage purposes, by a system of placarding, or of putting up signboards, with such letters and characters as would indicate those used for storage purposes; and when, in the course of business, material was placed upon the premises, and a warehouse receipt issued therefor, the material, generally in bulk, along with or close by other material, was to be distinguished by stakes, cards, and tags; and a record of the different shipments and lots of material piled or stacked upon the premises was supposed to be kept at the office of the warehouse custodian, who was a person selected by agreement for the purpose of representing the warehouse companies in the matter of carrying on and looking after the warehouse portion of the premises, and the material stacked or stored upon such premises. Between the system of placarding and tagging, with the office records kept by the warehouse custodian, it was supposed that any person interested to inquire, or prosecuting an inquiry with reasonable diligence and intelligence, could ascertain the fact that certain material was on the warehouse premises, and in the possession or under the control of companies other than the manufacturing company, and that the ma-

terial covered at any time by any outstanding warehouse receipts could be ascertained by this system of tagging and marking, together with the records kept in the office of the warehouse custodian, constantly on the premises.

It is not to be doubted that the system was irregularly maintained in some of its details, if, indeed, it was at any time entirely perfect, and that there were slipshod methods that finally entered into the system of warehouse keeping which was actually undertaken to be maintained on these premises. While this is so, the evidence abundantly establishes that there was at no time a warehouse receipt issued, except when the property called for by that warehouse receipt was upon the premises, and by agreement in possession of the warehouse custodian, and that there was sufficient effort on the part of the warehouse custodian at all times to keep an amount of material and supplies in stacks and in piles on the warehouse premises of the kind, value, and quantity called for by any and by all of the warehouse receipts outstanding at any given time, and, if at any time the material appeared to be running below this limit, demand was made that the deficiency should be made good, which was done; and this system continued down until a very short time before these bankruptcy proceedings were instituted, when, for a short while prior thereto—at least two or three weeks—there was suffered to occur a shortage in the kind, quantity, and value of the material necessary to answer the claims of all the outstanding warehouse receipts.

It is not disputed that the warehousing system would be good if properly and carefully maintained in its essential details. The objection is that the system, in its essential details, calculated to furnish reasonable safeguards, and to give notice of the real condition of affairs as they at any time existed, was disregarded. This contention on behalf of plaintiffs is thus stated by one of plaintiffs' eminent counsel:

"Suffice it to say that had that 'paper system' been their actual system, this cause would not be before this court for adjudication, nor would these trustees be the representatives here of more than a million dollars of general creditors, but for the fraud of the 'actual system' by which alone was made possible the false credit obtained by the bankrupt."

It is conceded, and could not be controverted, that the creditor banks now holding these warehouse receipts took the same in good faith, and without any knowledge, and in the absence of facts which would put them upon inquiry, as to any failure or slipshod methods in regard to carrying out the full details of the system of warehousing, as described and defined by the evidence and papers found in this record.

In its last analysis, the contention here is not so much over the system of warehousing theoretically adopted and theoretically followed by these warehousing companies, and its sufficiency in law to constitute a pledge, as over the disregard shown in respect of the details of that system on the part of the warehousing companies, and the warehouse custodian, their representative on the ground, as well as certain inspectors who made trips in behalf of the warehousing companies to these premises from time to time for the purpose of

looking after the business, and charged with the duty of maintaining the system theoretically adopted in all of its details.

The contention is that the placarding was insufficient to mark or point out the premises, or to give notice to the public that any particular parts of the premises were occupied for warehousing purposes, or that any of the premises was so occupied, and that the system of tagging and marking the property covered by any warehouse receipt was insufficient to identify the same. It is insisted that the warehousing premises were not marked off by any sufficiently defined boundaries, by stakes, placards, fences, gates, signboards, or otherwise, to show and maintain the exclusive possession of the warehousing companies. The argument is that there was no warehouse at all, and that the very foundation on which a valid warehouse receipt could be issued is thus wanting. The further contention is that there was no exclusive possession of the premises, and that there was and could be no exclusive possession of the property delivered, so as to constitute a pledge, and that, if delivered, the property was not so separated or marked that the material on hand at the time of issuing any warehouse receipt therefor could now be identified, as the evidence discloses that from time to time the manufacturing company used up this material as the operation of its factory and the demands of its business might require, and that other material was substituted from time to time, and frequently, so that it cannot now be said that very little, if any, of the original material covered by the warehouse receipts is on hand, or was at the time of the beginning of the bankruptcy proceedings.

This is the contention in respect of the facts given in brief outline, and a discussion in detail of the evidence would extend this opinion beyond all reasonable limits, and does not seem to be called for in pronouncing what the court regards as a proper judgment in the case, and giving briefly and chiefly, in respect of questions of law, the grounds on which the judgment proceeds.

It is not to be disputed that the earlier cases on the subject declare a very strict doctrine in regard to the questions of actual delivery, segregation, and exclusive possession, as necessary conditions in constituting a valid pledge, but a study of more recent cases discloses what is always recognized—that the law itself, in order to meet the requirements of commerce and our constantly changing industrial and commercial conditions, is progressive and expansive, and constantly, by slow changes, adapting itself to the changed conditions due to progress, and in this way the earlier and more stringent rules are constantly being liberalized and somewhat relaxed. It is now well established, for example, that, in determining the sufficiency of delivery in a pledge, it is necessary to consider the nature of the property, the surrounding circumstances, and the objects of the pledge, and the reasonable convenience of the pledgor and pledgee, and the apparent demands of larger aggregations of capital and large operations in business. It is settled that there need not in all cases be an actual moving of property, but only such a delivery as the property is reasonably capable of, and as is reasonably suitable under the circumstances. In the case of property of much weight or bulk,

moved or transferred with difficulty and expense, a symbolical or constructive delivery has become the rule in almost all cases, instead of an actual delivery; and for much the same reasons the strict necessity of segregation is slowly disappearing, and the validity of substitution is very well settled. It is well settled that, where property is stored in a warehouse, the owner may pledge it by transferring to the pledgee the warehouse receipts—this being a symbolical delivery of the property—and it will give the pledgee such special property in the goods as will entitle him to recover possession. The same doctrine is applicable to bills of lading as ordinarily made out, with notes or drafts attached, and discounted at banking institutions. The cases on this subject are many, and need not be cited, but in this connection reference may be made to the following cases: *Means v. Bank of Randall*, 146 U. S. 620, 13 Sup. Ct. 186, 36 L. Ed. 1107; *Clark v. Iselin*, 21 Wall. 360, 22 L. Ed. 568; *Stewart, Gwynne & Co. v. Insurance Co.*, 9 Lea, 104; *Cornick v. Richards*, 3 Lea, 1; *Price v. Wisconsin M. & F. Ins. Co.*, 43 Wis. 267; *Bank of Rome v. Haselton*, 15 Lea, 242. Other and many cases will be found collated in 22 A. & E. Encycl. of L. (2d Ed.) p. 858.

It may be of service to refer briefly to some of the leading cases:

In the leading case of *Blydenstein v. New York Security & Trust Company*, 15 C. C. A. 14, 67 Fed. 469, a system of doing business was adopted by which the warehouse issued what was called "open receipts" for certain specified quantities of burlap, without specifying any particular bales, and kept against such open receipts those bales which had been longest in store, and delivering to the pledgor's order the oldest bales, and substituting for such bales later bales under the open receipts, but keeping on hand always a sufficient quantity to cover the outstanding open receipts, under which the holders could at any time call for the quantity specified in the receipts from the warehouse; and in such a system substitutions were constantly going on, and the holders of the outstanding warehouse receipts were not able at any time to call for the burlap bales originally covered by the warehouse receipts, but, as the quantity was kept up, they could at any time call for burlap bales of like number, quantity, and quality. It was held that the pledge of the open receipts as security gave the pledgee a valid lien on the bales then in store; that the release of older bales from time to time constituted a valuable consideration for subjecting the new bales, as they were deposited from time to time, to the same lien; and that the transaction was not unlawful, and was in all respects valid, and the pledge good.

This same system of warehousing was brought in question in the subsequent case of *New York Security & Trust Co. v. Lipman*, 91 Hun (N. Y.) 554, 36 N. Y. Supp. 355, and the subject re-examined at length, and the *Blydenstein* Case followed and approved; the Supreme Court (now the Appellate Division of the Supreme Court) holding that it was competent for *Lipman & Co.* and the warehouse company to make an agreement by which receipts were to be issued without bale marks, so that other bales could be substituted for those in pledge; that such an agreement as this violated no statute, and was not against public policy, and was valid. It was, of course, held

and necessarily implied in such a decision that the transfer of the warehouse receipts carried title to the property, and created a valid lien upon the property—not only the bales of burlap originally in possession when the pledge was made, but upon the new bales subsequently substituted and finally found on the premises—and that the plaintiff in that case, as pledgee, was, as to the bales stored in substitution of the older ones, a holder for value, in the usual course of business. The opinion was by Parker, J., then one of the Judges of the General Term of the Supreme Court, now Chief Judge of the Court of Appeals. Referring to this contract and system of dealing, under which the property was not segregated by marks or distinguishing brands, but was an open receipt, according to the understanding, and subject to the constant substitution of new for older bales, the learned judge said:

"Lipman & Co., in accordance with the usual custom in such cases, and their agreement with the warehouse company, continued thereafter to deposit bales of burlap in the warehouse as they were received from time to time and to sell burlap which was stored, and to call for deliveries to their purchasers, the oldest bales being always held for delivery on the open receipts, and, when they were delivered, the next oldest bales were substituted. Thus the bales which were on hand at the time the warehouse receipts in question were given, were after a time all disposed of by this process of substitution, new bales being put in the place of the old as fast as they were taken out, so that there was always in the possession of the warehouse company a sufficient number of bales to make good the agreement which the warehouse company expressed in its receipts. The arrangement which Lipman & Co. had with the warehouse company made it possible to take out the old bales from the warehouse, and put in new ones, without the necessity of making new receipts every time there was a sale. Such was the agreement, and of its validity there seems to be no doubt. No statute was violated, nor is any reason apparent for deeming it against public policy for a bailee to agree with his bailor that, if he [the bailor] shall at any time have on storage a greater amount of goods of the same kind and quality, he may substitute the surplus for a like quantity of that which was originally pledged. It was precisely that which the Terminal Warehouse Company and Lipman & Co. agreed should be done, and it was that which they did in fact. Bales of burlap were never delivered upon the order of Lipman & Co., unless there were present in the warehouse other bales, apparently the property of Lipman & Co., to substitute in their place. By this process of substitution it so happened, in the course of time, that the entire 801 bales which were in the warehouse on the 1st day of December, 1891, were delivered to persons to whom they had been sold by Lipman & Co., and other bales stored in the warehouse were substituted in their place and stead."

This case was on appeal affirmed by the Court of Appeals of New York. *New York Security & Trust Co. v. Lipman & Co.*, 157 N. Y. 551, 52 N. E. 595. The Court of Appeals of New York, referring to the case of *Blydenstein v. New York Security & Trust Co.*, 15 C. C. A., 14, 67 Fed. 469, said:

"We close our review by quoting from that opinion as follows: 'The trust company, therefore, on September 7, 1892, obtained a valid lien on 500 bales of Lipman & Co.'s burlap then stored in the warehouse. Thereupon the warehouse company became its bailee, and held the bales for it. *Gibson v. Stevens*, 8 How. (U. S.) 384 [12 L. Ed. 1123]. Whenever thereafter Lipman & Co. asked to substitute other similar goods of their own for those originally delivered as collateral, the surrender of an equal quantity of the original security of equal value would be a valuable consideration for the giving of the

new security. The pledgee as to the latter would be a holder for value, and the exchange would have no effect upon the rights of the pledgee as founded upon the original contract. *Colebrooks on Col. § 15; Clark v. Iselin*, 21 Wall. 360 [22 L. Ed. 568]."

In the case of *National Exchange Bank of Hartford v. Wilder*, 34 Minn. 149, 24 N. W. 699, the rule was recognized and declared that possession by the pledgee was necessary to the existence and continuance of a pledge. It was held, however, that such possession need not be actual physical possession. The delivery of a recognized symbol of title, such as a warehouse receipt, which puts the pledgee in control and constructive possession of the property, was declared to be sufficient. It was further held that where the property was part of a large, uniform mass, like wheat in an elevator, separation was not necessary to constitute an appropriation by the contract of pledge, and that a warehouse receipt was equivalent to an actual transfer of the possession, and rendered the warehouseman bailee of the pledgee. The opinion in this case is instructive and reviews the authorities.

In the case of *Hoffman et al. v. Schoyer et al.*, 143 Ill. 598, 28 N. E. 823, the warehouse receipts called in question were issued without showing on their face the brands or distinguishing marks of the property stored, notwithstanding a statute of the state of Illinois required that the warehouse receipts should distinctly state on their face the brands or marks upon such property. The receipts were nevertheless held good in the hands of an assignee for value. It was further declared that the holders of such receipts had a specific lien as against the party storing the property, notwithstanding the property covered by the receipts was mingled in a common mass with such other property, and that most of it had been removed from the warehouse and disposed of after issuance of the receipts, and other property substituted in its place. The transactions were, of course, good on the ground of estoppel as against the owner or pledgor; and it was held that the lien created by the warehouse receipts was not lost by the appointment of a receiver, and was good against the firm creditors. The case is distinguishable from the one at bar in the fact that the creditors in that case were partnership creditors, under the necessity of working out any equity they might have through the partnership, while in this case the general creditor is not limited by that view, and may assert all the rights belonging to a general creditor of an individual.

In the case of *Citizens' Banking Co. v. Peacock & Carr*, 103 Ga. 171, 29 S. E. 752, it was held that, to create a pledge or pawn, it is necessary that the property pledged shall be delivered into the possession of the pledgee, but delivery may be either actual or constructive, and when warehouse receipts for cotton are given in pledge the effect is to deliver the cotton itself.

In the case of *Alabama State Bank v. Barnes*, 82 Ala. 607, 2 South. 349, it was decided that, in the absence of statute regulation, the delivery of a warehouse receipt, payable to bearer, as collateral security, without indorsement, placed the legal title and vested the possession of the property in the pledgee, as if there had been an actual manual

delivery, and that a transfer by mere delivery passed a special property and a constructive possession, and that this possession was sufficient to create a valid pledge between the parties, and as against third persons who had not acquired prior or intervening rights.

In the case of *American Pig Iron Storage Warrant Co. v. German, Ex'x, et al.*, 126 Ala. 194, 28 South. 603, 85 Am. St. Rep. 21, it was said that possession of the property pledged, and good faith on the part of the pledgee, are both necessary to constitute a valid pledge as against the rights of the creditors of the pledgor, but that statutes requiring mortgages of personal property to be in writing were without application. It was also held that possession must be complete, unequivocal, or exclusive of the pledgor's possession in his own right. It was declared to be unnecessary, however, in order to give validity to the pledge, that delivery of the property should be made at the very time of the contract, but that the property might be subsequently delivered, and that the pledge would become valid and take effect upon such delivery in performance of the contract. It was further adjudged that in case of pledge of tons of iron under an agreement of pledge, on a spot of ground belonging to the pledgor (a furnace company), but located apart from its other ironyards, and tons of iron pledged placed upon such spot of ground, and marked with paint with the pledgee's initials, this was sufficient delivery of possession of the iron, and gave sufficient public notice of the pledgee's interest in the iron. It was furthermore ruled that the subsequent wrongful removal of the iron so delivered, without the consent or ratification of the pledgee, could not defeat the pledgee's right, upon maturity of the debt, to have such iron subjected to the payment of the debt, and this notwithstanding the iron removed was transferred to a bona fide vendee.

In this state (Tennessee) it was declared as early as the case of *Julius Ochs et al. v. Burger, and F. Seibel v. W. G. Price et al.*, 6 Heisk. 483, that a transfer and delivery of a bill of lading is, in law, a delivery of the property, and vests title in the transferee; such a delivery being constructively sufficient.

In *Stewart, Gwynn & Co. v. Insurance Co.*, already cited, it was declared, in accordance with the doctrine of the modern cases, that warehouse receipts are considered representatives of property, and that an assignment of the receipt is equivalent to a delivery of the property, and that such receipts are contracts.

In the case of *Ex parte Fitz*, 9 Fed. Cas. 185, 2 Lowell, 519, it was ruled by Judge Lowell, of Massachusetts, that a bill of sale intended for security operated as a pledge, and that delivery to the pledgee might be either actual or constructive, and, again, that possession might be kept by an agent, and that such agent might be the pledgor.

In *Dunn v. Train*, 125 Fed. 221, 60 C. C. A. 113, the agreement was that a paper company should deliver the product of its mill to selling agents as security for advances which were made to it by the plaintiff, and deliveries were made, as the goods were manufactured, to an agent agreed upon, who was also an employé of the manufacturing company, and the product was placed by itself on the premises of the company, and was thereafter controlled by its agent, who

shipped from time to time as the plaintiff might order. It was ruled that there was both actual delivery and continuous possession, such as rendered the pledge valid against an assignee of the company, with respect to the goods on hand when the assignee was appointed.

Aldrich, District Judge, giving the opinion of the Circuit Court of Appeals, said:

"We are not aware of any absolute rule of law which would render actual possession and dominion inoperative, and a pledge invalid, because the keeper selected to protect the property was in the employ of the pledgor. Such a bailee or keeper was in the employ of the manufacturers in *Sumner v. Hamlet*, 12 Pick. 76; and even—as said in *Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779—temporary possession may be in the pledgor himself, as special bailee, without defeating the legal possession of the pledgee. Neither is there any absolute rule of law that, where one keeper succeeds another, formal delivery shall be made to the successor. Of course, enough should be done to identify the property, and to show that dominion and control over the property were assumed by the successor; and this sufficiently appears, for the learned judge below has said that the pile being left where it was and as it was, the successor added to this pile the product as it was delivered to him. Nor is there any absolute rule of law which requires property pledged to be removed from the premises of the pledgor. It is enough if the facts sufficiently show that the goods are actually set apart in the keeping of the special bailee, with authority to notify third persons that they are held in pledge, and to remove the goods, if found necessary for the safety of his principal."

In support of the proposition, now well settled in the adjudged cases, that the pledgor himself may be agent of the pledgee for possession and custody, see, also, *McCready & Co. v. Haslock*, 3 Tenn. Ch. 13.

In *Ayers v. McCandless*, 147 Pa. 49, 23 Atl. 344, it was held that a change of location was not in all cases necessary to constitute a valid delivery of a chattel as against creditors of the vendor. As was said by the court, "Due regard must be had to the character of the property, the nature of the transaction, the position of the parties, and the intended use of the property." In that case a lot of lumber piled on the millyard of the vendors was marked on each pile in such a manner as to be visible to one examining the lumber as an intending purchaser. A bill was given, reciting this fact, and agreeing that the vendors were to deliver up possession of the lumber, and to hold it in their yard and mill subject to the order of vendee. This was held sufficient as against an execution creditor of the vendors.

In *Sumner v. Hamlet*, 12 Pick. 76, it was held that, in order to maintain a valid lien as against an attachment subsequently made on goods, it was not necessary that the goods should be removed from the premises of the pledgors, and that it was sufficient if they were in the custody of a special bailee, agreed upon, for the purpose of holding possession, although such bailee was at the time an employé of the pledgors. It was declared to be sufficient if such special bailee was authorized to give notice of the lien to any purchaser or attaching creditor, and also to remove the goods, if removal should become necessary for the safety of his principal.

In a work of high authority the result of the more recently adjudged cases is thus laid down:

"Delivery, in order to be effectual against the world, should be followed by an acceptance of possession, and methods of delivery and acceptance dif-

fer according to the subject-matter and the local situation of the thing. For corporeal chattels in possession there should be usually a delivery of those chattels to the pledgee at once. But constructive delivery and acceptance are now much favored in such transactions. The transfer of the bill of lading of a ship at sea, or the delivery of a warehouse key, have long been esteemed sufficient for legally transferring possession of the thing so symbolized. And so, in modern times, one's pledge by delivering bills of lading of goods in transit, or waybills, whether inland or by water, usually suffices to make the pledgee's title good against the world. Warehouse receipts and the receipts of wharfingers or other hired custodians are also, when expressed in a negotiable form, permitted, in a variety of instances, to be turned over by way of a symbolical delivery of the goods on storage which they represent. Even the delivery of such muniments without a formal indorsement or assignment has, in deference to mutual intent and the loose usages of business, been frequently upheld as constructively sufficient, at all events between the parties themselves.

"Advances are constantly made on the security of merchandise in the course of trade at the present day, and it is quite customary of late years for the consignee of goods which are in transit to pass his bills of lading over to some bank or capitalist by way of security for the discount of his paper. Such transfers are firmly sustained by American courts as amounting to a pledge of the goods themselves for the pledgor's paper indebtedness, and, whether the transit were by land or sea, valid, on the score of a constructive delivery, as against both the pledgee and the public. The exercise of further dominion over the goods by such a pledgor, without his pledgee's assent, is held to confer upon a third party only a tortious possession, such as cannot prevent the pledgee from recovering them." *Schouler on Bailments* (3d Ed.) §§ 189, 190.

See, also, to the same effect, the following cases: *Marine Bank v. Fiske et al.*, 71 N. Y. 353; *Dows v. National Exchange Bank*, 91 U. S. 618, 23 L. Ed. 214; *Munroe v. Philadelphia Warehouse Co.* (C. C.) 75 Fed. 545; *American National Bank v. Henderson*, 123 Ala. 612, 26 South. 498, 82 Am. St. Rep. 147; *Cornick v. Richards*, 3 Lea, 1; *Cherry v. Frost*, 7 Lea, 1; *Bank of Rome v. Haselton*, 15 Lea, 242; *Fidelity Insurance, Trust & S. D. Co. v. Roanoke Iron Co.* (C. C.) 81 Fed. 439.

The cases thus referred to are regarded as sufficiently showing the trend of the modern cases, without extending this review to other cases which might be cited.

In view of the doctrine as now established by the decided weight of authority, I conclude that there was a sufficient and valid delivery of possession, in the methods adopted in regard to the warehouse receipts in question.

There is no statute of this state or of Alabama which defines or requires any particular kind of warehouse. In regard to such heavy and bulky material as iron and other similar products used in a manufacturing establishment like the one in question, it would seem to be quite unreasonable to require that it should be stored or kept in any particular kind of building or warehouse, such as would be necessary for the storage of grain, meats, and the like. Such a requirement would render a warehousing system for such material and articles extremely difficult and expensive. In the absence of statutory regulation, I conclude that leased premises like these in question, sufficiently marked off, by placards, stakes, or otherwise, to indicate possession, is valid, in law, as a warehouse lot or storage place, and that such a place is suitable and appropriate to heavy and bulky

material of the kind in question, and that the premises were sufficiently marked, so far as the issues now to be decided are concerned.

There would seem to be no serious difficulty, as matter of law, in treating the lessor and lessee as both in the actual possession of the premises, so far as the particular business and objects of possession on the part of each might require. It is not perceived that there is any conflict in such a possession, or that the agreement contravenes public policy, and it is not insisted that it is in violation of any statute.

In the absence of fraud, the issuance of the warehouse receipts in question, based on receiving warrants for material at the time on the premises and under the control of a custodian selected by agreement, was a valid and sufficient constructive delivery. In dealing with the situation, it is to be kept in mind that constructive possession is, as matter of law, at any time in the person entitled to such possession, in the absence of an actual adverse possession. In other words, constructive possession follows the right and the title, in the absence of a hostile possession and control. It is very true, as plaintiffs' able counsel has so clearly said, that "good faith does not make good a pledge, unless there has been a delivery of possession, either actual or constructive." This proposition, although too plainly evident for denial, was brought out and restated in the case of *Hook v. Ayers*, 80 Fed. 978, 26 C. C. A. 287. Delivery of possession, either actual or constructive, and acceptance, are facts which lie at the very foundation of the contention on behalf of the defendant banks, as innocent holders. Such possession and acceptance are the essential elements constituting the pledge, and the pledge is the foundation on which the defense of innocent holders is based. In the absence of such transfer of possession as would constitute a pledge, the position of innocent holder or purchaser could not exist. On the contrary, it is equally true that, if these warehouse receipts had their origin in a valid pledge, they passed to the defendant banks as innocent holders, as symbolic representatives of property, and their defense as assignees for value in good faith is a complete answer to every other objection urged in support of this bill. Their defense as assignees for value in good faith is good against every other ground on which this suit rests. And nothing in the dealings or methods between the pledgor and warehouse companies as bailees before or subsequent to a valid pledge of property which once passed into the hands of an innocent holder could affect or destroy the rights of such holders.

Assuming, as I have just said, that the issuance of warehouse receipts, in their inception, was on property at the time on the premises and under the control of the warehousing companies, through a custodian selected by agreement to hold possession, the subsequent interference with or interruption of that possession by substitution or otherwise would not divest or defeat the rights of the assignees for value, in the absence of knowledge or consent on their part. There would, as to them, and as matter of law, remain continued possession, for the reason that without their knowledge or consent there could be no legally valid change of possession. And indeed, so far as the point of substitution is concerned, in respect of product and ma-

terial like the kind here in question, the right to make such substitution by contract, or by methods of doing business in the absence of a contract, is no longer disputed in the well-considered cases. If, as in the case of *Blydenstein v. New York Security & Trust Co.*, supra, the parties might later make it a term or provision of the contract that substitution might be made from time to time in regard to material in bulk or in mass, it follows necessarily that a method of transacting the business in the same way would be valid in the absence of an express contract providing for such method of doing business—certainly so as regards transferees for value.

In reference to cases, I have not regarded it as essential, in view of the close analogy, to point out the distinction between bills of lading, as symbols of property, and warehouse receipts. The former, by mercantile law and usage, stand as substitutes for, and as symbolic representatives of, the goods described, and are, in a general sense, negotiable. The transfer passes the title, though the instruments are not negotiable, in the full sense of the law merchant, in the absence of statute. Warehouse receipts, in like manner, are now regarded as symbols of property, and their transfer passes the title, and by statute of the state of Tennessee they are made negotiable, and it would seem that they are quasi negotiable instruments under the law of Alabama, in the absence of a restrictive indorsement of the instrument. However this may be, it is well settled that the title to the property described passes by the indorsement, in due course of trade, for value, of both classes of instruments; and cases relating to the one class of instruments, so far as the transfer of possession is concerned, are equally applicable to instruments of the other class.

It remains to consider briefly the claim of the Santa Fé Land & Improvement Company. I do not regard it as important to distinguish between the Santa Fé Land & Improvement Company and the Atchison, Topeka & Santa Fé Railway Company, and the separate part performed by each in the transactions which give rise to this claim, and the claim may be referred to generally as that of the Santa Fé Land & Improvement Company.

Now, the car-building contract in question, as originally entered into, was between the Santa Fé Land & Improvement Company and the Standard Steel Car Company. The contract is found in a letter written in answer to invitations for bids on building certain cars according to specifications, and the letter and the acceptance thereof, which completed the contract, are as follows:

"Chicago, Ill., Jan. 28th, 1903.

"Santa Fé Land & Improvement Co., Chicago, Ill.—Gentlemen: We propose to build for you and deliver f. o. b. tracks of the Atchison, Topeka & Santa Fé Railway Company at any junction point, our option, between Chicago and Kansas City, inclusive, 1,200 36-foot box cars of 60,000 pounds capacity at price, and under specifications, terms and conditions as expressed hereafter.

"Price: Eight hundred and nineteen dollars (\$819.00) each.

"Specifications to be in accordance with the specifications of the Atchison, Topeka & Santa Fé Railway system No. 126, dated Topeka, Kansas, January 9, 1903, a copy of which is attached to and made part of this agreement. In said specifications it is understood that where yellow pine is specified it means, long leaf yellow pine. Cars to be provided with two name plates, in

suitable location on cars, reading 'This car is the property of the Santa Fé Land Improvement Company.' It is understood that you will furnish the following material on receipt of proper order from us, giving dates of delivery, at the prices and places of delivery named below:

"Air Brake, \$30.00 per car f. o. b. Wilmerding.

"Brake Beams, \$12.40 per car f. o. b. Detroit.

"Truck Transoms, Bolsters and body bolsters, \$142.00 per car f. o. b. East St. Louis.

"Journal Boxes, \$18.40 per car f. o. b. Chicago.

"Journal Bearings, \$12.65 per car f. o. b. your works.

"Draft Rigging, \$20.40 per car f. o. b. your works.

"Springs, shaft and bolster, \$14.80 per car f. o. b. your works.

"Couplers Trojan, not including brackets, \$18.00 per car f. o. b. your works.

"Roof (Murphy), \$25.50 per car f. o. b. your works.

"Total for material furnished \$294.15 per car.

"We agree to accept the above material from you and pay to you the prices for same named above.

"Delivery: We guarantee to deliver the above cars during months of July and August, 1903, provided that if we desire, in order to effect delivery of all the cars prior to August 31st, we may commence delivery of the cars prior to the 1st of July; delivery contingent, however, upon strikes, accidents, fires and other causes unavoidable and beyond our control.

"Terms: Cash on arrival of cars on tracks of the Atchison, Topeka & Santa Fé Railway Company, as provided herein in lots of 25, inspector's certificate to be attached to invoice, provided that no payments shall become due and payable prior to the first day of July, 1903, but on that date payments shall be made for such cars as may have been delivered prior to the first day of July, and thereafter as cars are delivered.

"This letter is written in duplicate and your acceptance hereon will constitute a contract between us.

"Standard Steel Car Company,
"J. M. Hansen, President."

"Accepted:

"Santa Fé Land Improvement Company,

"By W. B. Jansen, Vice President."

The contention on behalf of defendant banks is that this contract is complete and unambiguous in its terms and provisions, and constitutes a sale, and not a bailment of the car material and specialties set out in specifications referred to, consisting of air brakes, brake beams, journal boxes, and the like, and that it is not permissible for the court to consider what occurred in any previous negotiations or in subsequent dealings with this car material to be furnished by the Santa Fé Land & Improvement Company. In determining whether the contract is one of sale or bailment, the evidence which it is supposed tends to show that the transaction was a bailment, and not a sale, was duly objected to on the hearing upon the ground that the tendency of such evidence is to vary and contradict the written contract as made, and the meaning of which is not doubtful. A previous letter written by the Standard Steel Car Company in relation to the same matter, and dated January 26, 1903, is as follows:

"Standard Steel Car Company. General Offices Frick Building.
J. M. Hansen, President.

"Pittsburg, Pa., 1612 Fisher Building.

"Mr. W. E. Hodges, Gen. Pur. Agt., A. T. & S. F. Ry. Co., Chicago, Ill.—
Dear Sir: In reply to your valued inquiry of the third instant in relation to naming you price on wooden box cars, we take pleasure in quoting you as follows:

"On 3,000 wooden box cars of 60,000 pounds capacity, in accordance with your company's drawings and specifications, delivered f. o. b. your company's tracks, Chicago, Ill., a price of Eight Hundred Twenty-Five Dollars (\$825.00) each car, your company to furnish the grain doors free of cost to us at our works.

"Delivery of these cars to begin at our works during April, 1903, at the rate of from 30 to 35 cars per day, until completion of order.

"Should your company decide to furnish f. o. b. cars the material listed below we will make allowance in accordance with the following schedule:—

Point of Delivery.		
Material.	F. O. B. Cars.	Allowances Per Car.
Player Cast Steel Truck, Bolsters and Transoms.....	East St. Louis.....	\$100 00
Leighton & Howard Cast Steel Body Bolsters	East St. Louis.....	42 60
Miner Draft Attachments.....	Chicago, Ill.....	20 35
Malleable Iron Journal, Boxes and Lids	Butler, Penn.....	16 68
Journal Bearings	Chicago, Ill.....	12 86
Bolster & draft springs.....	Butler, Penn.....	14 00
M. C. B. Couplers.....	Coupler Works.....	18 50
Monarch Brake Beams.....	Detroit, Mich.....	11 64
Westinghouse Air Brakes.....	Wilmerding, Penn.....	29 00

"Thanking you for your kind inquiry and trusting our proposition will receive your favorable consideration, we beg to remain.

"Yours very truly,

[Signed]

J. M. Hansen,

"President."

It would needlessly incurber this opinion to set out the specifications and the subsequent correspondence between the parties to the contract, and between the Santa Fé Land & Improvement Company and the Southern Car & Foundry Company, the bankrupt; the Standard Steel Car Company having assigned the car building contract to the Southern Car & Foundry Company, at Anniston, Ala., under an arrangement by which that company was to build the cars, instead of the Standard Steel Car Company.

In the auditing departments of the Santa Fé Land & Improvement Company and the Atchison, Topeka & Santa Fé Railway Company, and on their books, the contract was clearly treated as a sale, and the price of the car material and specialties furnished by the Santa Fé Land & Improvement Company through the Atchison, Topeka & Santa Fé Railway Company as a debt against the Standard Steel Car Company, and finally against the Southern Car & Foundry Company, to be deducted from the price at which the cars were to be manufactured, and credit for the material to be allowed in settlement for the cars as made and delivered from time to time. A regular bill or invoice of these goods, in the usual form, was sent to the Southern Car & Foundry Company, stating how a draft for the price annexed should be sent, but accompanied by a letter which stated that the bill calling for the price would be deducted in the voucher remittance of the Santa Fé Land & Improvement Company, in payment for the cars. When the car material was shipped from the manufacturers to the Southern Car & Foundry Company, a printed form of receipt, or acknowledgment of the arrival of the goods, was sent by the Southern Car & Foundry Company.

It is shown in evidence that it was customary for railways, in making contracts for the construction of cars, to furnish parts of the material necessary to a completion of the cars, but it is not shown in the evidence that a course of dealing like this had previously occurred between these parties; and Hodges, a witness for the Santa Fé Land & Improvement Company, explains that the reason why the Santa Fé Land & Improvement Company furnished the material through its associate, the Atchison, Topeka & Santa Fé Railway Company, was that it could purchase the material at a lower price than the figure at which the same goods were estimated in the contract—the Atchison, Topeka & Santa Fé Railway Company being a large purchaser of such material—and that when, in the car-building contract, the estimate on the cost of the cars was fixed, it was seen that the Santa Fé Land & Improvement Company could make a profit by buying and furnishing such material as it had the right to furnish under the contract. The right to supply this material by the Santa Fé Land & Improvement Company was not because there was any difficulty in the Southern Car & Foundry Company securing these car specialties or material, or that they were to be of any particular design or standard, which the Southern Car & Foundry Company could not secure on the market, but, as explained by the witness Hodges, because a profit could be derived in purchasing this material direct from the manufacturers by the Atchison, Topeka & Santa Fé Railway Company at an advantageous price, and furnishing the material to the Southern Car & Foundry Company at a price above that sum; this price to be deducted from the contract price of the cars when completed and delivered. And in this connection it may be remarked that the Santa Fé Land & Improvement Company was not under obligation by the contract to furnish these car specialties and material, but had the option to do so, provided it availed itself of that option, in order to secure a profit and gain by reason of the difference between the purchase price to it and the credit price which it was allowed against the full contract price of the cars.

It is insisted on behalf of the Santa Fé Land & Improvement Company that the letter of January 26, 1903, tends to show that the transaction was a bailment, and so intended, and not a sale; and likewise in regard to the acknowledgment or receipt forwarded by the Southern Car & Foundry Company when the consignment of this material was received at its plant at Anniston, Ala. It is also said that the circumstance that neither the Santa Fé Land & Improvement Company nor the Atchison, Topeka & Santa Fé Railway Company was a dealer or seller of material and car specialties like those furnished under this contract is material in determining whether, under the contract, there was a sale or bailment of the personal property in question.

On behalf of the defendant banks the point is made that at the time this contract was executed, and, so far as the record discloses, now, the Standard Steel Car Company was entirely solvent, and that neither party ever contemplated, even remotely, any difficulty such as that which has come about on account of the bankruptcy of the Southern Car & Foundry Company, the assignee of the Standard Steel Car Company. It is said there was no motive for making a bailment instead of a sale, but, on the contrary, good reason on the part of the Santa Fé

Land & Improvement Company for furnishing these goods as a sale, instead of a bailment, as the burden of loss by accident would, in that view, be put upon the other party.

Without further reference in detail to the facts, or the discussion of these facts, it is sufficient to say that if it is permissible to look outside of the contract as made by the letter which contained a final proposition by the Standard Steel Car Company, and accepted in due form by the Atchison, Topeka & Santa Fé Railway Company in writing, much may be said on both sides in the way of pointing to minor circumstances as bearing on the question of whether this was a contract of sale or of bailment; and the case would, in these minor circumstances, perhaps, be about evenly balanced. I do not understand eminent counsel for the Santa Fé Land & Improvement Company to insist that the contract was a bailment, if its interpretation must be limited to the letter which contained the final proposition, and the written acceptance of that proposition. However this may be, it seems to me that it is too plainly evident for denial that the letter, as accepted, construed without regard to previous negotiations or subsequent dealings, constitutes a contract of sale, and not of bailment, and that the circumstance that the purchase price was to be paid by deducting from the contract price of the cars is not material, and would not change the result. After careful study of this contract, I have concluded that the contract cannot be affected in its interpretation or enforcement by any facts disclosed in previous negotiations or in the subsequent dealings between the parties, and this view renders it unnecessary to discuss minutely the circumstances both previous and subsequent to the execution of this contract which are supposed to bear upon its interpretation.

I conclude that the written contract contained in the final letter and specifications referred to, and the acceptance, is complete, and is not ambiguous, and that the case is within the principle of *Powder Company v. Burkhardt*, 97 U. S. 110, 24 L. Ed. 973. I would be entirely willing to announce a different conclusion if I felt that I could justifiably do so on this record, and under the authorities in relation to this question of sale or bailment.

It is hardly necessary to state that, under its cross-bill intervention, the burden is on the Santa Fé Land & Improvement Company to establish the proposition that the contract was a bailment, and not a sale, and that the title to the property did not pass to the bankrupt. *Crosby v. Delaware & Hudson Canal Co.*, 141 N. Y. 589, 36 N. E. 332; *In re Leeds Woolen Mills* (D. C.) 129 Fed. 922.

As between the Santa Fé Land & Improvement Company and the Southern Car & Foundry Company, bankrupt, this result would militate against our common sense of justice and against equity, but the question here is considered between parties both of whom are entirely innocent in regard to the rights which they are asserting in the case. The Santa Fé Land & Improvement Company placed the property in the possession and under the control of the bankrupt, and clothed the bankrupt with the apparent ownership of the property, without any restriction or limitation in the contract, or otherwise, calculated to protect itself or others dealing with the Southern Car & Foundry Company, as innocent purchasers, from the possibility of just such wrong and hardship

as must now fall upon some one. Placing this particular property in pledge under a warehouse receipt by the Southern Car & Foundry Company could not be regarded as an honorable transaction, as there was clearly an implied confidence and trust in the consignment of this property to the Southern Car & Foundry Company under the contract, and the abuse of that trust and confidence is without any redeeming feature. But the unfortunate situation now is that an injury has been inflicted, and all that remains for the court to do is to determine, as between the Santa Fé Land & Improvement Company and the defendant banks, as holders of the warehouse receipts and of this property in pledge, upon whom this harsh loss must fall. Both parties have acted in good faith, and nothing can be charged against either in that regard. If the testimony as to negotiations previous to the final contract and the methods of dealing with the car material furnished under the contract subsequent to its execution were admitted as competent evidence, and duly considered, it could hardly be regarded as sufficient to change the result. It must be acknowledged that the case is close and doubtful. If, upon the whole of the evidence, the proper interpretation of the contract were still left doubtful, there is authority for the doctrine that this doubt would be resolved against the maker of the contract, in favor of an innocent purchaser. In *Arbuckle v. Kirkpatrick*, 98 Tenn. 221, 29 S. W. 3, 36 L. R. A. 285, 60 Am. St. Rep. 854, the question was whether or not the contract under consideration was one of sale, or of mere agency; and, in the concluding paragraph of the opinion, Judge Wilkes, giving the opinion of the Supreme Court of the state of Tennessee, said:

"In construing such a contract, whenever it affects the rights of others, it will be so construed as to protect such rights, and not to enable the complainant to carry out any double purpose. In view of its uncertainty and contradictory provisions, the court will see that third persons are not prejudiced by its construction. The decree of the Court of Chancery Appeals is therefore affirmed."

As I conclude that the written contract, as finally entered into, must be regarded as a contract of sale, and not of bailment, and that this interpretation cannot be changed by extrinsic evidence, it is unnecessary to take up the inquiry whether the proposition declared by the Supreme Court of Tennessee is applicable in a contract like this, and as between the Santa Fé Land & Improvement Company and the defendant banks, who are the real parties to this contest over the car specialties property.

In regard to the leading question here between the trustees and the defendant banks, it was said by counsel that while considering the position, as bona fide holders, of the defendant banks, it must not be forgotten that the general contract creditors are also innocent creditors, although not innocent holders as known to the law. The force of this suggestion is acknowledged, but it is also not to be overlooked that the general creditors extended credit upon the general solvency and commercial standing of the bankrupt upon the whole of its credit and property, and not upon any particular property, while the defendant banks extended credit and advanced money distinctly upon the faith of the special property and material called for by these warehouse receipts,

which are made negotiable by a statute of Tennessee, and are everywhere recognized in law and in mercantile usage as symbols of property, and as passing title to the property specially described in such instruments. So that, while both parties are innocent creditors, the one is a general creditor, and the other an assignee for value of special property, and is afforded protection by the law as such, and the position of such assignee for value is different from that of a general creditor. All of this is, of course, obvious enough without restating it.

The views thus expressed will sufficiently indicate the several orders and decrees appropriate to give effect to these views.

The costs which have accrued under the cross-bill intervention of the Santa Fé Land & Improvement Company will be paid by that company, and the remaining costs incident to the bill by the trustees in the case will be paid out of the general fund belonging to the estate of the bankrupt subject to administration and general distribution among the creditors.

NOTE.—The case of *Thompson v. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. —, just decided, is authority for the view, expressed in the foregoing opinion, that the trustee under the existing bankruptcy act takes the property of the bankrupt in just such condition as the bankrupt himself held the property, in the absence of fraud or some positive provision of the bankruptcy act itself. The court said:

“Under the present bankruptcy act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the act. In *re Garcewich*, 53 C. C. A. 510, 115 Fed. 87, 89, and cases cited.”

WADLEIGH v. NEWHALL.

(Circuit Court, N. D. California. March 13, 1905.)

No. 13,640.

1. CONSTITUTIONAL LAW—CIVIL RIGHTS—MATTERS WITHIN PROTECTION OF FOURTEENTH AMENDMENT.

The rights, privileges, and immunities which the fourteenth constitutional amendment and Rev. St. § 1979 [U. S. Comp. St. 1901, p. 1262], for its enforcement, were designed to protect, are such as belong to citizens of the United States as such, and not as citizens of a state.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 625.]

2. PARENT AND CHILD—RIGHT TO CUSTODY OF INFANT.

Parents have no right to the custody of their infant children, except subject to the paramount right of the state, to be exercised whenever deemed for the best interest of the children.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parent and Child, § 4.]

3. CIVIL RIGHTS UNDER FEDERAL CONSTITUTION—CUSTODY OF CHILDREN.

Code Civ. Proc. Cal. § 1747, which authorizes proceedings for the appointment of guardians for the persons and estates of minor children

having no guardians by will or deed, is a lawful exercise of the state's power; and proceedings based thereon, by which parents are deprived of the custody of their children, do not give them a right of action against the persons instituting the proceedings, under Rev. St. § 1979 [U. S. Comp. St. 1901, p. 1262], for depriving them of rights, privileges, or immunities secured to them by the Constitution or laws of the United States.

4. PLEADING—STRIKING COMPLAINT FROM FILES—SCANDALOUS MATTER.

A complaint in an action to recover damages for depriving plaintiff of rights in violation of the federal Constitution considered, and *held* to contain allegations and charges against not only the defendant, but also other persons, not parties, which rendered it scandalous to such an extent that it would be struck from the files; it having been previously determined that it did not state a cause of action.

At Law. On demurrer to complaint and motion to strike the same from the files.

Horace W. Philbrook, for plaintiff.

Martin Stevens and R. T. Devlin, for defendant.

MORROW, Circuit Judge. This is an action to recover from the defendant the sum of \$50,000 damages, alleged to have been sustained by the plaintiff by reason of the defendant maliciously subjecting the plaintiff, and causing him to be subjected, to the deprivation of rights, privileges, and immunities secured to him by each, respectively, of the following provisions of the fourteenth amendment to the Constitution of the United States, to wit:

"(1) Nor shall any state deprive any person of life, liberty, or property without due process of law; (2) nor deny to any person within its jurisdiction the equal protection of the laws."

It is alleged that the plaintiff was deprived of these rights, privileges, and immunities of the Constitution under color of section 1747 of the Code of Civil Procedure of the state of California. This section provides that the superior court, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either of them, of minors who have no guardian legally appointed by will or deed.

The plaintiff alleges in his complaint that he is a citizen of the state of Washington, and now residing in said state, and that the defendant is a citizen of the state of California, and an inhabitant of the Northern judicial district thereof. The complaint was filed July 29, 1904. The plaintiff alleges that prior to the 29th day of January, 1903, there had been born to the plaintiff and his wife, and of their marriage, five children, as follows: (1) May, born on the 18th day of September, 1887, and of the age of 15 years on the 29th day of January, 1903. (2) John, born on the 18th day of September, 1889, and 13 years of age. (3) Sarah (who until she was about 5 years of age was named Florence), born on the 26th day of November, 1891, and 11 years of age. (4) Solomon, born on the 16th day of September, 1894, and 8 years of age. (5) Helen, born on the 25th day of January, 1901, and 2 years of age. It is alleged that for more than a year prior to January 29, 1903, the plaintiff and his wife and these children resided together in California, except that John had been in charge of the Boys' and Girls' Aid Society in San Francisco since about December 24, 1902; that defendant, during the month of January, 1903, and during the year next prior thereto,

was the president and executive head of the corporation known as the California Society for the Prevention of Cruelty to Children, a corporation organized under an act of the Legislature entitled "An act for the incorporation of societies for the prevention of cruelty to children," approved April 3, 1876 (Civ. Code Cal. § 607); that during the month of January, 1903, M. J. White was the secretary and executive agent of said corporation, and as such subject to the defendant's domination and control; that on or about the 29th day of January, 1903, the defendant and the said M. J. White and one Herbert J. Lewis, who was then and ever since has been the superintendent of the Boys' and Girls' Aid Society—

"Contriving and maliciously intending, and with the purpose and design, to gratify the crafty and evil inclinations and to magnify the importance of the defendant and of others of his said confederates, and to wrong, injure, and oppress the plaintiff and his wife and their children, and to abduct the said children from the plaintiff and from his wife, and maliciously, forcibly, and fraudulently to take away the said children, with the intent to detain and conceal them from the plaintiff and from his wife, and to separate the said children from one another, and to break up and destroy the plaintiff's family, and to hold the said children falsely imprisoned, and to estrange the affections and to poison the minds of the said children against the plaintiff and his wife, and to deprive the plaintiff of the services and of the society of each, respectively, of his said children, and to brand falsely the said children John Wadleigh and Solomon Wadleigh as criminals, and to corrupt and destroy the morals of the said child May Wadleigh, and to corrupt and destroy the morals of the said child Sarah Wadleigh, and to seduce and pervert her affections to the defendant and for his wrongful gratifications, and to give out to the public and induce the public to believe that each, respectively, of the said children was not in truth the offspring of the plaintiff or of his wife, and fraudulently to induce the said children to believe that they, respectively, were not the offspring of the plaintiff or of his wife, and to obtain and hold for effectuating their said intended wrongdoing a false judgment of the superior court of the said city and county of San Francisco to be made under color of the said statute contained in section 1747 of the Code of Civil Procedure of California, and by means of causing the said guaranties of the Constitution of the United States to be violated against the plaintiff and his wife and their children, and purporting to appoint the said M. J. White guardian of the persons of the said children, and to use the name and the pretended exercise of the corporate powers of the said the California Society for the Prevention of Cruelty to Children as a means and shield by and under which to effect their said intended wrongdoing, entered into and together formed a combination and conspiracy, with the common design to effect by their concerted action their said intention and purposes, and thereupon in furtherance of their said common design proceeded" as stated in the complaint.

The complaint then alleges the filing of an unverified petition in the superior court of the state of California in and for the city and county of San Francisco, by the defendant and by his confederates, for the appointment of M. J. White as the guardian of the plaintiff's children. It is alleged that the petition was filed without probable cause. A copy of the petition is annexed to the complaint. The material allegations of this petition are denied, and declared to be as follows: It is alleged that upon this petition the court, without notice and without hearing or opportunity for hearing, without proof, or evidence, or probable cause, and entirely upon the said false and unverified petition, made an order purporting to authorize the said M. J. White instantly to seize and arrest and take said children away from the plaintiff and from his

wife, and to hold and keep the said children in person. Thereupon the defendant and his confederates, with the assistance of two police officers, forcibly, maliciously, and feloniously seized and arrested four of the children, May, Sarah, Solomon, and Helen, and took them from the plaintiff and from his wife, just as the plaintiff and his wife, together with the children, were about to depart from San Francisco for Seattle, in the state of Washington. It is alleged that the child John was also to have gone with the other members of the family, but was detained by the defendant and his confederates at the home of the Boys' and Girls' Aid Society, and thereupon and thereafter the defendant and his confederates held and kept the said children falsely imprisoned at various places as in the complaint set forth; that Sarah, on the 3d of February, 1903, and May, with the youngest child, Helen, on the 5th day of February, 1903, escaped from the defendant and his confederates and fled to the plaintiff and his wife; that John and Solomon were held by the defendant and his confederates until they were produced in the superior court on February 7, 1903; that after the plaintiff and his wife had made and entered their appearance in the superior court on February 7, 1903, there was a pretended trial and hearing of the said suit or proceeding, and solely upon said petition, which had been filed by the defendant and his confederates in the said superior court on the 29th day of January, 1903, as before stated; that this trial and hearing was held in department 9 of said superior court, in the courtroom thereof in the City Hall of the city and county of San Francisco; that the said pretended trial and hearing was the only trial and hearing of the said proceeding that was had at any time in or before the said superior court, and that neither at the said pretended trial or hearing, nor at any other time, was any evidence given in support of the allegations concerning the plaintiff or his wife, or concerning any of their children, stated in the said petition as grounds for the appointment of guardian for the person of any of said children; that four of the said children, namely, May, John, Sarah, and Solomon, were in the said courtroom during the said pretended trial or hearing; that the said children John and Solomon were brought to the said courtroom and to the said pretended trial or hearing by the defendant and his confederates and in their custody; that May and Sarah were brought there by plaintiff and his wife; that Helen was not present in said courtroom, but was at the lodgings of the plaintiff and his wife in the said city and county, sick with a severe cold which she had contracted while she was in the custody of the defendant and his confederates.

The proceedings in the court upon the hearing are described in the complaint in detail. These proceedings resulted in the declaration of the judge presiding at the hearing that he would appoint, and the subsequent appointment of, M. J. White as guardian of the persons of plaintiff's children, and thereupon it is alleged that the defendant and his confederates seized and arrested the four children, May, John, Sarah, and Solomon, and took and abducted them from the plaintiff and his wife, and held and kept them imprisoned at various places until in the month of January, 1904, when plaintiff's wife petitioned the Supreme Court of the state for the discharge of the four children from the custody of the defendant and his confederates, for their restoration to

plaintiff, and for leave to take the children without delay to the plaintiff in the city of Seattle; that a writ of habeas corpus was granted, and on the 12th day of January, 1904, the said children May and Sarah were discharged from the custody of the defendant and his confederates, and restored to the custody of the plaintiff's wife. No order was made with respect to the children John and Solomon, as they were not then in the custody of the guardian, M. J. White; but subsequently, and on January 20, 1904, they were also surrendered into the possession of plaintiff's wife, and thereupon she, with the four children, May, Sarah, John, and Solomon, departed for Seattle, where they have since resided.

The complaint does not state the grounds of the action of the Supreme Court in discharging the children May and Sarah from the custody of the guardian appointed by the superior court, and no opinion in the case appears to have been filed or published. What defects, if any there were, in the proceedings, have not been brought to the attention of the court, unless the following allegation of the complaint may be construed as such a statement:

"No citation or process or notice in the said suit or special proceeding was at any time served upon the plaintiff herein, or upon his wife, or upon any of the plaintiff's said children; that no citation or copy of a citation, or process or copy of process, in the said suit or proceeding, was at any time delivered or shown to the plaintiff herein, or to his wife, or to any of their children at any time in the year 1903."

But this allegation is qualified by the further allegation that the hearing of the petition for guardianship was after the plaintiff and his wife had "entered their appearance in said superior court in the said suit or special proceeding," and the allegation that they were present at each hearing. It would seem that a voluntary appearance in the proceeding would amount to a waiver of notice in a collateral attack upon the proceeding; but, however that may be, the regularity of the proceedings in the state court is not a matter for present consideration.

In the preceding references to the allegations of the complaint, many matters charged therein have not been noticed, for the reason that they are not necessary to a general understanding of the cause of action, which it is the present purpose to point out and consider. The ultimate claim of the plaintiff is that the defendant and his confederates, in furtherance of their common design, and by means of the acts done by them in furtherance thereof, and under color of section 1747 of the Code of Civil Procedure of California, have maliciously subjected plaintiff, and have maliciously caused him to be subjected, to the deprivation of rights, privileges, and immunities secured to him by each, respectively, of the provisions and guaranties of the Constitution of the United States, referring to the provisions of the fourteenth amendment relating to due process of law and the equal protection of the laws. From this statement it very clearly appears that the plaintiff's complaint against the defendant is based upon proceedings in the state court resulting in the judicial appointment of a guardian for his minor children and the taking of the children into custody under such guardianship. These acts, it is said, were done under color of law, but were not due process of law, and deprived the plaintiff of the equal protection of the laws.

To this complaint the defendant has interposed a demurrer upon a

number of grounds, but it will only be necessary to notice the objection that the complaint does not state facts sufficient to constitute a cause of action. The defendant has also interposed motions (1) to strike from the files of the court the entire complaint and suppress the same, and (2) to strike out certain portions thereof.

In support of the complaint, against the demurrer and the motions interposed by the defendant, the plaintiff asserts that the case is a civil-law action, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, and arising under the Constitution and/or laws of the United States, and as such is within the jurisdiction of a Circuit Court of the United States; that the law under which the suit arises is section 1979 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1262]. That section provides as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The plaintiff alleges in his complaint, and has urged in support of it, that section 1747 of the Code of Civil Procedure of California, providing for the appointment of guardians by the superior court for the persons of minors residing in the state who have no guardians legally appointed by will or deed, is invalid and void, for the reason that it deprives persons of life, liberty, and property without due process of law, and denies to persons within its jurisdiction the equal protection of the laws, and that the defendant, proceeding under color of this invalid and void statute in securing the appointment of a guardian for the four minor children of the plaintiff, brought himself within the provisions of section 1979 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1262], and is liable thereunder. This contention of the plaintiff as to his cause of action limits the issues involved, and enables the court to determine without much difficulty the real questions to be considered, notwithstanding the voluminous recitals of irrelevant and immaterial matter.

The rights, privileges, and immunities which the fourteenth amendment to the Constitution of the United States guaranties, and which this section of the Revised Statutes was designed to protect, were the rights, privileges, and immunities which belong to citizens of the United States as such, but not the rights, privileges, and immunities which belong to the citizens of the state. There are privileges and immunities belonging to citizens of the United States in that relation and character, and it is these, and these alone, that a state is forbidden to abridge. *Bradwell v. The State*, 16 Wall. 130-138, 139, 21 L. Ed. 442.

This brings me to the consideration of the question whether the state had authority to confer upon the superior court the power to appoint a guardian for the plaintiff's minor children. In *United States v. Green*, Fed. Cas. No. 15,256, the father of an infant petitioned the court for a writ of habeas corpus to bring up the body of an infant

daughter alleged to be wrongfully detained in the custody of the defendant, who was her grandfather. The court (Mr. Justice Story), in discussing the right of the father to have the custody of his daughter, said:

"As to the question of the right of the father to have the custody of his infant child, in a general sense it is true. But this is not on account of any absolute right of the father, but for the benefit of the infant; the law presuming it to be for his interest to be under the nurture and care of his natural protector, both for maintenance and education. When, therefore, the court is asked to lend its aid to put the infant into the custody of the father, and to withdraw him from other persons, it will look into all the circumstances, and ascertain whether it will be for the real, permanent interests of the infant; and, if the infant be of sufficient discretion, it will also consult its personal wishes. It will free it from all undue restraint, and endeavor, as far as possible, to administer a conscientious, parental duty with reference to its welfare. It is an entire mistake to suppose the court is at all events bound to deliver over the infant to his father, or that the latter has an absolute vested right in the custody. The case of *Rex v. De Mandeville*, 5 East, 221, is not inconsistent with this doctrine, but, on the other hand, supposes its existence. The court there thought it for the interest of the child to give the custody to the father. The judges thought there was no reason to suppose the father would abuse his right, or injure the child. Lord Eldon, in *De Manneville v. De Manneville*, 10 Ves. 52, avowed his approbation of the doctrine, and said he had, exercising the authority of the king as *parens patriæ*, removed children from the custody of their father, when he thought such custody unsuitable. The case of *In re Waldron*, 13 Johns. 419, is directly in point; and to the same effect is *Rex v. Smith*, 2 Strange, 982."

The law upon this subject in this country is stated in section 10 of Hocheimer on Custody of Infants as follows:

"The general result of the American cases may be characterized as an utter repudiation of the notion that there can be such a thing as a proprietary right or interest in or to the custody of an infant, or that a claim to such custody can be asserted merely as a claim, and the general drift of opinion is in the direction of treating the idea of trust as the controlling principle in all controversies in relation to such custody."

In 2 Story's Eq. Jur. § 1341, that author says:

"The jurisdiction of the court of chancery extends to the care of the person of the infant, so far as necessary for his protection and education, and, as to the care of the property of the infant, for its due management and preservation, and proper application for his maintenance. It is upon the former ground, principally—that is to say, for the due protection and education of the infant—that the court interferes with the ordinary rights of parents, as guardians by nature or by nurture, in regard to the custody and care of their children. For although, in general, parents are intrusted with the custody of the persons and the education of their children, yet this is done upon the natural presumption that the children will be properly taken care of and will be brought up with a due education in literature, and morals, and religion, and that they will be treated with kindness and affection. But, whenever this presumption is removed—whenever (for example) it is found that a father is guilty of gross ill-treatment or cruelty towards his infant children; or that he is in constant habits of drunkenness and blasphemy, or low and gross debauchery; or that he professes atheistical or irreligious principles; or that his domestic associations are such as tend to the corruption and contamination of his children; or that he otherwise acts in a manner injurious to the morals or interests of his children—in every such case the court of chancery will interfere, and deprive him of the custody of his children, and appoint a suitable person to act as guardian, and to take care of them and to superintend their education."

In *Mercein v. People*, 25 Wend. (N. Y.) 64, 35 Am. Dec. 653, there was a controversy between the father and mother with respect to the custody of a minor child. The father and mother lived apart under a voluntary separation. The child had been left in the custody of its mother. Subsequently the father sought to obtain the possession of the child by a writ of habeas corpus. In the Court of Errors, Senator Paige, discussing the rights of the respective parents to the custody of minor children, said:

"By the law of nature the father has no paramount right to the custody of his child. By that law the wife and child are equal to the husband and father, but inferior and subject to their sovereign. The head of a family, in his character of husband and father, has no authority over his wife and children; but in his character of sovereign he has. On the establishment of civil societies, the power of the chief of a family as sovereign passes to the chief or government of the nation; and, the chief or magistrate of the nation not possessing the requisite knowledge necessary to a judicious discharge of the duties of guardianship and education of children, such portion of the sovereign power as relates to the discharge of these duties is transferred to the parents, subject to such restrictions and limitations as the sovereign power of the nation think proper to prescribe. There is no parental authority independent of the supreme power of the state. But the former is derived altogether from the latter. In the civil state there is no inequality between the father and mother. Ordinarily a child, during infancy, is entirely under the discipline of its mother, and very frequently wives discharge the duty of education of their children better than the husbands. De Felice, *Lectures on Natural Rights*, lecture 30. It seems, then, that by the law of nature the father has no paramount inalienable right to the custody of his child. And the civil or municipal law, in setting bounds to his parental authority, and in entirely or partially depriving him of it in cases where the interests and welfare of his child require it, does not come in conflict with or subvert any of the principles of the natural law. The moment a child is born, it owes allegiance to the government of the country of its birth, and is entitled to the protection of that government. And such government is obligated by its duty of protection to consult the welfare, comfort, and interests of such child in regulating its custody during the period of its minority."

The provisions of section 1747 of the Code of Civil Procedure of California are a part of the procedure provided for the execution of this supreme power of the state, and there is nothing in the argument of counsel for plaintiff to show that this law is unconstitutional. It must, therefore, be treated as valid, and within the legislative authority of the state. The conclusion follows that no right of action under section 1979 of the Revised Statutes [U. S. Comp. St. 1901, p. 1262] or the fourteenth amendment to the Constitution can be predicated upon the enforcement of this statute in a case that comes within its provisions. The demurrer to the complaint is therefore sustained.

There remains the further question presented by the motion to strike this complaint from the files. This motion is based upon the grounds that the complaint is scurrilous, scandalous, and devised to publish a libel under color of law, and that the scurrilous, scandalous, impertinent, and irrelevant matter is so interwoven with the relevant matter that it cannot be separated therefrom. Having determined that the complaint does not state facts sufficient to constitute a cause of action, we are concerned only with the character of the irrelevant matter contained in this complaint. Among other things, it contains recitals of articles published in the newspapers concerning the guardianship pro-

ceedings in this case in the superior court, and charges and innuendoes concerning the action of the court and others. It is alleged that during the month of January, 1903, and during 10 years or thereabouts next prior thereto, one George A. Newhall, the defendant's brother, was, and ever since has been, and now is the intimate personal friend and business associate of the defendant; that from the 30th day of December, 1899, or thereabouts, until the 1st day of October, 1903, or thereabouts, the said George A. Newhall was a duly appointed, qualified, and acting police commissioner, and member of the board of police commissioners of the said city and county of San Francisco; that in the evening of the 29th day of January, 1903, while the plaintiff and his wife and their four children, May, Sarah, Solomon, and Helen, were at the Ferry Depot Building in San Francisco, waiting to depart thence upon their intended journey of removal to Seattle, the defendant and his confederates, with the assistance of two police officers of the city and county of San Francisco, whose presence there and assistance they had wrongfully procured by means of the defendant's influence and his connection with the police department of the said city and county hereinbefore stated, and all of them armed with deadly weapons, waylaid and stole upon the plaintiff and his wife and their said four children, and then and there, with force and violence, maliciously and feloniously assaulted them all, and then and there, without any warrant, or any regular process, or any authority therefor, forcibly, maliciously, and feloniously seized and arrested the said four children. This is the only reference in the complaint to the said George A. Newhall. There is no averment that he is one of the conspirators, but he is charged by innuendo and inference with the violation of law, and being connected with the crime of false arrest and false imprisonment.

It is further alleged that the defendant and his confederates forcibly, maliciously, and feloniously assaulted the children May and Sarah, and feloniously cut off the hair of the said two children. It is alleged that the trial and hearing in the superior court was destitute of any element of fairness, good faith, or candor, and was a travesty upon justice; that at the pretended trial defendant caused himself to be made a witness, although he knew nothing, and feigned to give testimony against plaintiff, and to prejudice the court wrongfully against plaintiff; that defendant testified that the wife of plaintiff had once borrowed two dollars of defendant, and had tried to sell him a collie dog; that the defendant and his confederates fraudulently repeated and made to the treasurer of the city and county of San Francisco their false and fraudulent representations and pretenses, and by means thereof obtained from him and out of the public treasury of the said city and county, and thereupon fraudulently and feloniously converted to their own private use, \$250 and upwards belonging to said city and county; that the defendant and his confederates gave the child Sarah many presents of clothing and trinkets, caused her teeth to be filled, and kept her at various schools.

There are many other allegations and charges contained in this complaint of the same character; and in plaintiff's brief in support of the complaint it is admitted that the complaint charges that the

defendant and his confederates committed 12 crimes of felony and 39 crimes of misdemeanor, as follows: Five crimes of child stealing (5 felonies); 2 crimes of kidnapping (2 felonies); 5 crimes of false imprisonment, effected by violence, menace, fraud, and deceit (12 felonies in all); 12 crimes of assault, 2 crimes of assault and battery, 8 crimes of false arrest, 7 crimes of libel, 7 crimes of criminal contempt of court, and 3 crimes of criminal conspiracy (in all, 39 crimes of misdemeanor). It will not be necessary to refer to these charges more in detail. It is sufficient to say that they are irrelevant and immaterial to the main charge, which has been considered, even if that charge could be sustained as a statement of a cause of action.

The court is of the opinion that this complaint, containing these scurrilous and scandalous charges, ought not, under the circumstances, to be allowed to remain on the files of the court. The motion of the defendant to strike the complaint from the files is therefore granted

In re **HERSHKOWITZ.**

(District Court, S. D. New York. May 4, 1903.)

No. 3,821.

1. BANKRUPTCY—REVIEW OF REFEREE'S DECISION—CONSTRUCTION OF ORDER.

Where a court of bankruptcy, on a petition for review of an order of a referee requiring a bankrupt to turn over certain property to his trustee, or to pay its value, made an order giving the bankrupt a stated time within which to comply with the order of the referee, it was impliedly an affirmance of such order, and it is not again subject to review in subsequent proceedings.

[Ed. Note.—Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

2. SAME—CONTEMPT—FAILURE TO OBEY ORDER TO SURRENDER PROPERTY.

The fact that a court of bankruptcy in affirming an order of a referee requiring a bankrupt to turn over property to his trustee struck therefrom a provision for the commitment of the bankrupt in case of his default, and gave him additional time, is not an adjudication that he should not be so punished, but leaves that matter to be brought up anew by motion in case the bankrupt fails to obey the order within the time allowed.

In Bankruptcy. On motion for order committing the bankrupt for contempt.

The following is the opinion of the referee (William H. Willis):

This is a proceeding on a petition of William Ford Upson, the trustee in bankruptcy of the above-named bankrupt, and an order made thereon requiring the said bankrupt to show cause before me why he should not deliver over to said trustee "all the property heretofore and still concealed by him from said trustee, to wit, property of the value of \$6,500, consisting of furs and skins; or why he should not turn over and deliver to said trustee \$6,500 in money, being the equivalent in value of said property concealed by said bankrupt." On hearings had before me on the return of such order to show cause I have been attended by Mr. Rosenberg of Messrs. James, Schell & Elkus, attorneys for the trustee, and by Mr. Jesse Epstein, attorney for the bankrupt, and the proofs offered on such hearings are as follows: "All the evidence taken at the first meeting and on specifications and at other times, and the report of the Honorable Ernest Hall, referee in bankruptcy, and order

of the Honorable George B. Adams, Judge of the United States District Court, confirming said report, and refusing a discharge in bankruptcy on the ground that the bankrupt concealed \$6,500 worth of goods; and on all other proceedings herein." It appears that on the application of the bankrupt for his discharge objection was made on behalf of certain creditors on certain specified grounds and that the issues raised by such specifications were duly referred to the Honorable Ernest Hall, referee in bankruptcy, as special commissioner, to ascertain and report the facts. It further appears that after hearings before the said special commissioner and the examination of numerous witnesses, including the bankrupt himself, and the introduction of other testimony and proofs, including the testimony of the bankrupt and other witnesses taken at the first meeting, the said special commissioner rendered his report, bearing date May 7, 1902, finding that all the specifications were fully sustained, and that the discharge of the bankrupt should be denied. On the 24th day of May, 1902, this report was duly confirmed by the court, and the discharge of the bankrupt refused accordingly.

The report in question, which was based on the same evidence that is now before me, contained an analysis of the facts as presented, and an able opinion thereon; and after a very careful examination of the same, and also of the evidence on which it is founded, I accept such report as truly and correctly expressing my own views in the premises, and embody the same herein. This report is as follows:

"To the District Court of the United States for the Southern District of New York:

"I, Ernest Hall, the referee in charge of the above-entitled matter, to whom was referred, as special commissioner, the specifications of objection to the discharge of the above-named bankrupt, having been attended by the bankrupt in person and his counsel and by the counsel for opposing creditors, and having heard the proofs of the opposing creditors in support of said specifications and the proofs offered by the bankrupt in opposition, and having heard and considered the arguments of counsel for the respective parties, and after due deliberation, do report as follows:

"The specifications, although stated in several different forms, present but two vital questions for consideration, viz.: First, that the bankrupt failed to keep just and true books of account from which his true financial condition could be obtained, and concealed his books of account from his trustee, and failed to state them in his schedules; and, second, that in contemplation of bankruptcy he concealed and took to himself assets of the value of \$6,000, and made false oath in not including such assets in his schedules. In the consideration of the evidence offered we are met at the outset by the very peculiar circumstances that the books of account kept prior to January 1, 1901, have disappeared, and the trustee has not been able to find them. Their disappearance has been but lamely excused; and at the same time, by an alleged robbery, in which substantially the entire stock in trade of the bankrupt, consisting of a very large quantity of bulky merchandise, is swept away in the course of a spring morning, and has disappeared without a trace being left behind. The conjunction of these two circumstances naturally gives rise to a suspicion of fraudulent dealing which requires explanation. The bankrupt was adjudicated as such in an involuntary proceeding on June 11, 1901. In order to appreciate and understand the full weight of the evidence offered, it is necessary to consider the condition of the bankrupt's affairs and business since the 1st of January, 1901, when, according to his story, he owed nothing, and had on hand a stock of about \$800. Between that time and May 10, 1901, he bought largely, having on hand a stock of furs, manufactured, unmanufactured, and in process of manufacture, of the value of about \$7,500, and owed at that time, as shown by his schedules, about \$7,500, all contracted for merchandise in 1901, or in a space of about four months. He was a manufacturer of furs, and did business at 55 East Ninth street, Manhattan, N. Y. City. The building was formerly a dwelling house, containing three stories and basement. In the basement was a restaurant. On the first floor (a few steps above the sidewalk) a furrier by the name of Harris did business. On the second floor was the bankrupt's place of business, and the third (or top floor) was occupied by the father-in-law of the bankrupt, Henry

Nagorsky, as a residence for his family, which consisted of a wife and two sons. The story of the bankrupt regarding the alleged robbery is that he had made up into garments a large quantity of the furs which he had bought, and for which he still owed, and that they consisted of about 12,000 skins and furs, and were of sufficient bulk to fill six or seven large packing cases, although they were not packed, but were on shelves and in boxes and closets in the place of business. Louis Nagorsky, one of the sons of Henry Nagorsky, and a brother-in-law of the bankrupt, and who lived in the upper floor, directly over the place of business, was in the employ of the bankrupt as his book-keeper. On the night between the 9th and 10th of May, 1901, and at about 4:30 o'clock in the morning of May 10th, Louis Nagorsky testifies that, having been ill, and having taken a cathartic the night before, he was awake at about 4:30 a. m., and had gone down to a toilet room on the same floor as the place of business, on the floor below that on which he lived, and discovered that the door leading into the place of business had been broken open by removing a panel, and that a robbery had been committed, and everything was upset. He also discovered that the front door on the first floor had been broken open and was standing open. He reported the fact to his father, and sent him to the police station to report the alleged robbery. The witness Louis Nagorsky testifies very positively that the robbery took place between 4 and 5 o'clock in the morning, although he heard no noise, or breaking in the doors, or removing the goods; but when he came downstairs at about 4:30 in the morning the robbery was complete and the robbers and goods had disappeared, leaving no trace. There is little doubt but that the front street door was broken open or opened between 4 and 5 o'clock, as the police officer on the beat, who had a very short post, and paid particular attention to the business portion of it, tried the door at 4, and found it closed, and upon returning from the other portion of his post at 4:45 he at once saw that the door was open, and went into the place, and was told of the robbery. I am therefore convinced that whatever took place in that place of business occurred between 4 and 5 o'clock in the morning of May 10, 1901. I am bound to take notice that at the hour named the day has dawned, and by 4:30 there is fairly good daylight. There was no elevator in the building. If any goods were taken they had to be carried downstairs. If they were taken out in cases, the cases must have been brought through the front door and up a flight of stairs (as no cases were removed), and then carried down again after they were packed. If the goods were carried in bags, or in the arms of the thieves, they must have made many trips to carry 12,000 skins, or made-up garments. They must have had a wagon waiting for them in which to carry them away. The store was in a busy part of the city, in which people are moving about between 4 and 5 in the morning, and yet no one is produced who saw any signs of a robbery, or who saw any one about the premises, or any horse and wagon in the neighborhood. Nor have the diligent detectives who had charge of the case ever found the slightest clue to the robbers or the goods. It must also be taken into careful consideration that the bankrupt had in his employ from five to nine workmen engaged in preparing the skins and making them up into garments, and the bankrupt claims that they were busily engaged in that work; but not one workman is produced who could testify as to what furs or skins were in the place of business before May 10th, nor is there one word of evidence to show that any of the workmen came to work on the morning of May 10th, and found that their services were no longer needed, because of the disappearance of the immense amount of goods. If it has been as the bankrupt claims, some one or more of the workmen could have cleared away all doubt by showing when he left his work on the night of May 9th the goods were there, and when he returned to his work on the 10th they had all disappeared. I regard the omission to produce one of these men as significant and important, and as almost conclusive against the contention of the bankrupt. The only disinterested person who is produced was at the store on the 9th of May, and saw no large amount of goods, and saw no work going on, and was told by Nagorsky that they were not manufacturing any more; but the suspicion to which the statement might give rise was attempted to be cleared away by the bankrupt going to the place of business of this man, and stating that he could manufacture samples for them if they wanted them, and that

Nagorsky was a d—n fool for saying what he had said. Another curious circumstance is that there was an alarm bell connected with the door of the bankrupt's place of business, which rung when the door opened, but the Nagorskys say the wires had been broken or cut some time before the alleged robbery. The appearance of confusion in the place of business when Nagorsky discovered the alleged robbery is suspicious. He says that boxes and furs were strewn about the floor. But there appears no reason why the muffs or other garments in those boxes should not have been taken. There is no evidence that they were not as valuable as the goods which were taken. From the entire evidence, and without regard to the disappearance of the books, and making every allowance for the salutary requirement of the law that, where an act is susceptible of an innocent construction, it should be so adjudged, rather than a guilty or fraudulent one, I am convinced that there was no robbery committed in the premises of the bankrupt on May 10, 1901, or at any other time, and that the goods had been removed by the bankrupt before that date, pursuant to a fraudulent scheme to keep them for his own benefit and to cheat his creditors of their just claims, and that he conceals the property from his trustee, and fraudulently omitted it from his schedules, and made false oath to his schedules in omitting to set it forth as part of his assets.

"But if there could, upon such overwhelming proof of fraud, be left a lingering doubt, it is removed by the disappearance of the books of account prior to January 1, 1901. The bankrupt was bound to aid his trustee and his creditors by every means in his power to discover the true state of his affairs, and to show all his debtors and all his creditors, and particularly so under the peculiar facts in this case. He had a full set of books prior to January, 1901, and kept them in his desk. He says he took the new set of books to his lawyer, but left the old ones, including his checkbook, in the desk, and never saw them again after the receiver was appointed. But why did he not mention them in his schedules? He did not know that they were lost when his schedules were prepared. But who could possibly have an interest in taking the old books but the bankrupt? And for what honest purpose could he have taken them, or caused them to be taken? The receiver did not find them when he took possession, nor any trace of them. The learned counsel for the bankrupt contends that, as he was keeping a full set of books at the time of his failure, which are not shown to be false, he was complying with the bankruptcy law. If those books would show his true financial condition, it would undoubtedly be a compliance with the law; but if they would not, or if there is a strong suspicion that they would not, then they are of no more utility than if they had been opened the week or the day before the failure. If there were proofs that all open accounts in the old books had been transferred to the new ones, they would fulfill all requirements; but such is not the case. The bankrupt had on January 1, 1901, goods outstanding amounting to \$2,000. They were not transferred to the new books, and their collection is not fully shown. The new books contain no inventory of stock on hand on January 1, 1901, either by transfer from the old books or otherwise. There were many transactions had by the bankrupt in loaning and borrowing money covering a long period of time regarding which no entries were carried from the old books or entered in the new. It is true that the bookkeeper, McGinley, testified that the true financial condition of the bankrupt could be ascertained from the new set of books, providing that the entries in them were true, and providing that they stated all the facts from the old books; but the evidence shows conclusively to my mind that they did not contain all necessary and proper entries, and were incorrectly kept and untruthful. It is quite time, in my opinion, that bankrupts recognize the fact that when they are asking the benefit of the beneficent provisions of the bankruptcy law, and are asking to be discharged from their debts and to be again restored to commercial credit, that they should recognize the necessity of acting with absolutely good faith with the court and their creditors, and in aiding by every means in their power a fair and full discovery of their assets and a fair distribution of them among their creditors, rather than hampering the court and the trustee in every manner which cunning can suggest to cover up and hide the true condition of their affairs, and depriving their creditors of the benefit

of such assets as remain. I am of opinion that the specifications are fully sustained by the evidence, and that the discharge of the bankrupt should be denied. I return herewith all the proceedings had before me and the evidence taken herein. All of which is respectfully submitted.

"Dated May 7th, 1902. [Signed] Ernest Hall, Special Commissioner."

With regard to the failure of the bankrupt to produce any of his many alleged employes as witnesses in his behalf before the special commissioner, which failure is commented upon by the commissioner, it should be noted that more than four months have now elapsed since the former hearing, and that the bankrupt has still failed to produce any of the alleged employes in spite of the fact that his position is more critical now than on the former occasion. The disappearance of the salesman who, according to the testimony of the bankrupt, was at the store on the day before the robbery, but has failed to present himself since, is still left wholly unaccounted for and mysterious. No possible motive for the action has been suggested by the bankrupt, and one can only infer that this salesman must have known in advance of what was to happen. It must be further noted that the bankrupt has made contradictory statements in regard to the amount of his loss by the alleged robbery. Monaghan, the patrolman, and Seeleck, the detective, both testify that the bankrupt told them at the time that the value of the goods stolen was \$2,660, while the bankrupt himself testified that his loss was \$6,500. Apparently the first statements were made in haste, and the amount claimed to have been lost by the alleged robbery was on second thought increased so as to correspond more nearly with the goods which had been purchased within the four months previous, and the disposition of which was not accounted for in the books. Under all the circumstances of the case, I am of the most positive opinion that no robbery of the bankrupt or of his place of business ever took place, and that the whole story of such robbery, as told by the bankrupt and his witnesses, is absolutely false, and part of a barefaced and audacious scheme of the bankrupt to cheat and defraud his creditors. I am also of the opinion that all the property of the bankrupt which he has not credibly and properly accounted for has been fraudulently concealed or disposed of by him, and that he is now chargeable with the same, or with its value. In respect to such value the testimony of the bankrupt himself that the value of the goods stolen from him was \$6,500 is a conclusive admission by him that at the time of the alleged robbery he had property of that value, and that no part of such property, or the proceeds thereof, passed to the trustee herein. It follows, therefore, that the bankrupt must now be held to have in his possession or under his control property of the value of \$6,500, which he is fraudulently concealing and withholding from his creditors.

The powers and duties of the courts in such a situation are definitely and clearly set forth in the Matter of De Gottardi (D. C.) 114 Fed. 328. At page 332 of this case, as reported, the judge says: "That a bankruptcy court has jurisdiction, on issues properly joined, to determine whether or not a bankrupt has in his possession or under his control money or other property belonging to his estate in bankruptcy, and, if the issues be found against the bankrupt, to make an order requiring him to pay or deliver to the trustee in bankruptcy the money or other property so found to be in his possession or under his control, and to enforce obedience to such an order by commitment as for contempt, are well-settled propositions." The facts of this case are similar to those now presented, the bankrupt having told a story of payments of \$6,000 and \$425, respectively, and also of a robbery of \$7,500, and the referee having refused to believe him, and having made an order that he pay over the property. Upon these points the judge says as follows: "De Gottardi's claim that he gave \$6,000 to a woman and \$425 to a doctor involves the admission that he did have that amount of money in his possession belonging to the estate of the bankrupts. This fact, however, is also testified to by Righetti, as well as evidenced by the books of the firm. The only question, therefore, to be determined on this branch of the case is whether or not De Gottardi's statement of his disposition of the money is to be believed. It has been said by high authority: 'The bankrupt, when on examination, after admitting the possession of property, must clearly account for the same to the satisfaction of the court, otherwise he must be held to still have it in his

possession and be able to hand it over to his assignee, and, on failing or refusing to account in a reasonable manner for the disposition of assets which have been traced to him, must be held to be acting in contempt of the jurisdiction of the court.' In re Salkey, 21 Fed. Cas. 238 (No. 12,253). Can it be claimed that De Gottardi has accounted in a reasonable manner for the \$6,500 which he admits to have been in his possession but a short time before the petition in bankruptcy was filed by asserting that he gave \$3,000 to a woman and \$425 to a doctor, when he refuses on cross-examination, where there is no immunity from self-criminatory evidence, to name the woman or the doctor to whom he says the money was given? Such a claim would be preposterous. If his testimony in this regard had been true, its corroboration would have been within his power. In the absence of such corroboration, under all the circumstances of this case, the issue cannot be otherwise found than against him. The claim of the bankrupts that they were robbed of \$7,500 is likewise an admission of the fact that they did have in their possession that amount of money belonging to their estate. Here, again, the question to be determined is whether or not the testimony of the bankrupts in regard to the alleged robbery is to be accepted as true or rejected as false." See, also, Matter of Taylor, 7 Am. Bankr. Rep. 410, 114 Fed. 607, where the bankrupt's story that he had been robbed of \$1,700 was refused credence, and he was accordingly imprisoned for contempt for failure to pay over the money as ordered. The general rule in this connection, as established by a long line of authorities, is that where it is shown that the bankrupt had property shortly before the bankruptcy proceedings, and he fails to account for such property credibly and properly, he must be held to have the same still in his possession or under his control, and must be required to pay it over forthwith, or suffer the consequences.

The prayer of the petition herein must accordingly be granted, and an order made requiring the said bankrupt to turn over forthwith to the trustee property of the value of \$6,500 heretofore concealed by him from said trustee, and consisting of furs and skins, or the sum of \$6,500 in money

James, Schell & Elkus, for trustee.
Epstein Bros., for bankrupt.

HOLT, District Judge. I think that Judge Adams, by making the order allowing the bankrupt five days after the entry of the order to comply with the order of Mr. Referee Willis, is to be deemed to have affirmed the order of the referee on the petition for review, and that Judge Adams, by striking out the provision in the order as submitted, "that in default thereof let the above-named bankrupt be committed to jail for contempt of this court," did not thereby adjudicate that the bankrupt should not be punished for contempt, but left such a motion to be brought on at a subsequent period, if the bankrupt did not avail himself of the opportunity to pay within the five days afforded by the order. I think, therefore, that I am precluded from passing upon the question whether there was error in the admission of evidence before the referee, and that the simple question before me is whether the bankrupt has complied with the order of the referee, which was impliedly affirmed by Judge Adams.

The motion is granted. An order will be entered adjudging the bankrupt in contempt, and providing for his being committed to jail until he complies with the order of the referee.

In re KNICKERBOCKER STEAMBOAT CO.

(District Court, S. D. New York. April 7, 1905.)

1. WITNESSES—CONSTITUTIONAL PRIVILEGE—OBJECTION TO INTERROGATORY BY COUNSEL.

The constitutional privilege of a witness not to be compelled to give evidence which may incriminate him is personal, and cannot be invoked by counsel as a ground of exception to interrogatories propounded in a pleading.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1058-1060.]

2. ADMIRALTY—INTERROGATORIES IN PLEADING.

Interrogatories annexed to an answer in a proceeding for limitation of liability, which are directed solely to the discovery of assets of the petitioner, are immaterial to the issues, and subject to exception.

In Admiralty. Proceeding for limitation of liability. On exception to interrogatories in answer.

Martin A. Ryan, for petitioner.

Coleman & Coleman and A. Gordon Murray, for respondent.

ADAMS, District Judge. The libel here was filed by the Knickerbocker Steamboat Company, to contest and limit its liability as owner of the steamboat General Slocum. It is alleged that on the 15th of June, 1904, she was engaged in transporting a number of passengers from the foot of Third Street, East River, New York, to Locust Grove, New York, and while proceeding on the trip, about 10 o'clock in the forenoon, through Hell Gate, she was discovered to be on fire, said fire having originated in the forecastle from an unknown cause, and she was beached on the northerly end of Brothers Island. It is further alleged that a large loss of life occurred by reason of the premises and that many actions have in consequence been brought against the petitioner and more are feared, hence the petitioner desires to claim the benefit of Sections 4283, 4284 and 4285 of the Revised Statutes of the United States and the acts amendatory thereof and supplemental thereto [U. S. Comp. St. 1901, pp. 2943, 2944].

Louis Schiettinger, administrator of the estate of Dora Schiettinger and of Freda Schiettinger, deceased, appeared and answered the petition, denying many of the material allegations thereof and alleging that the Slocum was unseaworthy because she was not properly manned and equipped and did not have competent officers and crew. Further it is alleged that the boat was not manned and equipped as required by the laws of the United States particularly that she was not provided with water tight bulkheads, or with life boats, or boat disengaging apparatus, or with proper fire extinguishing equipment and a well drilled and efficient complement of men to operate the same in case of necessity; also that she was not provided with such number and character of good, efficient and available life preservers and with the life preservers required by law, and such other life saving apparatus as would best secure the safety of persons on board in case of fire, or other disaster, but on

the contrary, the fire extinguishing appliances on board were wholly improper and unsuitable, and the men to operate the same were wholly insufficient, incompetent and undrilled, and the number and character of good and available life preservers and other life saving appliances were wholly insufficient and not in accordance with law. It is further alleged that the boat, although carrying excursionists, had on board certain loose hay or straw, or other dangerous or inflammable material, contrary to statute, and that the officers, pilot and master were not properly certificated and licensed as required by law.

Annexed to the answer were a number of interrogatories, as follows:

"FIRST: State the names of the directors and officers of the Knickerbocker Steamboat Company on June 15th, 1904, and annex a copy of the by-laws of the Company and a list of the stockholders, with the amount of stock held by each stockholder on said June 15th, 1904.

SECOND: (a). What officers or directors had last been aboard the Steamboat 'General Slocum' prior to June 15th, 1904, and give the dates of such visit or visits.

If you shall say that no officer or director had so been aboard, state who last inspected the said steamboat, and if there was a report of such inspection in writing, annex a copy of your answer hereto.

(b). What were the rules and regulations promulgated by the Company for the guidance of the officers and crew of its vessel 'General Slocum' in force June 15th, 1904, and annex a copy hereto.

(c). Give the various dimensions and the ordinary details of the Steamboat 'General Slocum.'

THIRD: State the names of the master and all the pilots, mates, engineers and crew employed on board the 'General Slocum' June 15th, 1904, and what certificate, if any, had each.

FOURTH: State the total number of persons, including passengers and crew on board the 'General Slocum' at the time of her loss.

FIFTH: State the number, size and capacity of the life-boats and life-rafts carried by the 'General Slocum' on her last voyage and what apparatus was supplied for the lowering of the boats.

SIXTH: What fire extinguishing apparatus was the 'General Slocum' equipped with and how many feet of fire-hose did she have aboard and how long had it been aboard and how and where was it stowed when not in use?

SEVENTH: When last had there been a fire drill with the apparatus and hose on board; had all the men employed on board on June 15th, 1904, been engaged in the drill and if not all, which ones had been? State what such drill consisted of.

EIGHTH: When last had there been a boat-drill with the boats aboard and had all the men employed on board June 15th, 1904, been engaged in the drill and if not all, which ones had been? State what such drill consisted of and whether the boats had been put overboard and into the water and disengaged from the davits.

NINTH: How many life preservers had the 'General Slocum' aboard; what were they made of; by whom made, and the date of their purchase and installation?

TENTH: What compensation did the Company receive for the use of the 'General Slocum' on June 15th, 1904? Was such compensation prepaid, and if pursuant to a written contract or charter, annex a copy.

ELEVENTH: Did the Company have any claim against any party or parties either at law or in admiralty arising out of maritime contract or tort for injury or otherwise, to the 'General Slocum' or for a salvage service performed by the 'General Slocum' or any claim whatever on account of said Steamboat? If there is such a claim, state what it is fully and whether suit is pending and in what Court.

TWELFTH: What are the names of the other boats belonging to the petitioner and in what service are they engaged?

THIRTEENTH: What, if any, was the amount of insurance on the 'General Slocum'? What Company or Companies became liable therefor and have any of them paid the amounts due and is it still in the petitioner's possession; if not, what disposition has been made of the amount and to what persons and for what purpose?"

These have been excepted to by the petitioner as follows:

"The Knickerbocker Steamboat Company excepts to the interrogatories annexed to the answer of Louis Schiettinger administrator of the estate of Dora and Freda Schiettinger and refuses to answer the same for the following reasons:

FIRST: The petitioners decline to answer the First interrogatory because it is incompetent, irrelevant and immaterial; also because the respondent is not required by law or the rules of this Court or the Supreme Court of the United States to answer the same.

SECOND: The petitioners decline to answer the Second because (a) is indefinite, and immaterial; also because it calls for the production of a document not required to be produced by the petitioners; (b) is indefinite and immaterial; also might subject petitioners to a penalty or forfeiture or a crime; (c) indefinite, immaterial, and might subject petitioners to a penalty or forfeiture or a crime.

THIRD: The petitioners decline to answer interrogatories Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth on the grounds that they are incompetent, irrelevant and immaterial; also because petitioner is not compelled by law to answer the same; also because answering the same might subject, or tend to subject, petitioners to a penalty or forfeiture or a crime.

FOURTH: The petitioners decline to answer interrogatories Tenth, Eleventh, Twelfth and Thirteenth because they are incompetent, irrelevant and immaterial; also because petitioner is not required by law or the rules of this Court or the Supreme Court of the United States to answer the same."

1st. It is conceded that the names of the officers and directors of the company should be furnished but immateriality is urged as to the remainder of the interrogatory. The by-laws are apparently material because presumably they will define the officers' duties and in that way indicate the corporation's knowledge, which is a disputed issue in the action. I do not see what bearing a list of the stockholders can possibly have upon the determination of the issues involved here.

Exception overruled except as to the list of stockholders and their amounts of stock.

2d. It is urged in opposition to this interrogatory that it is indefinite as it does not ask if the officers or directors went on the steamer for the purpose of inspection, and if that is what is meant, the privilege of a party not to furnish possibly incriminating evidence against himself is resorted to. The interrogatory seems to be sufficiently definite and with reference to the latter objection, it might possibly be urged with effect if the privilege were relied upon by a party or a witness, but I do not see how it can where he has not objected. It is said in Abbott's Trial Evidence, pp. 783, 784:

"Where the privilege exists, it is personal to the witness. His counsel cannot be heard to object. * * * The witness has a right to advise with his counsel in the hearing of the court, but not privately, but must give his own answer without aid in writing or otherwise."

I acted upon this principle on the 30th of December, 1901—In re Emil Henschel [no written opinion]—where a referee in bankruptcy certified a question: "Whether so much of Section 7, sub. 'a' (9), Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425], is sufficient to grant a bankrupt that complete immunity * * * which is guaranteed to every person by the Fifth Amendment of the Constitution of the United States." It appeared that the privilege had been invoked by counsel only and for such reason the matter was sent back to the referee.

Exception overruled.

3rd, 4th, 5th, 6th, 7th, 8th and 9th: These exceptions are similar to No. 2, in so far as they assert the constitutional privilege. As it was only done here by counsel and not by the corporation itself or by any person who might be incriminated as an aider or abetter of the corporation—See *United States v. Van Schaick* (C. C.) 134 Fed. 592—the exceptions can not be considered.

Exceptions overruled.

10th, 11th, 12th and 13th: It would seem that these interrogatories are merely for the purpose of finding assets of the petitioner. As such they are inadmissible. It is well settled, for example, that vessel owners seeking limitation are not required to surrender insurance moneys. *The City of Norwich*, 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134.

Admiralty Rule 32 provides that interrogatories may be propounded touching any matter charged in the libel or any matter of defence set up in the answer. These do not seem to fall within the rule.

Exceptions sustained.

THE TOLEDO.

(District Court, S. D. New York. April 11, 1905.)

SALVAGE—SAVING BURNING OIL STEAMER—COMPENSATION.

A fire broke out in combustible material in the storeroom of a tank steamer lying at Port Arthur, Tex., and laden with crude petroleum, at about 9:30 p. m. Libelants' tug went to her assistance, and, breaking a port into the storeroom, with a hose extinguished the fire, the service requiring an hour or more. Both vessels and those on board were in some danger from a possible explosion of gas and oil. The tug was worth \$20,000, and the saved value of steamer and cargo \$221,000. *Held*, that the salvors were entitled to an award of \$9,000, one-third to go to the officers and crew.

[Ed. Note.—Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.]

In Admiralty. Suit for salvage.

Butler, Notman & Mynderse, for libellants.

Wing, Putnam & Burlingham, for claimant.

ADAMS, District Judge. This action was brought by the Fuel Oil Transit Company, the owner of the steamtug Captain Sam, and her officers and crew, and Philip R. Jones, the marine agent of

Guffey Oil Company, at Port Arthur, Texas, to recover a salvage compensation for services rendered to the steamship Toledo, and her cargo of crude petroleum, at Port Arthur, in subduing flames which broke out in her store room about 9:15 o'clock P. M. on the 27th day of February, 1903.

It appears that the Toledo was a nearly new steel steamship 256 feet long over all, built at Toledo, Ohio, especially for the carriage of oil in bulk, for which purpose she had seven tanks, all of them forward of the engine room, which was in the after part of the ship. She also had a peak tank, situated in the forward part of the ship. In addition she had an after peak tank, in the stern of the ship, commonly used for fresh water. Over the forward peak tank were sailors' quarters and above them the rooms of the 1st and 2nd mates. Aft of this part of the ship was a compartment which contained the pump room and a room for ship's stores. A space 8 by 12 feet was partitioned off from the starboard after corner of the store room by open slat work to form a paint locker. It contained 2 wooden shelves, built against the coffer dam bulkhead. The compartment was reached from the main deck, through a companion way, which had a flight of steps running forward to the first deck. Another flight led from the first deck, under the first flight, to the pump room below.

Aft of the pump and store room compartment was a coffer dam 2 feet wide, running from the upper deck to the bottom of the ship, which separated Tank No. 1 from the pump room compartment and there were 5 more tanks, running back to another coffer dam, which separated No. 6 from No. 7, the latter being used for oil or coal, as might be desired. Another coffer dam separated No. 7 from the fire room.

Port Arthur was the outlet for the Texas oil fields, as well as other products of that state. Its deep water harbor was connected by an artificial canal with Sabine Pass, 8 miles distant. The latter communicated with the Gulf of Mexico by a natural water way. The basin at Port Arthur is lined with warehouses, grain elevators, lumber wharves, owned by various parties, and the oil wharves of the J. M. Guffey Petroleum Company. There were three of the latter but only one sufficiently completed at the time to be used for loading vessels.

The Toledo had come to Port Arthur in ballast, from Philadelphia, and on the 27th of February about 3:30 o'clock P. M. she was fully loaded with oil, by means of pipe lines. She had taken on board about the equivalent of 21,000 barrels of oil, which was put in tanks Nos. 2, 3, 4, 5 and 6. As soon as she was loaded, she was moved forward and moored to some spiles about 60 feet from the canal bank to enable the steamer J. M. Guffey to take her place and the latter, some 30 or 40 feet astern of the Toledo, commenced to load by means of the same lines. The oil steamer Catania was lying about 300 feet astern of the stern of the Guffey, waiting to take the latter's place when she should be loaded. The Captain Sam, a wooden oil burning tug, 85 feet long, was lying moored on

the outside of the Guffey. The Captain Sam had been that day to Sabine Pass, returning about 8 o'clock P. M., with the libellant Jones on board and was under his orders.

About 9:15 o'clock P. M. a fire broke out in the store room of the Toledo, causing volumes of smoke to issue from the companion way and through the ventilators, leading to the pump room compartment. It subsequently appeared that the fire was in some canvas on the shelves in the paint locker. There were other articles of an inflammable nature in the store and pump room, subject to be consumed by the flames. The fire was principally caused by the burning of the canvas mentioned. How it originated was apparently not known. It caused a dense smoke, with some flames, and was dangerous on account of the nature of the cargo.

An expert on this subject was examined for the libellants in court. In addition to being a scientific man, he had considerable practical experience with oil. He said, in substance, that petroleum will only ignite by contact with flames but it is constantly evaporating, giving off a combustible gas, which when mixed with air and ignited, is apt to explode with great violence. It will ignite in a temperature of 400 or 500 degrees Fahrenheit, without contact with flames. It is heavier than air and will settle to the bottom of any receptacle, driving out the air. When the tank is full, the gas will overflow on the deck of a steamer and run along and down any orifice left open and in a case like this, it was apt to run into the compartment where the fire was, with disastrous consequences to life and property. If the fire had not been promptly overcome, such a result might have occurred here and in such event the ship would have sunk, and the ignited oil have floated to other vessels, of which there were several in the harbor, and caused their destruction, as well as the warehouses and other property in the harbor.

The testimony of this witness has not been met by that of any other expert and seems to be reliable and credible. It is proved that there is generally some seepage, or leakage, of the oil and that the gas will readily penetrate through small openings, which are usually found about the rivets and other holes of iron fittings, used to separate the compartments.

A disputed question in the case is, whether the coffer dam aft of the store room was empty or full. The libellants contend that it was empty at the time of the fire and the testimony shows that after the fire it had a rusty appearance inside. It was actually empty at 9 o'clock the next morning, but the claimant says that it had been pumped out at an earlier hour. I am rather disposed to believe that it was empty at the time of the fire. In any event, it was only three quarters full and this, according to the expert testimony, was almost equally dangerous with a completely empty tank because any oil finding its way there, would rise to the top of the water and generate gas, which would have been subject to explosion in the high temperature in the immediate vicinity of the fire. The expert further says, that the upper part of the coffer dam would become red

hot, meaning a temperature of 600 to 800 degrees. The danger of explosion existed, notwithstanding Tank No. 1 was apparently empty, by the gas flowing along the deck to the pump room companion way, and thus getting into the compartment, or by entrance through any defective rivet hole or other leaks that might have existed.

Another disputed question of fact arises out of opposing contentions with respect to securing an entrance to the pump room through the breaking of the glass port on the starboard side. It is claimed by the Toledo that her master entered a small boat, which was near the steamer, and broke the port with an oar. On the other hand, the tug claims that one of her men broke it with an axe and a 2 inch hose was immediately put in, which threw a stream on the fire and eventually subdued it. It is impossible to reconcile these diverse claims and it seems that the tug's is more entitled to credence. I accordingly adopt her view in such respect.

The length of the service is also disputed. It was probably of an hour or an hour and a half's duration, but the time is not of great importance. The effectiveness is the real matter to be determined. The fact that the salvage was quickly rendered rather tends, in a case of this kind, to enhance its value.

The tug at first passed the port leading into the store room, in order to reach the bow of the steamer for the purpose of removing her, but upon being advised there that the master did not wish the Toledo to be towed away but for assistance with fire hose, the tug circled around and went to the port and then broke in the dead light and played on the fire as stated. Some time was necessarily lost in this manœuvre, but the tug reached the fire in time to effect the result and should not be blamed for any delay incident to her first attempt.

It is claimed by the libellants that the Captain Sam was worth \$30,000 and by the Toledo that \$12,000 would have covered her value. It appears that she was more than 30 years old but had recently been repaired and was in good serviceable condition. It is probable that \$20,000 is a conservative estimate of her value.

The Toledo was worth \$200,000 and the oil on board \$21,936.07. The claimant's total value at risk, therefore, was \$221,936.07.

The services were brief but efficient and dangerous in some degree. The question of a proper allowance is a difficult one. The libellants claim \$40,000, and the claimant urges that \$750 would be ample. Of course the danger to the Toledo and her cargo is the principal matter for consideration but the risk of the salvors is a proper one to enter into an award. Where human life is involved, the value of the services is increased. Dr. Lushington said, in this connection, in *The Thomas Fielden*, 32 Law Journal, 61, 62:

"The first question to be ascertained is the following: was there any danger to the ship, or to the lives of the individuals concerned in the performance of the salvage services? Now, that is the first and most material question, because I hesitate not to say that, however great may be the danger to the property itself, if it is wholly unattended with risk to human life, it assumes much less value than when under circumstances where human life

is put in peril. * * * The time is of no consequence. I have even held the opinion that, when once I can come to the conviction that human life has been at stake, even for a short time, it is the duty of the Court amply to reward the persons concerned; and for obvious and plain reasons—first, because from the necessity of the case, a very great reward should be given wherever there has been a sacrifice of human life; and, secondly, that human life is above all other considerations, and ought never to be exposed to unnecessary hazard and risk."

The danger was recognized on the Toledo, many members of her crew were seeking safety in flight. The officers however remained and did what they could in the emergency. There was practically no other assistance than that of the Captain Sam to be had. The Guffey, lying astern of the Toledo could have aided her with a stream of water, if the fire could have been properly reached by the pump room companion way, but assistance of that kind was of little use as the fire could not be subdued in that way, owing to the difficulty of obtaining an entrance there on account of the smoke. The port in the locker room was apparently the only practicable way of conquering the flames with water, although something might have been done through the companion way by the use of steam, but it is doubtful if all ventilation of the compartment could have been stopped and the vessel saved in that way. The master of the Guffey testified that he had a steam hose but his appliances would have been useless in this fire.

No closely analogous case to this has been cited but several where danger existed on the salvaged vessels have been called to my attention, viz.: The Cyclone (D. C.) 16 Fed. 486; The Lydia (D. C.) 49 Fed. 666; The Elena G. (D. C.) 61 Fed. 519, and The Elmbank, 69 Fed. 104, 16 C. C. A. 164.

The Cyclone was a case of salvage in New York Harbor, where a bark loaded with naphtha took fire while lying at a wharf. She was towed into the stream and the fire extinguished. The value of the vessel was appraised at \$6,500 and that of the naphtha at \$7,553. It was held that the bark and cargo were in extreme danger and that there was personal hazard attending the services, owing to the inflammable and explosive character of the naphtha. 15% was allowed upon the value of the vessel and 25% upon the cargo.

The Lydia was lying in the Kill von Kull at the end of the pier at Bayonne loaded with 2,900 barrels of crude petroleum and iron pipes. It was said that the petroleum cargo was highly inflammable and the gases, from it, if confined, liable to explode. The value of the ship was from \$8,000 to \$10,000 and of the cargo \$12,412. The aid of the tugs engaged in the service of towing into the stream and extinguishing the fire was timely and prevented any serious loss. \$4,000 was allowed for the whole service.

The Elena G. was lying in the Schuylkill River at Point Breeze, loaded with 39,641 cases of refined petroleum. A fire and explosion occurred a short distance away, setting fire to the wharf where the vessel lay and to large quantities of oil floating on the river. The flames were communicated to another vessel and the Elena G. There was great danger that they would reach the cargo

and cause instant destruction of it and the vessel, worth together about \$35,000. The salving tugs were worth about \$53,000. A salvage of \$6,800 was allowed.

The Elmbank was lying at a dock in San Francisco. Her cargo consisted of sulphur. A fire broke out which the City Fire Department was unable to subdue with water and the agent of the underwriters engaged the services of the libellant, who had previously, to the agent's knowledge, extinguished a fire in a vessel's hold by the use of carbonic acid gas. The libellant directed that the fire engines cease pumping water into the hold and that all the hatches and other openings into the hold be tightly closed. He then provided empty barrels and fitted them with necessary tubes for the introduction of gas into the hold. Chemical engines belonging to the Fire Department were then brought to the scene. Carbonic acid gas was introduced into the hold by the engines at about 5 o'clock P. M. and by 8 o'clock P. M., or earlier, the barrels and the gas they contained, arising from the fragments of marble and muriatic acid used in them, were in use. The district court allowed \$10,000 in view of the libellant's exposure to hazard and his skill as a chemist. 62 Fed. 306. The salvaged property was worth \$97,000. The award was reduced to \$6,000 on appeal.

While none of these cases affords any particular aid in the determination of the question here as to the amount of the award, yet they indicate the disposition of the courts to recognize services rendered under dangerous circumstances and so far are applicable as the testimony here shows that the tug and salvors as well as the Toledo and cargo were in a somewhat hazardous situation. Of course, the danger to the tug was not imminent at any time, except possibly from the effects of an explosion on the Toledo and what risk there was of that was quickly averted.

I think that, considering the value of the property at risk and saved, \$9,000 will be a proper compensation, one third of which should go to the master and crew of the Captain Sam, in proportion to their wages, the master receiving a double portion. The libellant Jones, as he was identified with the tug, will be considered as one of her officers and will be allowed three portions at the rate of master's wages.

Decree for libellants accordingly.

SMITH v. DAY et al.

Circuit Court, D. Oregon. April 19, 1905.)

No. 2,307.

1. APPEAL—DECISION—RETRIAL—ADDITIONAL EVIDENCE—EFFECT.

Plaintiff, a passenger on a steamer lying in a river, was injured by a rock thrown out by a blast on shore. In an action for such injuries, the Circuit Court of Appeals held that evidence showing that defendants gave no notice to the boat passengers that a blast was about to be fired was sufficient evidence of negligence to justify submitting the case to the jury. *Held*, that additional evidence introduced on a subsequent trial after re-

versal that the blasts fired were not in a series, but were continuous, with short intervals of time between them, so that it was practically impossible that there should be separate notices of the firing of each blast, did not so change the rights of the parties as to deprive the former decision on appeal of its effect as the law of the case.

2. SAME—INSTRUCTIONS.

Where, in an action for injuries to a passenger on a boat by being struck by a rock thrown from a blast on shore, there was evidence that plaintiff had knowledge of the blasting operations before his injury, but the court, on a prior appeal, held that it was a question for the jury whether defendants engaged in such operations were guilty of negligence in failing to give notice to plaintiff of the blasting, an instruction, on a retrial of the case, that it was defendants' duty to exercise reasonable care to avoid injuring persons situated as plaintiff was, and to exercise reasonable care in giving notice to plaintiff that blasts were about to be fired, was not erroneous because it implied that defendants were required to send some one on board the boat to give notice to plaintiff in person, and for that purpose to wake him if he was asleep.

3. SAME—DAMAGES—EXCESSIVENESS.

Plaintiff was somewhat injured, through defendants' negligence, by being struck by rock thrown from a blast. He claimed injury to his right ear, but on the trial had little difficulty in hearing questions put to him as a witness; and, though he was made cross-eyed from the effects of the accident, his vision, for practical purposes, was unimpaired. It appeared that plaintiff's ability to follow his occupation and his earning capacity were not materially diminished. *Held*, that a verdict for \$10,000 was excessive, and should be reduced to \$3,000.

See 117 Fed. 956.

A. S. Bennett and G. W. Allen, for plaintiff.
Dolph, Mallory, Simon & Gearin, for defendants.

BELLINGER, District Judge. The facts in this case are set out in the opinion of this court upon the motion for a new trial in 86 Fed. 62, and in the opinions on appeal, 100 Fed. 244, 40 C. C. A. 366, 49 L. R. A. 108; 128 Fed. 561, 63 C. C. A. 189. Upon the last trial the jury returned a verdict in favor of plaintiff for \$10,000. The defendants move to set this verdict aside and for a new trial upon the ground that the verdict is excessive and appears to have been given under the influence of passion or prejudice, and upon the further grounds that the court erred in its instructions to the jury, and that the evidence is insufficient to sustain the verdict.

The plaintiff's right to recover is based upon the alleged negligence of the defendants in failing to give plaintiff notice, before the accident from which the injury complained of resulted, that blasts were about to be fired. Prior to the decision by the Circuit Court of Appeals in the second appeal (128 Fed. 561, 63 C. C. A. 189), I was of the opinion that the plaintiff's admissions, in his testimony, of knowledge that there was blasting going on immediately prior to the accident, were sufficiently explicit to take the question of notice out of the category of disputed facts, and furthermore that, inasmuch as the plaintiff was at the time of the accident in the cabin, where all those traveling on the boat resorted for safety, he must be presumed to have been in as safe a place as he could get, with the exercise of reasonable care and with knowledge of what

was going on, and that therefore the question of notice was not material.

The appellate court—Judge Gilbert dissenting—reversed the judgment. That court holds that the question of notice, notwithstanding plaintiff's admissions of knowledge, is a question for the jury. The opinion, which is brief, states the conclusion of the majority of the court as follows:

"It is conceivable that reasonable men might say that in the prosecution of such work, under the circumstances disclosed by the record, some notice should be given of each separate and distinct blast fired in the immediate vicinity of people liable to be injured thereby."

The further ground upon which this court based its decision, namely, that the plaintiff was at the time of the accident in as safe a place as he could get in the exercise of reasonable care, under the circumstances, is not referred to in the opinion.

Upon the last trial the defendants introduced testimony to the effect that the blasts fired were not in series, but were continuous, with short intervals of time between them, so that it was practically impossible that there should be separate notices of the firing of each blast. And this testimony being uncontradicted, the defendants contend that the case is taken out of the rule laid down by the appellate court. My conclusion is otherwise. In my opinion, the case is in no way altered by this new testimony. All of the testimony on the former trials relating to this particular matter was to the effect that the blasts were fired in regular and close succession until completed. There was no contradiction and no dispute between the parties as to that. The plaintiff did not contend at any time that notice should have been given of each blast, nor did he so contend upon the trial recently had, notwithstanding the reversal of the former judgment upon the ground that the jury should have been permitted to so find. In none of the instructions requested by the plaintiff was the court asked to submit such a question to the jury, nor was such a thing thought of, so far as I am advised, nor was there anything in the case, independently of the continuous character of the blasting, to make the question of more than one notice material, since the plaintiff's position was not changed during the blasting. He remained from first to last in the cabin of the boat, where the passengers went to be out of danger.

On the last trial the court instructed the jury that, in the prosecution of the work upon which the defendants were engaged, it was their duty to exercise reasonable care "to avoid injuring persons situated as plaintiff was"; that it was required of them to exercise reasonable care in the matter of giving notice "to the plaintiff" that blasts were about to be fired; and in that connection the jury were told that they should consider all the circumstances of the case, including that of "the place where the plaintiff was on the boat." The defendants contend that the notice here described, having reference to the situation in which plaintiff was, and to the place he was in on the boat, might be construed by the jury to imply that defendants were required to send some person on board

the boat, who should give to the plaintiff in person the notice to which he was entitled, and who should wake him for that purpose if he was asleep. The instructions in question were given and the case submitted to the jury upon the law of the case as settled by the appellate court. While this question was not presented to that court in the precise form in which it is now presented, and was not in terms passed upon, yet it inheres in the case. As already suggested, the testimony bearing upon the particular matter was the same in the last trial as in the one that preceded it. In view of the opinion of the Court of Appeals upon the facts before it, I am not prepared to say that the notice required should not have been of the character suggested by the instructions as defendants interpret them. The plaintiff, in the trial before the last appeal, testified that at the time he went upon the boat there was blasting—so he understood; that he heard some noise, and thought they were blasting. It is not probable that he in fact heard blasting at this time, since there was no blasting then going on, and he was speaking with reference to the locality where he was. His statement that he “understood there was blasting at that time” can have no other interpretation than that he knew that the work being prosecuted there involved blasting at that time of the day. He may not remember or correctly state the reasons for his understanding. That is not material. His means of knowledge do not affect the conclusiveness of the admission made against his interest. After going upon the boat and playing a game of cards, he says that he heard some noise that sounded like blasting at a distance; that this noise “sounded very indistinct in there, because there was a cataract of water, and more or less noise going on, caused by the passengers and the unloading of freight.” The fact that the blasting sounded like distant blasting was due—so he states—to the noises which he knew about and describes. The plaintiff says that the idea he had “was a vague idea that there was work going on on the outside—whether there was blasting there, or noise that sounded like it.” He also says that he dozed off into a light sleep after hearing several blasts. These admissions of knowledge are independent of what he learned when first going on the boat. The use of the word “outside” to describe the location of the noise that sounded like blasting, and the work he supposed was going on, identifies his “idea” of what was going on with the actual facts of the case. There was no noise of distant blasting heard by any of the witnesses, and this blasting was heard by all the witnesses who have testified upon the subject. If it was not sufficient to answer the purpose of notice to the plaintiff, then no warning cry given on the outside would have sufficed, as further appears from the fact that Mosher and Young, witnesses for plaintiff, heard the warning to look out while they were on the bow of the boat. These uncontradicted facts show that plaintiff knew all that he could have learned from any warning cry or notice from without the boat about the fact that there was blasting. It does not appear, however, that he knew the extent of the danger to be apprehended from it. His attorney, examining him as a witness in his own behalf, asked this

question: "If you had been warned that there was blasting going on so close to that boat as to make it dangerous, to make danger of rocks coming down through the roof over your head, what, if anything, would you have done?" etc. To this the plaintiff answered that he "supposed" he would have gone down on the lower deck, if anybody had said anything about it, but there was nobody there but the steward and a few passengers, and "the steward didn't say anything about it." "If the lower deck hadn't been there, and it had been necessary to go off a long distance from the blasting—leave the boat and go off a long distance from the blasting to make yourself safe—what, if anything, would you have done if you had known or been warned that there was any danger there; any blasting there that would have been likely to endanger your life?" With the answer that was wanted thus clearly indicated, the plaintiff answered: "I would have went off, I suppose, if they had made it clear my life was in danger. I think a man naturally would go any place." Upon the second trial, and before there had been any suggestion that the plaintiff might have found a place safer than the boat's cabin by going ashore or to the lower deck, one of plaintiff's attorneys, in his opening argument to the jury, anticipating the defense of contributory negligence, said: "Where could he have gone if this alarm of fire had been heard by plaintiff, and this was not a place of safety? Where would he go, * * * where would he be, not to be guilty of negligence, except in the cabin of the boat?"

These facts show that the plaintiff believed himself to be exercising due care for his own safety in going into the cabin of the boat and remaining there, with knowledge of the blasting on the outside, and that he adhered to that belief in the earlier stages of the case; and I am of the opinion that, inasmuch as the other passengers acted as he did, he was justified in that belief, since ordinary care is such care as the great majority of men would exercise in like circumstances. The plaintiff's conduct in this respect was not affected by the question of separate notices of different blasts. If he did not know that there was to be a succession of blasts, nevertheless he remained during all the blasting in the place where he was when the first blast was fired. It is clear, therefore, that if the defendants failed in any duty that was imposed upon them, to the plaintiff's injury—and the fact that the case was remanded for another trial has the effect of a determination that the jury would have been warranted in so finding—it was in their failure to anticipate what happened, and give the plaintiff such a warning as would have enabled a man, in the exercise of ordinary care, "situated as the plaintiff was," to have avoided the injury complained of. Whether they should have advised the plaintiff to leave the cabin, although they may have had the opinion expressed by plaintiff's attorney that it would be negligence for him to do so, it is not my province to decide. At all events, there is a necessary implication from the judgment of the appellate court that the jury might find that the defendants were remiss in some way aside from the question of notice of each separate and distinct blast,

in the matter of the warning in question; and so the instructions, if given the interpretation which the defendants say the jury may have given them, did not go too far.

I am of the opinion that the verdict is so excessive that a new trial must be granted on that ground unless the plaintiff will consent to remit the larger part of the sum assessed. In the other verdict found for the plaintiff, the jury assessed his damages at \$2,000. His physical condition is as good now as it was when that verdict was returned, if not better. He testifies that the hearing in his right ear has been rendered defective, but that his left ear is probably as good as it ever was. His hearing, as it appeared from his examination as a witness, was good. There is frequently much difficulty on the part of witnesses in this court whose hearing is normal, in hearing the questions put to them on the witness stand, because of the bad acoustics of the room and the noise from the street; but the plaintiff seemed to hear without difficulty, and answered without hesitation. His hearing seemed as good as the best. The injuries suffered have made him cross-eyed, but his vision is, for all practical purposes, as good as it ever was, and his capacity for following his usual occupation is not diminished. I do not regard the matter of his personal appearance as a serious damage to a man at plaintiff's age. There is no impairment of plaintiff's ability to follow his occupation; no diminution of his earning capacity, or of any of the faculties upon which his well-being depends. I am of the opinion that, under these circumstances, damages in excess of \$3,000 would be excessive. If the plaintiff will consent to remit all above that sum, the motion for a new trial will be denied, and a judgment entered accordingly; otherwise the motion will be allowed

JOHN B. ELLISON & SONS v. UNITED STATES.

(Circuit Court, E. D. Pennsylvania. March 11, 1905.)

No. 45.

1. CUSTOMS DUTIES—ENTRY FOR IMMEDIATE TRANSPORTATION—ENTRY AT INTERIOR PORT BEFORE ARRIVAL.

Imported merchandise entered at one port for immediate transportation to another cannot be entered for consumption at the latter port before its arrival within the limits of that port.

2. SAME—CONFUSION OF GOODS.

Where an importer has protested against the imposition of duties alleged to be excessive, and there is no way of distinguishing the merchandise properly assessed from that which is subject to the duty claimed by the importer, the protest must be overruled as to all the merchandise.

3. SAME—ENTRY.

In the provision in section 33, Tariff Act July 24, 1897, c. 11, 30 Stat. 213 [U. S. Comp. St. 1901, p. 1701], for "merchandise previously imported, for which no entry has been made," the word "entry" refers to an entry for consumption.

4. SAME.

The provision in section 33, Tariff Act July 24, 1897, c. 11, 30 Stat. 213 [U. S. Comp. St. 1901, p. 1701], that "on and after" that date merchan-

dise previously imported should be subjected to the duties imposed by said act, is not limited to merchandise imported prior to that date, but applies also to that imported on that day.

5. SAME.

Certain merchandise was imported at the port of New York July 24, 1897, and there entered for immediate transportation to the port of Philadelphia; and, before the tariff act of that date (chapter 11, 30 Stat. 213 [U. S. Comp. St. 1901, p. 1701]) had become operative, the importer sought to enter the merchandise under the tariff act of August 27, 1894, c. 349, 28 Stat. 509, and tendered an entry in due form to the collector at the latter port, which was refused on the ground that the goods had not reached that port. *Held*, that the action of the collector was justified.

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision below (G. A. 5,482, T. D. 24,796) affirmed the assessment of duty by the collector of customs at the port of Philadelphia on merchandise imported by John B. Ellison & Sons.

William A. Keener and J. Stuart Tompkins, for importers.

Wm. M. Stewart, Jr., Asst. U. S. Atty., J. Whitaker Thompson, U. S. Atty.

J. B. McPHERSON, District Judge. The facts out of which this controversy arises are stated in the following opinion of the Board of General Appraisers:

"This case involved the question whether the goods under consideration are dutiable under the tariff act of 1897 or that of 1894.

"From the record and the evidence offered at the hearing, we find the following to be the facts:

"The goods consist of woolen and worsted cloths, and were imported from England by the steamer *Paris*, which arrived at New York on July 24th, 1897, on which day a representative of the importers entered them at the New York customhouse for immediate transportation to Philadelphia, the entry reciting that they were 'intended to be transported by the Pennsylvania Railroad Company, under their bond dated February 12th, 1893,' and also that they were 'consigned to the collector of customs at Philadelphia.' The precise hour of the day on which this immediate transportation entry was made is not shown, but is stated to have been early in the day.

"On the same day, Saturday, July 24th, 1897, the importers sent a clerk to the customhouse at Philadelphia, who appeared before the special deputy collector there, presented a duly certified consular invoice, tendered the duties in cash, and asked permission to make a consumption entry of the merchandise. The testimony shows that this was at some time before 12 o'clock noon. The deputy collector refused the entry on the ground that the goods had not reached Philadelphia. Subsequently, on July 28th, the goods were formally entered and were assessed for duty under paragraph 366 of the tariff act of July 24th, 1897 (chapter 11, § 1, Schedule K, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1666]). The importers paid the duties under protest, claiming that the articles were properly dutiable under the tariff act of August 28, 1894.

"It has been held by this board and the courts that the tariff act of 1897 took effect at the moment the President signed it—that is to say, at 6 minutes past 4 o'clock on the afternoon of July 24th, 1897. *United States v. Stoddard*, 91 Fed. 1005, 34 C. C. A. 175, affirming 89 Fed. 699, and *In re Stoddard*, G. A. 3,993; *United States v. Iselin*, 95 Fed. 1007, 36 C. C. A. 681, affirming 87 Fed. 194, and *In re Iselin*, G. A. 3,989, T. D. 18,533. It has also been held that after notice of the arrival of a vessel has been posted at the customhouse an importer may enter goods that are on board of her, without waiting for her master or captain to enter her with the collector. *United States v. Legg*, 105 Fed. 930, 45 C. C. A. 134.

"Goods entered in bond for immediate transportation are constructively in a bonded warehouse, and under the custody of the government, and the year within which they may be withdrawn for consumption, as provided by section 2970 of the Revised Statutes [U. S. Comp. St. 1901, p. 1950], begins to run from the date of their arrival at the port of original importation, and not that of ultimate destination. Seeberger v. Schweyer, 153 U. S. 609, 14 Sup. Ct. 881, 38 L. Ed. 839. We do not find it necessary to determine where a withdrawal entry should be presented while goods are in transitu between the two ports, or precisely when the collector of the port of ultimate destination obtains jurisdiction over them. There is much reason for thinking that the merchandise must come within the limits of his collection district before he could lawfully accept a withdrawal entry, although the question is not free from doubt. In the present case the record contains a report by the collector of customs at New York that the Pennsylvania Railroad Company receipted for six of the cases on the 24th of July, 1897 (the last day on which the tariff act of 1894 remained in operation), and for thirty-four cases on the 26th of July. This report has not been controverted by the importer, and we find it to be true. There is nothing in the record to show which of the cases were received by the railroad company on the 24th of July, or, indeed, the time of day at which they were received. It is, of course, clear that the thirty-four cases which remained under the control of the collector at New York till July 26th, when the present tariff act was in full operation, were properly assessable for duty under that act, and not under the act of 1894. They would be directly within the terms of section 33 (Act July 27, 1897, c. 11, 30 Stat. 213 [U. S. Comp. St. 1901, p. 1701]), providing for goods 'previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose.' As to these the collector at Philadelphia evidently could not have lawfully accepted a withdrawal entry under the tariff act of 1894.

"There being no evidence to show which of the six cases were delivered to the railroad company on July 24th, this board is not in a position to make any intelligent order concerning them. It seems highly improbable that they could have passed out of the jurisdiction of the New York collector before 4:06 p. m. on July 24th, 1897. There are many details of regulation to be complied with before the goods could be turned over to the carrier. See General Treasury Regulations for 1892, arts. 394 to 428. Then, too, freight does not move as soon as received, and its progress is apt to be slow. One of the witnesses called by the importers expressly testified that all the goods 'were not placed on board the cars' on July 24th, 1897. It is significant, too, that none of the goods were entered at Philadelphia till July 28th.

"Our conclusion is that thirty-four of the cases are clearly dutiable under the tariff act of 1897, and that as to the remaining six the evidence fails to support with reasonable certainty the claim that they are dutiable under the act of 1894, and, further, that it is impossible to tell which of the whole importation these six cases were.

"Where an importer mixes en masse two kinds of goods, and it is impracticable or impossible to separate them, a protest, the claim in which covers the entire importation, must be overruled, even though some of the goods might be subject to the classification claimed in the protest.' In re Arbib, G. A. 4,014, T. D. 18,616; In re Schmoll, G. A. 4,624, T. D. 21,900; United States v. Ranlett, 172 U. S. 133, 19 Sup. Ct. 114, 43 L. Ed. 393.

"The protest is overruled, and the decision of the collector affirmed."

It is no doubt true that something may be said, from an equitable point of view, in favor of the importers' position; but, as I regard it, the difficulty is that the positive language of the law must furnish the rule for decision. The cases cited by the board—to which may be added *Nunn v. Gerst Brewing Co.*, 99 Fed. 939, 40 C. C. A. 190—have decided that the tariff act of 1897 did not go into effect until a few minutes past 4 o'clock on July 24, and that goods entered for consumption before that hour were dutiable under the act of 1894. If, therefore, the plaintiffs' merchandise had

been entered for consumption at the port of New York, instead of being entered there for immediate transportation to the port of Philadelphia, the same decision would be made in the present case as was made in the cases that have been cited. But while the goods had been "imported" into the United States, and had become subject to duty upon the arrival of the vessel in the port of New York, an entry for consumption could not be made in Philadelphia because the goods were not within the limits of that port at the time when the duty was tendered to the collector: *Arnold v. United States*, 9 Cranch, 104, 3 L. Ed. 671; *United States v. Vowell*, 5 Cranch, 368, 3 L. Ed. 128. A special act of Congress is necessary to permit such an entry at any other port than the port of ultimate destination. See Rev. St. § 2816 [U. S. Comp. St. 1901, p. 1879] et seq. If the evidence leaves it in doubt whether 6 of the 40 cases had been delivered to the Pennsylvania Railroad in New York before the act of 1897 took effect, and therefore might perhaps be regarded as constructively within the jurisdiction of the collector of the port of Philadelphia, there is no way now of distinguishing these cases from the others, and in such a situation it has been decided by the Supreme Court that the whole protest must be overruled: *United States v. Ranlett*, 172 U. S. 133, 19 Sup. Ct. 114, 43 L. Ed. 393.

As I have already indicated, I am unable to escape from the express provisions of section 33 of the act of 1897 (Act July 27, 1897, c. 11, 30 Stat. 213 [U. S. Comp. St. 1901, p. 1701]):

"That on and after the date when this act shall go into effect, all goods, wares and merchandise previously imported, for which no entry has been made, and all goods, wares and merchandise previously entered without payment of duty, and under bond for warehousing, transportation, or other purposes, for which no permit of delivery to the importer, or his agent, has been issued, shall be subjected to the duties imposed by this act, and to no other duty upon the entry or withdrawal thereof."

Plainly, as it seems to me, the "entry" to which this section refers is an entry for consumption, for it is contrasted with an entry for other purposes, and, as the plaintiffs' goods fall precisely within the language of the statute, having been "previously entered without payment of duty and under bond for transportation," they are "subjected to the duties imposed by this act and to no other duty upon the entry or withdrawal thereof." In reaching this conclusion, I regret to be obliged to differ from the decision in *Hartwell Lumber Co. v. United States* (C. C.) 128 Fed. 306, where it was held that this section applies only to importations made prior to July 24. The reason given for that decision is that,

"To hold otherwise would practically be deciding that no importations could be made under the 1894 act on the day the new act took effect, even though they arrived at the port previous to the hour when the act became a law, since the law might have become effectual after the customhouse had closed, while yet there was plenty of time to have tendered entry and reported the vessel."

It has been held, however, in the cases heretofore referred to, that importations could be made under the act of 1894 during the earlier hours of July 24, and the reason for the decision seems

therefore to be impaired. But aside from this consideration, the language of the section seems to me to be unambiguous. "On" the date when it is to go into effect Congress declares that all merchandise "previously entered"—that is, as I understand it, entered before the act takes effect—without payment of duty, etc., is to pay the duty imposed by the act of 1897. In other words, if the goods have already become, in effect, part of the general stock of merchandise in the country, they are to pay the duty imposed by the act of 1894; if they have not yet become completely a part of such stock, they must pay the duty levied by the act of 1897. No doubt the test is arbitrary, but so many other tests would be; and, in any event, Congress had the right to choose it, and the courts must apply it.

The decision of the board is affirmed.

THOMAS v. ADELMAN.

(District Court, E. D. New York. April 11, 1905.)

BANKRUPTCY—VOIDABLE PREFERENCE—KNOWLEDGE OF DEBTOR'S INSOLVENCY.

A creditor who knew when he received repayment of a loan, after pressing for the same for several months after it was due, that the debtor obtained the money by a sale of his stock of merchandise, and that such sale put him out of business, had reasonable cause to believe the debtor insolvent, and that he intended to give a preference; and the amount is recoverable by the debtor's trustee in bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445].

Action by Trustee in Bankruptcy to Recover Alleged Unlawful Preference.

Edwin Louis Garvin, for complainant.

Jesse Silberman, for defendant.

THOMAS, District Judge. This is an action to recover money alleged to have been paid to the defendant by the bankrupt, on the ground that it was a preference, within section 60a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]). Proceedings in bankruptcy were instituted on February 13, 1903. It appears from the defendant's statement that in May or June of the previous year the bankrupt came to him "and wanted to loan some money, saying he had some bills to pay, and was very short. I had known him for a number of years, and knew him to be thoroughly reliable. So I gave him the money. That was one occasion. He called again at my office, and I made him another loan, which was supposed to be paid within a month or two." The first loan was \$125 or \$100, and the second loan was \$130. The defendant states:

"He pleaded poverty, and I simply gave it to him, and he said he would return it within a month or two. Q. Then it was due several months ago? A. Yes; in August. Q. Both amounts? A. Yes. Q. Did you press him? A. Yes; I pressed him from September on. Q. What excuse did he give you? A. He simply said business was bad, but that, as soon as he could, he would

pay. Q. Did he finally pay you? A. Yes; after I had pressed him. Q. How much did he pay you? A. He paid me the full amount, \$255. Q. When did he pay this? A. 9th of February. Q. How did he explain his ability to pay you on that date? A. He claimed that it was due to my pressing that he was put out of business."

It further appears that before the payment the defendant went to the bankrupt's store, and, finding him absent, told his wife that he must have the money; that he told the bankrupt the same; and that later he wrote a letter in which he said he must have the money. It further appears from the defendant's statement that he had loaned the bankrupt money from time to time for nine years; that he never asked about his financial business; that when he went to the store he found a nicely arranged place, nicely stocked. It further appears that the bankrupt at the time was totally insolvent, and that, in order to pay the defendant the debt, he sold his goods, and paid him from the proceeds.

Upon this evidence, it is concluded that the defendant had reasonable cause to believe that the payment was made with the intention of giving him a preference. The creditor must have had knowledge that the bankrupt's business was bad, and that he only made the payment after being pressed therefor, and that such pressing resulted in putting the defendant out of business. Such state of facts would ordinarily show that the debtor was unable to pay his debts, and that the enforcement of the claim had produced such a crisis in his business as compelled him to abandon the same. It is not a case of a business man going into voluntary liquidation, but presents the case of a man in trade, forced to abandon his trade to meet the claim of a creditor.

On this state of facts, it is considered that the plaintiff should have a judgment to recover the sum of \$255, with interest from the time that the action was begun.

In re SMART.

(District Court, N. D. Ohio, E. D. April 27, 1905.)

No. 1,509.

BANKRUPTS—TOWNSHIP FUNDS—DEPOSITS—NATURE AND FORM.

Rev. St. Ohio, § 1513, provides that, in any township not provided with a good fire and burglar proof safe, the township funds may be deposited in some bank or other safe place, subject to the order of the treasurer. Section 1514 declares that the failure or inability on the part of an individual or corporation with whom such funds are deposited to refund the money deposited shall not release the treasurer from responsibility; and section 6841, with reference to embezzlement of public money, declares that nothing therein contained shall make it unlawful for a township treasurer, etc., to deposit any portion of the public money with any person, firm, or corporation doing a banking business under the banking laws of the state or United States, provided that such deposit shall not release the treasurer from liability for loss. *Held*, that a deposit by a township treasurer of separate township funds in a private bank under said sections was an ordinary, and not a special, trust deposit.

In Bankruptcy.

Alvord & Reynolds, for claimant.

M. B. & H. H. Johnson, for trustees.

TAYLER, District Judge. This case is here on petition for review of the finding of the referee in bankruptcy in the matter of the claim of John F. Wells as treasurer of the township of Kirtland, Lake county, and, as such, treasurer also of the board of education. The claimant, at the time of the filing of the petition in bankruptcy, had on deposit with the bankrupt, who was a banker, \$2,336.17 as treasurer of the board of education, and \$1,175.12 in township funds. The claim was made and the referee found that these sums were special deposits made by the claimant as treasurer, and were therefore trust funds in the possession of the bankrupt, and to be preferred in payment to the claims of the general creditors. The agreed statement of facts discloses that the claimant was the duly elected and qualified treasurer of Kirtland township; that the amounts of money which he had on deposit corresponded with the claim made by him; that, while neither the board of education nor the board of trustees for the township authorized, by resolution, the deposit of the public funds in the bankrupt's bank, yet the individual members of both boards knew that the claimant, as such treasurer, had deposited the funds in the bankrupt's bank, called the "Bank of Willoughby," and had made no objection thereto; that an ordinary passbook for a checking account was issued to and accepted by the claimant, Wells, in the name of "John F. Wells, Treasurer"; that he had deposited to the one account moneys belonging to the board of education and to the township; that he had no safe in which to keep the public funds intrusted to his care; that he had not mingled his private funds with the money so deposited, nor used the money so deposited in his private business; that the officers of the bank knew that the funds were public moneys, and that Wells held the same as treasurer for the board of education and the township, and, with such knowledge, mingled the funds so deposited with its other funds; and that the bank always had in its vaults, in money, a sum greater than the balance which from time to time the treasurer, Wells, had on deposit in the bank. The question therefore arises, was the referee right in holding that this fund was a special deposit, and entitled to payment before a dividend is allowed to the general creditors?

The authority under which a township treasurer may deposit money in a bank is found in section 1513 of the Revised Statutes of Ohio, which reads as follows:

"Sec. 1513. In any township in which there is not provided a good fire and burglar proof safe, in which to keep the funds belonging to said township, the treasurer or person intrusted with funds of the same may, by and with the consent of the trustees deposit the funds belonging to said township in some bank or other safe place, subject to the order of the treasurer making the deposit."

Section 1514 also relates to this subject, and is as follows:

"Sec. 1514. The failure or inability on the part of an individual or corporation, with whom the funds of a township are deposited, to refund the money deposited, shall not, in any way or manner release the treasurer from responsibility, but he shall be held and firmly bound for the money belonging to said township."

The ground upon which the referee based his conclusion that this deposit was special and entitled to preference was that the law does not permit the township treasurer to make anything other than a special deposit, which means, I assume, that the actual money left by the treasurer with the officers of the bank is to be kept in the form in which it is turned over, and that the title to that particular money never passes to the bank, and that, since the bank always had in its vaults an amount of currency in excess of the amount of the balance due to the township treasurer, it must be assumed to have retained such amount because of the trust impressed upon the deposit made by the treasurer. This view, it appears to me, is unsound. The statute uses the words which are universally applied to a case of a general deposit. The statement is not made that it is to be deposited in the safe of a bank, but deposited in the bank. It does not say that the treasurer may always have access to the deposit, but that it shall be subject to the order of the treasurer. These are exactly the terms upon which all general deposits are made with a bank. The claim that it is a special deposit must imply that the purpose of the statute is that the order which the treasurer may make upon the fund is an order which, being received by the bank, is to be satisfied out of the identical funds, which, in some part of the bank, it has kept segregated from the remaining assets. Section 1514 provides that the failure of the bank to refund the money deposited shall not release the treasurer from responsibility. It is a strained construction and definition of the word "refund" to say that it means to return the identical thing which was deposited. The ordinary meaning of "refund" is to repay. It does not involve an idea so concrete as the return of a package of money or the return of a particular thing. The failure of the bank to restore to the treasurer the actual thing which he deposited would imply, not the ordinary infirmities of the bank, but that it had been stolen or in some way had met with loss by accident.

Section 6841, which is a part of the criminal law, supports the view here asserted, and is contradictory of any other. After defining the subject of embezzlement of public money, section 6841 says:

"Provided, however, nothing in this act shall be so construed as to make it unlawful for the treasurer of any township, municipal corporation, board of education or cemetery association to deposit any portion of such public money with any person, firm, company or corporation organized and doing a banking business under the banking laws of the state of Ohio, or the banking laws of the United States. Provided, further, the deposit of any such funds in any such bank shall in no wise release any such treasurer from liability for any loss which may occur thereby."

This section is to be construed in connection with the others, and it shows, if it shows anything, that the treasurer may deposit, in the usual way in which deposits are made, the public funds in his hands, with any person, firm, company, or corporation organized and doing a banking business. If the deposit were special, there was no need of requiring that the depositary should be a bank. The natural and proper direction to the treasurer would have been to deposit it in a safety deposit box, or in some other place which was physically safe. The whole purpose of the law was to minister to the convenience of the public as well as of the treasurer. He is not in any sense relieved from responsibility, no matter what precautions he may take. If loss occurs, he must make it good. His bond remains liable, precisely the same as if he had not deposited in a bank at all. It would be a very unhappy situation if the general depositors in a bank, in order to make sure of the safety of their own funds, should be required to inform themselves as to how much of the deposits in the bank mingled with their own funds would be construed as special deposits made by public officials, and therefore to be satisfied before any dividend could be paid on their claims. There may have been other public officials who deposited public funds in this bank.

The claimant has no preferential right in these funds, and the decision of the referee is reversed, and the claim disallowed as a preference.

In re NOYES BROS. Ex parte DILLINGHAM. Ex parte CLARK. Ex parte EASTMAN.

(District Court, D. Massachusetts. April 17, 1905.)

No. 6,862.

1. CORPORATIONS — BANKRUPTCY — STOCKHOLDERS — PLEDGES — INDIVIDUAL LIABILITY.

Rev. St. Me. c. 47, § 85, declares that a pledgee for value, holding a certificate of corporate stock as security merely, shall not be subject to any of the liabilities of the stockholder unless he appears on the books of the corporation as the absolute owner of the stock. *Held*, that where the books of a bankrupt corporation were not in accord with reference to stock held by a claimant as security for a loan to the corporation, but the stock ledger, after the entry of claimant's ownership, contained the notation, "Note 5 years given. Stock as collateral due 1907"—it sufficiently appeared that the claimant was not the absolute owner of the stock, and was therefore not individually liable as a stockholder for corporate debts.

2. SAME—ENTRIES.

Recitals attached to similar entries of stock held by pledgees, "Jan. 23, 1902, 3 years note—Due Jan. 23, 1905," and, "For 3 years—collateral note given," were also sufficient to show that the holders of the stock were pledgees only, and not stockholders.

In Bankruptcy.

Jeremiah Smith, Jr., trustee, pro se.
Amos L. Hatheway, for creditors.

LOWELL, District Judge. Dillingham lent \$3,000 to the bankrupt corporation, taking its note therefor, with a certificate of 30 shares of its stock as collateral security. The certificate was issued in Dillingham's name without qualification, but the stock ledger contained the following entry:

A. E. Dillingham, Sandwich, Mass.			
	No.	No.	No.
	Transfer.	Certif.	Shares.
1902.			
June 2. Thirty shares	N. B. Inc.	156	30
Note 5 years given. Stock as collateral due 1907.			

That Dillingham can prove his claim was not seriously disputed. Proof involves two propositions: First, that he was a creditor of the bankrupt corporation, and not merely an ordinary stockholder; second, that he held as collateral security the stock which had been issued to him. But one question remains, viz., was Dillingham individually liable as stockholder, so that the trustee in bankruptcy can set off his individual liability against the corporation's admitted liability to him?

The individual liability which by statute is attached, under varying conditions, to corporate stock as security for the payment of the corporate debts, is ordinarily the liability of the stockholder; that is, of the person who holds legal title to the stock as owner. This is true so generally that it may be said to be part of the common law of corporations. Now the pledgee of most kinds of personal property is not deemed the owner thereof. He has not a complete legal title thereto, but only what is called a "special property." The general property is in the pledgor. In the case of corporate stock, however, the decisions and statutes concerning the respective titles of pledgor and pledgee are not uniform. The title to the stock in any particular corporation depends upon the law of the state which created the corporation, and so, in order to determine who had title to the stock here in question, and who was individually liable in relation thereto, we must refer to the statutes and decisions of Maine. The trustee relies upon Rev. St. Me. c. 47, § 85:

"A pledgee for value, holding a certificate of stock of a corporation for security merely, shall not, while he holds such stock, be subject to any of the liabilities of a stockholder unless he appears on the books of the corporation as the absolute owner of such stock."

The trustee contends that this section, derived from Laws 1897, p. 328, c. 293, § 2, amounts to a provision that the pledgee of corporate stock is liable if "he appears on the books of the corporation as the absolute owner of such stock."

The interpretation of this statute is not altogether easy, and may depend upon the law of Maine existing before its passage. In *Freeman v. Harwood*, 49 Me. 195, 198, the defendant held corporate shares by way of collateral security, and the court said, "The legal title of the shares was in the defendant at the time of the alleged sale." This is an assertion that the legal title to stock pledged is in the pledgee rather than in the pledgor. An exception

to the general rule governing the title of pledgees is thus admitted in the case of corporate stock. The dictum in *Freeman v. Harwood* has support elsewhere. See *Lowell on Transfer of Stock*, §§ 54, 55; *Wentworth v. French*, 176 Mass. 442, 57 N. E. 789; *Ball El. Light Co. v. Child*, 68 Conn. 522, 37 Atl. 391; *Wheelock v. Kost*, 77 Ill. 296; *Hale v. Walker*, 31 Iowa, 344, 7 Am. Rep. 137; *Easton v. German-American Bank*, 127 U. S. 532, 536, 8 Sup. Ct. 1297, 32 L. Ed. 210.

On the other hand, there is authority that the pledgee of corporate stock is not individually liable by reason of his title thereto. See *Pauly v. State Trust Co.*, 165 U. S. 606, 17 Sup. Ct. 465, 41 L. Ed. 844, where the cases are discussed at length. The title of the pledgee of stock was in that case treated like that of the pledgee of other personal property—not as a general ownership, but as a special property. In their practical application, these two rules just stated differ less than in the theories of ownership which they recognize. Most of the cases which treat the pledgee as having the complete legal title are concerned with a pledgee who is entered on the corporate books as the unqualified owner of the stock. They speak of the pledgee as trustee for the pledgor, by reason of his having taken a transfer of the stock to himself on the corporation's books. The language used is general, but the decision seldom covers any pledgee who has not taken this transfer to himself without qualification. What would be the state of the title if the transfer to the pledgee described him as pledgee, they do not consider. On the other hand, those cases which hold that a pledgee, as such, is not individually liable, yet admit that he may become so by reason of certain entries on the corporation's books made with his consent. If in any case the stockholder is liable, so is any other person who is estopped to deny that he is a stockholder. Where the pledgee of stock represents himself to the creditors of the corporation as stockholder, and where the creditors, relying upon that representation, have acted upon it to their hurt, he is held estopped as against them, though his true status was known to the corporation. By somewhat artificial reasoning, the books of the corporation have been deemed to be a representation of the ownership of its stock, and if, with his consent, a person is therein described as stockholder, he is deemed to have joined in the representation. By another legal fiction, all creditors of the corporation are presumed to have become so in reliance upon the representations contained in the corporation's books. Hence any one who appears on the corporate books as stockholder has been held to be estopped, as against any and all creditors, from disputing the individual liability which by statute attaches to the stockholder. A pledgee may be bound by this estoppel as well as any other person. He is not held liable as pledgee, but his status as pledgee does not protect him from that liability which attaches to other persons not stockholders. If he has permitted himself to appear on the corporation's books as the unqualified holder of its stock, he is held individually liable in some jurisdictions where individual liability ordinarily at-

taches to the pledgor. Thus in *Pauly v. State Trust Co.* it was said:

"If, by the direction or with the knowledge of the pledgee, the shares are placed on the books of the association in such way as to imply that the pledgee is the real owner, then the pledgee may be treated as a shareholder."

Thus it has come to pass that the law of Maine, as stated in *Freeman v. Harwood* and modified by the act of 1897, which holds the pledgee to be the holder of the legal title to the stock, and, as the holder of this title, to be individually liable as stockholder if he appears on the books of the corporation as absolute owner of the stock, does not greatly differ in its effect from the law in those jurisdictions where it is held that the pledgee, as such, has not the legal title to the stock, and so is not individually liable as pledgee, but may become liable by estoppel if with his own consent he appears on the corporation's books as stockholder. The form of entry in the books of the corporation is deemed important, because it is treated as a statement of the facts on which individual liability depends, made publicly and authoritatively by the person whose name appears therein.

In the case at bar the books of the corporation are not in accord. The certificate issued to Dillingham, the book from which it was taken, and the "Treasury Stock Ledger Account" in the "Safeguard General Ledger Private," set Dillingham down as an ordinary stockholder. In the "Stock Ledger," on the other hand, under the heading "Treasury Stock," the entry shows informally, but with sufficient clearness, that he was only pledgee. If the creditor is presumed to contract in reliance upon the books of the corporation—though persons do not generally examine certificate books or corporate ledgers before lending money—and if the books are contradictory in their statements of stock ownership, which book shall be deemed to prevail? Upon what books of the corporation must the pledgee appear as the absolute owner of the stock in order to subject him to individual liability? Upon what books must he appear as pledgee in order to exempt him from this liability? It should seem that the certificate itself may be disregarded. The creditor will not be presumed to rely upon papers of which, as a whole, he cannot possibly have knowledge. The certificate is notice to the pledgee of the entry upon the corporate books, and the pledgee's acceptance of the certificate is evidence that he consented to the corresponding entry, but the form of the certificate itself does not otherwise add to his liability. *Williams v. American Bank*, 85 Fed. 376, 29 C. C. A. 203. The "Safeguard General Ledger Private," in the case at bar, seems to have been a private book outside the ordinary course of bookkeeping. The certificate book and the stock ledger are left.

Upon the whole, after examination at large of the stock ledger, I am of opinion that it is the book in which is contained the authoritative statement of the ownership of the corporate stock—the book in which a creditor would look if he wished to find out who were stockholders. It is therefore the "books of the corporation,"

designated in the statute. As Dillingham appears therein as pledgee, and not as absolute owner of the stock, he is not individually liable.

Judgment of the referee affirmed.

Ex parte Clark.

The facts were the same as in the Dillingham case, except that the entry in the stock ledger was as follows:

Jan. 23, 1902, 3 years note—Due Jan. 23, 1905

Miss Anna M. Clark, Framingham, Mass.

	No. Transfer.	No. Certif.	No. Shares.
1902.			
Jan. 23. Five		146	5

From this entry, I think it sufficiently appears that the stock was held in pledge.

In re Eastman.

The facts were the same as in the Dillingham case, except that the entry was as follows:

Adeline W. Eastman, Saunders St., Brighton, Mass.

For 3 years—collateral note given.

	No. Transfer.	No. Certif.	No. Shares.
1901.			
Sept. 17. Ten		139	10

From this entry, I think it sufficiently appears that the stock was held in pledge.

Judgment of the referee affirmed.

OBERG V. NORTHERN PAC. RY. CO.

(Circuit Court, D. Oregon. April 19, 1905.,

No. 2,834.

INJURIES—DAMAGES—EVIDENCE.

Plaintiff was injured in a railroad accident, and claimed a severe injury to the spinal cord. The evidence as to the nature and extent of the injury, both by experts testifying as witnesses for the parties and by experts appointed by the court, was conflicting, some of them testifying that plaintiff's tendency would be toward recovery, but none of them testified that he was simulating injury. Plaintiff had been obliged to have medical attention for some months. He seemed in a dazed condition, expectorating blood after the accident; had been incapable of work since the accident in 1903, and appeared in a condition of marked debility. *Held*, that plaintiff was entitled, on an inquiry after default, to a judgment for \$10,000.

J. M. Long, Alex. Sweek, S. C. Spencer, and W. M. Davis, for plaintiff.

Carey & Mays and B. S. Grosscup, for defendant.

BELLINGER, District Judge. This is an action for damages resulting from a railroad accident near Chehalis, in the state of Washington, in August, 1903, by which the cars of the train were de-

railed and thrown down an embankment. The accident resulted from an explosion of the boiler of the locomotive, to which was attached an excursion train, on the occasion known as "The Elks' Excursion." The question of damages is submitted to the court, without a jury, under a statute which imposes the duty upon the court of assessing damages in such a case when the defendant, by his default, admits the negligence complained of.

The testimony on the trial, as to the nature of plaintiff's injuries, was confined to that of medical witnesses. It was so conflicting, and the particular subject of inquiry was left in so much doubt by it, that the court subsequently, with the consent of the parties, appointed six disinterested physicians, from among those of the highest professional standing, to report upon the case. These physicians have made the plaintiff's case the subject of special study, and in the award which I shall make I adopt the conclusion reached by them as to the particular subject of their inquiry.

The question of injury to the spinal cord is one upon which the medical witnesses disagree, but by far the greater number of physicians acquainted with the case are of the opinion that there is no localized injury to the spinal cord, or the medullary portion of the brain, or to the spinal accessory nerve, and they believe that the tendency in plaintiff's case will be towards recovery. All are agreed that the plaintiff is not simulating injury—that he is an honest man. Practically all are also agreed that the plaintiff is probably exaggerating his symptoms. There is a tendency among sick persons as a rule to do so; this is a matter of common knowledge; and this tendency is naturally more pronounced where the injured person has a claim pending for damages resulting from an injury. Five of the six physicians selected by the court, since the trial, to examine and report upon the case, give it as their opinion that the plaintiff is suffering from traumatic neurasthenia or hysteria superinduced by the accident in question; that it appears that his condition has been markedly worse in the past than it is now, and that therefore he is making manifest improvement in his general health; and they believe that the tendency in his case will be towards recovery. The other physician of those so selected says that "traumatic neurasthenia" can be assented to as a term to describe plaintiff's condition, provided the trauma element be given the predominance as the primal causative factor; that neurasthenia, as such, fails to explain the symptom group in certain enumerated respects, and that in his opinion the term "traumatic neurosis" would perhaps be a less misleading term by which to describe plaintiff's condition. To this physician, recovery seems impossible, and any marked improvement improbable.

The six physicians who examined the plaintiff since the trial did so at my instance, with the consent of the parties to the action, without compensation, and solely in the interest of the truth. They made a series of examinations covering an extended period and requiring much time. I know that their services in this behalf were rendered at much inconvenience, if not pecuniary loss, to

each of them. The opinions contained in the report of these physicians are independent of the medical testimony given on the trial on the part of the respective parties. The witnesses so testifying are men of the highest standing, professionally and otherwise. The conflict in their testimony is irreconcilable—one group being of the opinion that the plaintiff is suffering from an injury involving the cervical cord, and injuring the nerve roots to the spinal accessory; the opinion of the other group being in substantial accord with that of the five physicians whose investigations were made at the instance of the court since the trial. I should place the most implicit reliance upon the testimony of either group, in the absence of the conflicting opinion of the other.

This, at least, is certain: the plaintiff sustained in the accident a shock so serious that he was obliged to have medical attention for some months—a part of the time in the hospital. He seemed in a dazed condition, and was spitting blood after the accident. The local physician at Chehalis and his own physician at Portland thought that he was suffering from fractured ribs. He presents in a very marked degree, to the ordinary observation, the appearance of a man who is suffering from some physical trouble. He has been made incapable of work since the accident, which occurred in August, 1903, and has in the meantime been in a condition of marked debility. If there has been no lesion, still his condition, whether characterized as traumatic neurasthenia or neurosis, is that of a substantial injury. The statement in the report to which I refer, that the tendency in plaintiff's case is towards recovery, is noticeably cautious. I do not feel justified in drawing from it an inference of an opinion that there will be a complete recovery, nor is there any expression of an opinion as to the probable time, if ever, when plaintiff will be able to resume his trade. I have no doubt but that plaintiff has been made worse by the pendency of this action and by the anxiety and worry incident to it, but his suffering by reason of this exaggeration of his injury is none the less real, and is an element of damage proper to be considered. In my opinion, the plaintiff has suffered damage by reason of the injuries suffered in the accident in question to the amount of \$10,000.

The findings and judgment of the court will be in conformity with this opinion.

In re CAMBRIDGE LUMBER CO.

(District Court, D. Massachusetts. April 18, 1905.)

No. 9,331.

1. **BANKRUPTCY—RECEIVERS—MANAGING BANKRUPT'S BUSINESS—COMPENSATION.**

Bankr. Act July 1, 1898, c. 541, § 48a, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3439], as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 799 [U. S. Comp. St. Supp. 1903, p. 415], provides that trustees shall receive for their services, and from estates which have been administered, such commissions on all moneys disposed of by them as may be allowed by the

courts, not to exceed specified percentages. Section 2 (5) as amended (32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 409]), authorizes the court to permit the business of bankrupts to be conducted for limited periods by receivers, who shall receive for their services compensation at no greater rate than is allowed trustees for similar services; and section 72 (32 Stat. 800 [U. S. Comp. St. Supp. 1903, p. 418]), declares that neither the referee nor the trustee shall, in any form or guise, receive any other or further compensation for their services than that expressly authorized and prescribed in the act. *Held*, that such sections fixed the compensation of trustees for conducting the bankrupt's business, as well as for other services in administering his estate, and hence a receiver of a bankrupt was only entitled to the percentages prescribed for all services, including carrying on the bankrupt's business.

2. SAME—"DISBURSEMENTS."

The word "disbursements," as used in section 48 as amended, should be construed, with reference to receivers, to include the value of property taken possession of by the receiver and delivered to others in specie

In Bankruptcy.

Arthur E. Burr, for receiver.

LOWELL, District Judge. This case concerns the allowance to be made to a receiver for conducting the business of the bankrupt. Under the original act of 1898, a receiver's compensation was not limited by statute, but only by the discretion of the court, like that of a receiver in equity. In *re Adams Sartorial Co.* (D. C.) 101 Fed. 215; In *re Scott* (D. C.) 99 Fed. 404. The compensation of a trustee, on the other hand, was fixed by section 48a of Act July 1, 1898, c. 541, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3439], "as full compensation for their services * * * from estates which they have administered, such commissions on sums to be paid as dividends and commissions as may be allowed by the courts not to exceed three per centum on the first five thousand dollars or less, two per centum on the second five thousand dollars or part thereof, and one per centum on such sums in excess of ten thousand dollars." It follows that a receiver might be allowed for conducting the bankrupt's business whatever the court saw fit to award, while the trustee could get nothing for like services, unless his management of the business increased the dividends paid to creditors. Yet the conduct of the bankrupt's business by the trustee was expressly provided for by section 2 (5) (30 Stat. 545 [U. S. Comp. St. 1901, p. 3421]), by virtue of which the court might "authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals or trustees if necessary in the best interests of the estates."

We come to changes introduced by the Ray bill. Section 2 was amended by adding the words, "and allow such officers additional compensation for such services but not at a greater rate than in this act allowed trustees for similar services." Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 409]. As the court of bankruptcy was already authorized, under its general equity jurisdiction, to allow the receiver for conducting the bankrupt's business whatever compensation, additional or otherwise, it saw fit to make, this amendment in no way increased his compensation. On the

other hand, that compensation, in some respects at least, was limited thereby for the first time to the compensation of the trustee. As the receiver's compensation was thus made to depend, at least to some extent, upon that of the trustee, we must determine the limits of the latter by construing the provisions regarding it as they stand amended by the Ray bill. The trustee's compensation, fixed as above stated by section 48a of the original act, was by the Ray bill affected as follows:

First. By the amendment to section 2 just quoted.

Second. By amending section 48 to read as follows:

"Trustees shall receive for their services * * * and from estates which they have administered, such commissions on all moneys disbursed by them as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars." 32 Stat. 799 [U. S. Comp. St. Supp. 1903, p. 415].

Third. By a new section (72):

"That neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this act." 32 Stat. 800 [U. S. Comp. St. Supp. 1903, p. 418].

What is the trustee's compensation expressly authorized and prescribed by the amended bankrupt act for conducting the bankrupt's business? It has been urged that the trustee who carries on the bankrupt's business may be allowed as a maximum both the stated percentage on all moneys disbursed by him as trustee, and a like percentage, in addition to the above, upon all moneys disbursed by him in the conduct of the bankrupt's business. He would thus receive a double percentage on some disbursements, a single percentage on others. This construction appears to me altogether untenable. No reason can be given for making a double allowance based on the same disbursements, and this is opposed to the whole spirit of the act. In practice, the trustee would always be tempted to ask leave to carry on the bankrupt's business. The construction proposed is therefore laid aside as inadmissible.

Again, it was urged that the trustee's compensation for conducting the bankrupt's business was left unlimited by the act; the limitation of section 48 applying only to his compensation for other services. This construction is opposed to the plain language of section 72, and must be rejected. It remains only to base the trustee's compensation upon section 48, allowing him as a maximum the percentage therein stated upon all disbursements made by him. While this construction, in form, gives him no additional compensation for conducting the bankrupt's business, it does give him this compensation in substance, because the conduct of the bankrupt's business will increase his disbursements and the sum upon which his percentage may be computed. It is true that this construction leaves the amendment to section 2 without effect, so far as the trustee is concerned, but a consistent interpretation of all the provisions

of the act is impossible. If, then, the trustee's compensation is thus limited, how does this limitation affect the compensation of a receiver? May the court allow its receiver what it sees fit for his services in general, with an additional limited allowance for his particular services in conducting the bankrupt's business? This construction has some support in grammatical considerations, but in effect it nullifies the limitations imposed at the end of section 2. If the receiver's compensation be composed of two elements, one of which is not limited, it is clear that a limitation upon the other is ineffectual. Upon the whole, though with considerable doubt, I prefer to construe the limitation as imposed upon the receiver's total compensation for all his services of whatever sort. The amendment is intended to provide that receivers shall not be more highly paid than trustees. The receiver's maximum compensation, therefore, is that stated percentage upon disbursements which is fixed as the maximum compensation of the trustee. One apparent exception may be made to this rule: It is the ordinary duty of the trustee to reduce the estate to money. As applied to him, the word "disbursements" may be confined to payments in money. The receiver, on the other hand, is often required to keep and deliver up property in specie, and, as a basis for his compensation, the word "disbursements" may be construed so as to permit a compensation based upon the value of the property which he delivers. Thus construed, the act is made reasonable and harmonious. If some violence is done thereby to its grammatical construction, that is a result required by every construction proposed. I find nothing in this interpretation opposed to the decision of this court in *In re Richards*, 127 Fed. 772, and in that case attention is called to the fact that the allowances above mentioned are to be treated by the referees as maximum allowances, not to be given in every case.

The judgment of the referee is reversed, and the case is remitted to him, with instructions to proceed in accordance with this opinion.

In re HARK et al.

(District Court, E. D. Pennsylvania. April 14, 1905.)

No. 2,065.

BANKRUPTCY—PRODUCTION OF BOOKS OF ACCOUNT—CLAIM OF PRIVILEGE.

A bankrupt who pleads his constitutional privilege as a reason for not producing his books of account, claiming that they contain evidence which may incriminate him, must bring such books before the court or referee for the determination of the question whether his plea is well founded on fact, and that the books may be used for such necessary and proper purposes as are not inconsistent with the protection of his rights.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1066, 1067.]

In Bankruptcy. On certificate from referee.

Harry S. Mesirov, for petitioners.

Henry N. Wessel, for Harry Hark, alleged bankrupt.

HOLLAND, District Judge. Harry A. Hark, one of the partners of the firm of Hark Bros., bankrupts, was subpoenaed and appeared before the special referee. The referee, at a meeting held on November 14, 1904, made the following order:

"After hearing testimony on November 10 and November 14, 1904, and upon motion of Harry S. Mesirov, Esq., attorney for the receiver and petitioning creditor, the referee orders and directs Harry A. Hark, one of the bankrupts, to produce all of the books and records of the business of Hark Bros., bankrupts, referred to by him in his testimony of November 10 and November 14, 1904, at an adjourned meeting to be held before the referee at 2:30 p. m. on November 14, 1904."

Harry A. Hark appeared at this adjourned meeting, but refused to produce his books and papers, and subsequently filed an answer, and then a supplemental answer, in the latter of which he says:

"If I am obliged to turn the said books over to the receiver, I will thus be obliged to furnish evidence which will put me in jeopardy of my liberty, and might lead a jury to convict me of crime."

The referee reports that there is no evidence before him to show that there is anything contained in the books tending to incriminate the bankrupts, and further calls attention to the fact that his order of November 14, 1904, was not an order to turn the books over to the receiver, but simply to produce them before the referee. This court decided (*In re Hess*, 134 Fed. 109) that:

"Where a bankrupt pleads his constitutional privilege against a production of books of accounts alleged to contain incriminating evidence, he should be required to bring such books and papers either before the court or referee in bankruptcy for determination of the question whether the plea is well founded in fact, and for the making of an order for the protection of the bankrupt from the discovery of such evidence, and, if possible, to enable the trustee to obtain other necessary information from such books."

There is nothing in the evidence produced before the referee to show that these books contain incriminating evidence, other than the allegation of the bankrupts in their answer. The order to produce them before him should have been complied with, and then the question as to whether this plea of the bankrupts is well founded could be determined by the referee.

As to the question of allowing the bankrupts to be represented by counsel, the referee reports that this privilege was not refused them at the hearing, and it is to be assumed that the referee will allow them to be represented by their counsel at any further hearing that may take place.

The bankrupts complain that they were not permitted to correct some erroneous statements made by them, although an examination of the record shows that corrections were allowed. A witness should always be permitted to make a correction in any statement theretofore made, and the reason for the correction, of course, can be taken into consideration by the referee in passing upon the credibility of the witness.

It is therefore ordered, adjudged, and decreed that the matter be referred back to the referee, David W. Anram, Esq., and that the said Harry A. Hark be, and is hereby, directed to comply with

the referee's order of November 14, 1904, to wit, to produce before him, the said David W. Amram, referee, all of the books and records of the business of Hark Bros., bankrupts, referred to by him, the said Harry A. Hark, in his testimony of November 10 and November 14, 1904; the said books and records to be produced at a meeting to be fixed by the said David W. Amram, referee, and notice to be served upon the said Harry A. Hark.

In re EDWARD HESS & CO.

(District Court, E. D. Pennsylvania. April 14, 1905.)

No. 1,993.

BANKRUPTCY—CLAIM OF PRIVILEGE—PRODUCTION OF BOOKS OF ACCOUNT.

The finding of a referee that there was no foundation in fact for the claim of privilege set up by a bankrupt on the ground that his books and papers, if produced, would tend to incriminate him, affirmed, and an order made requiring him to produce his books and to answer certain questions propounded to him; the only witnesses called, aside from the bankrupt, having testified that an examination of the books disclosed nothing of an incriminating character, and that they were properly kept.

In Bankruptcy. On certificate from referee.

Charles Biddle, Samuel P. Tull, and Edgar C. Van Dyke, for trustee.

Julius C. Levi, for bankrupt.

HOLLAND, District Judge. Some time ago a reference was made in this case "to take such testimony as the bankrupt might offer to show his answer that his books and papers contain evidence which may tend to incriminate him is made in good faith, to protect him against a criminal prosecution that has been instituted or which may be brought against him, and report such evidence and his conclusions thereon to this court, specifying which of the said documents, if any, did or did not contain such alleged incriminating evidence." (D. C.) 134 Fed. 109. The bankrupt and two witnesses appeared before the referee. Certain questions were propounded to the witnesses, who were unable to answer without the books and papers belonging to the bankrupt from which the data could be obtained to enable them to correctly answer the questions. The bankrupt refused to produce his books or papers referred to by these witnesses, and refused to answer certain questions. The referee directed him to produce the books and papers and to answer the questions. Whereupon counsel for the bankrupt requested the referee to certify the question to this court as to whether the bankrupt should be compelled to answer the questions and to produce the books and papers.

The two witnesses called testified that an examination of the books shows nothing in them tending to incriminate the bankrupt and that the books were properly and correctly kept. The referee, in an opinion filed, concludes that there is nothing in the answer to

the question referred to which will tend to incriminate him, nor is there anything in the books and papers which will have that effect, and therefore he should be compelled to produce his books and papers and to answer the questions. In these conclusions we think the referee is right, for the reasons stated in his opinion.

It is therefore ordered, adjudged, and decreed that the bankrupt produce the books and papers referred to in the opinion of the referee, in accordance with his order, and do answer the questions stated in his report.

In re SHEETS PRINTING & MFG. CO.

(District Court, N. D. Ohio, E. D. April 27, 1905.)

No. 1,612.

1. CONTRACTS—CONSTRUCTION—CONDITIONAL SALES—LEASES—RECORD—VALIDITY.

A contract leasing a machine for a term of three years, requiring the lessee to pay a rental of \$1,260 in monthly installments of \$35 each, secured by notes providing for termination on failure to pay such installments, and that the lessee shall have the option to purchase at any time within the three years on payment of \$1,700, less the amount of rentals then paid, was a conditional contract of sale, as defined by Bates' Ann. St. Ohio, p. 2306, § 1, and not a lease.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1327, 1328.]

2. SAME—BANKRUPTCY—FOLLOWING STATE LAWS.

On an issue as to whether a contract for the sale of a machine was a lease or a contract of conditional sale, a court of bankruptcy will follow the state law.

[Ed. Note.—State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

In Bankruptcy.

Kerr & La Dow, for claimant.

Brucker & Cummins, for trustee.

TAYLER, District Judge. This matter comes up on a bill of review to the finding of the referee on the claim of the Unitype Company. The referee allowed the claim. The Unitype Company, on April 1, 1901, entered into a contract with the bankrupt, the Sheets Printing & Manufacturing Company, by an instrument called "Simplex Type-Setting Machine Lease," by which the Unitype Company agreed to furnish and lease to the lessee one Simplex Typesetting Machine, "to hold for the term of three years, beginning as soon as the machine is erected on the premises of the lessee; and the said lessee hereby covenants to and with the lessor that he will pay for the same a rental of twelve hundred and sixty dollars (\$1,260.00) for the entire term of three years, in installments of thirty-five dollars (\$35.00) each, payable on the first day of each month until the \$1,260.00 has been paid, and will further secure such payments by giving at the beginning of said rental term his promissory notes in form acceptable to the lessor for the same; but

the giving of said notes shall not be regarded as payment of the rent aforesaid." The lessee agreed to maintain the machine and appurtenances in good operating condition and repair, and to cause them to be cared for by competent persons, and at the end of the term of the lease, or earlier if it should be earlier reclaimed by the lessor, to cause the machine to be properly boxed and delivered, freight prepaid, at the freight station in Shelby, Ohio, addressed to the lessor. Further covenants appear as follows:

"The lessee further covenants and agrees that in case he, or any party holding under him, shall violate any of the provisions, conditions or agreements herein contained, the lessor may, at his option, terminate this lease, and retain and keep all rentals hereinbefore stipulated to be paid by the lessee in consideration and payment for the use theretofore had of said machine and its appurtenances."

"It is further covenanted and agreed by both parties hereto that this lease shall extend to and cover a further period of two years upon the same terms and conditions; provided, however, that the lessee may, if he shall so elect, and give notice in writing of said election to the lessor at least thirty days before the end of the first term of three years, abandon, discontinue and terminate this lease at the end of said first rental term and return said machine as heretofore provided, immediately upon the ending of the first term aforesaid."

"The lessee shall have the option of purchasing said machine and appurtenances in his possession for the sum of seventeen hundred dollars (provided all his covenants then matured shall have been fulfilled), at any time within three years after its erection by payment to the lessor of such cash as with the amount of rental theretofore paid shall equal seventeen hundred dollars."

The bankrupt continued to pay the monthly installments until a short time before it went into bankruptcy, in January, 1904. The Unitype Company claims that it is the owner of the machine described in the contract; that the amount paid was paid by way of rent; and that the Ohio statute on the subject of conditional sales is not operative to prevent the assertion of its claim of title. This claim the referee sustained.

The conditional sale statute of Ohio (Bates' Ann. St. p. 2306) is as follows:

"(4155-2) Section 1. In all cases where any personal property shall be sold to any person, to be paid for in whole or in part in installments, or shall be leased, rented, hired or delivered to another on condition that the same shall belong to the person purchasing, leasing, renting, hiring, or receiving the same whenever the amount paid shall be a certain sum, or the value of such property, the title to the same to remain in the vendor, lessor, renter, hirer or deliverer of the same, until such sum or the value of such property or any part thereof shall have been paid, such condition, in regard to the title so remaining until such payment, shall be void as to all subsequent purchasers and mortgagees in good faith, and creditors, unless such condition shall be evidenced by writing, signed by the purchasers, lessor, renter, hirer or receiver of the same, and also a statement thereon, under oath, made by the person so selling, leasing or delivering any property as herein provided, his agent or attorney of the amount of the claim, or a true copy thereof, with an affidavit that the same is a copy, deposited with the clerk of the township where the person signing the instrument resides at the time of the execution thereof, if a resident of the state, and if not such resident, then with the clerk of the township in which such property is sold, leased, rented, hired or delivered is situated at the time of the execution of the instrument; but when the person executing the instrument is a resident of a township in

which the office of county recorder is kept, or when he is a non-resident of the state, and the property is within such township, the instrument shall be filed with the county recorder; and the officer receiving any such instrument shall proceed with the same in all respects as he is required to do by section 4152 of the Revised Statutes of Ohio, and shall receive the same fees as are allowed by law for similar services in other cases."

Three questions arise: First. Is the conditional sale in this case the kind of a sale covered by the statute just quoted? Second. If it is such a sale, is it void as to general creditors under the law of Ohio? Third. Does the law of Ohio control as to the assertion of such rights in a court of bankruptcy?

I am of the opinion that all of these questions ought to be answered in the affirmative.

1. This contract is a mere conditional sale. True, it is skillfully drawn with a view of avoiding that construction, but it does not successfully do so. Authorities might be multiplied on the question, but it will be sufficient to quote the language of the Supreme Court of the United States in order to obtain a standard of construction. In *Hervey et al. v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. Ed. 1003, in the fourth proposition of the syllabus, the court, referring to this kind of a transaction, says:

"Nor is the transaction changed by the agreement assuming the form of a lease. The courts look to the purpose of the parties; and, if that purpose be to give the vendor a lien on the property until payment in full of the purchase money, it is liable to be defeated by creditors of the vendee who is in possession of it."

On page 673 of 93 U. S. (23 L. Ed. 1003) Mr. Justice Davis quotes with approval the holding of the Supreme Court of Illinois; the statement of that court in that case being, "It was a mere subterfuge to call this transaction a lease;" and states that the case which the Supreme Court was then considering was like the case referred to in all essential particulars. It seems clear to me that this transaction was a conditional sale, and that the phraseology by which it is sought to avoid that appearance is a mere subterfuge.

2. Now, what have the Ohio courts said on this subject? They have spoken in unmistakable terms. The law is construed in the case of *Jones v. Molster*, 11 Ohio Cir. Ct. R. 432. That is the well-known piano case, in which the contract was held to be a conditional sale, and that it was void as to creditors. That case states the law of the state of Ohio as it stands to-day. Our Supreme Court has also declared that the assignee does not always stand in the shoes of the assignor; that he represents the creditors, and may assert some rights which the debtor himself could not have asserted before the intervention of creditors, or, as in this case, before the bankruptcy proceedings were instituted. No principle of law in Ohio is better settled than this.

3. The only question left is whether the bankruptcy courts of the United States will follow the law of the state of Ohio as respects the character of the contract, and the nature of the rights which it gives over the property which was the subject of the contract. I am unable to discern any reason why, where the bankruptcy act has

not itself in specific terms declared another rule, the rule of the state as established by its statutes and its courts should not be controlling.

The finding of the referee, therefore, in respect to the claim of the Unitype Company, is reversed, and the claim of that company to title to this machine and appurtenances denied.

THE MALLAY.

(District Court, D. New Jersey. March 24, 1905.)

SHIPPING—INJURY OF SCHOONER IN SLIP—INSUFFICIENT FASTENING OF SCOW.

The injury to a schooner's bowsprit as she lay in a slip *held*, under the evidence, to have been due to chafing by the bows of a scow tied a few feet away, and which, through the fault of those in charge, was insufficiently fastened, so that it drifted close to the schooner during a high wind.

In Admiralty.

Foley & Wray, for libelant.

Peter S. Carter, for claimant.

LANNING, District Judge. On February 6, 1896, the schooner William Bleakley was lying in the slip along and parallel with the northeasterly side of the pier at the foot of Twenty-Fourth street, South Brooklyn, where she had been some three weeks. Her bow lay toward the outer end of the pier, and about 60 feet back therefrom. Along and parallel with the outer end of the pier (being the northwesterly end) a scow, which I designate scow No. 1, was lying; her direction being at right angles to that of the schooner, and her end extending some feet (how many does not appear) beyond the northeasterly side of the pier. Between scow No. 1 and the schooner lay scow No. 2, but, as she was too long to get her full length in between scow No. 1 and the schooner, she lay with her bow tied close to the northeasterly side of the pier, a few feet in front of the schooner's bow, and with her stern outside of the end of scow No. 1. Her position, therefore, was diagonal to the northeasterly side of the pier. Scow No. 3 (being the Mallay, complained of by the libelant) lay by the side of the scow No. 2. Her bow was about even with the bow of scow No. 2, but, being several feet longer, her stern extended out of the slip, and in front of the scow No. 1. Her position, therefore, was also diagonal to the northeasterly line of the pier. Scow No. 4 lay alongside of the schooner, with the schooner between it and the pier. The bow of this last-mentioned scow was about even with the bow of the schooner. The bowsprit of the schooner was about 35 feet in length, and early in the morning of February 7th, a heavy wind having arisen, the underside of the bowsprit, about halfway between its end and the knightheads, was gouged and dug out to such an extent that it was necessary, as the libelant claims, to put into the schooner a new bowsprit. The question is, what vessel is responsible for the

damage, and, if the Mallay is responsible for it, what amount shall be awarded to the libellant?

The claimant of the Mallay insists that the damage was done by the lines of scow No. 4 which tied it to the pier; these lines, as it appears, passing both over and under the schooner's bowsprit. But the evidence utterly fails to support this theory. John Connors, William Ward, and John Carter all slept on the schooner during the night of February 6th. They rose early in the morning of February 7th, and found that during the night the storm had driven the Mallay toward the schooner, and that the Mallay was then bouncing up and down on the waves, striking the bowsprit of the schooner and gouging a hole in it. Each of these men declares that he helped in the work of readjusting the lines of the Mallay and in pushing her away from the schooner. The testimony of these eyewitnesses is not contradicted by that of any other witness. Lewis Swansen, the master of the Mallay, who slept on her that night, but who, when she was pushed away from the schooner, had evidently gone to his breakfast, himself says that he saw the damage done to the bowsprit about noon on February 7th, that the bowsprit was rotten, and that he took a handful of the wood of the bowsprit and found it "soft and rotten." It is not pretended by any one that at the time when he says he observed the condition of the bowsprit he could have reached it. If he handled any of the bowsprit's wood at all, he must have found it on his own scow. Indeed, Joseph Beyers, a witness for the libellant, declares that he saw ground pieces of the wood that had been gouged out of the bowsprit on the bow of the Mallay at the time the Mallay was pushed away from the schooner. I have no doubt, therefore, that the damage to the bowsprit was done by the Mallay. Nor does the evidence convince me that there was any rotten wood in the bowsprit.

The libellant insists that the Mallay was negligently tied, and that the damage was the result of such negligence. Considerable testimony has been taken on this point, but I am of the opinion that the weight of it decidedly favors the libellant. The Mallay does not seem to have had any lines that prevented her from sagging farther into the slip toward the schooner and coming into contact with her bowsprit. The evidence shows that if a line had been run from the bow of the Mallay to the stern of scow No. 2, which lay between her and the pier, it would have been impossible for the Mallay to come into contact with the schooner's bowsprit.

The contention of the claimant that the libellant's schooner was not properly tied to the pier, and that she drifted from the pier toward the Mallay, and thus incurred the injury to her bowsprit, is not, in my opinion, proven. The schooner was well secured with 11 lines, extending both from her bow and her stern to the pier.

The only remaining question, therefore, is as to the amount of damage that shall be awarded to the libellant. The libellant claims \$100. I think the evidence shows that it was necessary to substitute a new bowsprit for the injured one. I think, further, that a

new bowsprit could have been furnished for \$80. It may be that a new bowsprit would put the vessel into a somewhat better condition than it previously was, but the claimant cannot take advantage of this fact. *The Alaska* (D. C.) 44 Fed. 498, 501. *The John H. Starin* (D. C.) 116 Fed. 433.

A decree in favor of the libelant for \$80 may be prepared.

In re ROBINSON et al.

(District Court, D. Massachusetts. April 17, 1905.)

No. 8,074.

BANKRUPTCY—PROOF OF CLAIMS—USURIOUS NOTES—DISALLOWANCE—AMENDMENT—MONEY FRAUDULENTLY OBTAINED.

Where a creditor of a bankrupt sought to prove a note made in New York drawing usurious interest, and the claim was disallowed under the New York law on account of the usury, the creditor was entitled to amend his original proof by substituting therefor a claim for money fraudulently obtained by the bankrupt and received to the claimant's use.

In Bankruptcy.

John G. Palfrey, Charles E. Haywood, and Clifton L. Bremer, each for a creditor.

LOWELL, District Judge. A creditor sought to prove a note made in New York at a usurious rate of interest. On due objection the claim was disallowed, and the creditor has moved to amend his original proof by substituting therefor a claim "for money fraudulently obtained by said bankrupt and received to the deponent's use." The frauds alleged were representations of fact concerning the bankrupt's business, his assets, and his intended application of the money borrowed. The referee refused to permit the amendment on the ground that the claim as amended would not be provable. If provable as amended, it should be allowed. The law of New York so taints with illegality a usurious contract that money borrowed thereby cannot be recovered as money had and received. *Hammond v. Hopping*, 13 Wend. 505; *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961. The creditor cannot recover upon the usurious contract itself, nor yet upon the common counts, since any implied contract to pay money advanced is merged in the express usurious contract actually made. If, however, the creditor can establish a provable claim apart from the usurious contract, and unaffected by it, he will prevail. If A. obtains money by false pretenses from B., and gives him a note for the money thus obtained, B. may condone the fraud, and sue on the note, or he may sue to recover back the money, disregarding the fraudulent contract of which the note is evidence. Let us suppose that a note is nonusurious, and not yet due, the loan obtained by fraud. The creditor can either prove the note with a rebate of interest, or, disregarding the note, can prove for money had and received as due at once and without rebate. If a creditor can prove for

money had and received without regard to a nonusurious note, he can here prove without regard to the usurious note. See *Bradley v. Rea*, 14 Allen, 20; *Id.*, 103 Mass. 188, 4 Am. Rep. 524; also *In re Arnold*, 13 Am. Bankr. R. 320 (D. C.) 133 Fed. 789.

The judgment of the referee is reversed, and the case is recommended to him, with instructions to permit the amendment and to take further proceedings not inconsistent with this opinion.

IN re ANDERS PUSH BUTTON TELEPHONE CO.

(District Court, S. D. New York. April 12, 1905.)

No. 7,297.

BANKRUPTCY—COMMISSIONS OF REFEREE AND TRUSTEE—PROCEEDS OF PROPERTY SUBJECT TO LIEN.

A court of bankruptcy has no power, under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], to require a creditor secured by a valid lien to pay commissions on the amount realized thereon to the trustee and referee, although by stipulation the property is sold by the trustee; the proceeds of the property, so far as necessary to satisfy the lien, being no part of the estate, from which all commissions are made payable.

In Bankruptcy. On review of order of referee.

Taylor More, for Thomas B. Crary, mortgagee.

Henry W. Sykes, for Crouch & Fitzgerald, creditors.

HOLT, District Judge. This is a petition to review an order of the referee directing a secured creditor to pay to the referee and the trustee the amount of their commissions on the secured creditor's claim. Crary, the secured creditor, loaned \$5,000 to the bankrupt, and took as security, more than four months before the bankruptcy, an assignment of certain letters patent and a chattel mortgage. After the bankruptcy Crary and the trustee entered into a stipulation that the trustee should sell the assets covered by the assignment and the mortgage, the proceeds to be subject to the lien. This was done. The proceeds were more than sufficient to pay the claim, and the trustee paid it in full. Thereafter the referee made an order directing Crary to pay the commissions of the referee and trustee on the amount received by him.

I am not able to concur with the decision of the referee in this case. Crary's lien was concededly valid, and was created more than four months before the bankruptcy. The trustee, therefore, took the estate subject to the lien; and I do not see how the lienor can be deprived of the right under his lien to payment in full. The property, to the extent that it was covered by the lien, was no part of the bankrupt's estate. The theory of the cases cited by the referee (*Re Coffin*, 2 Am. Bankr. Rep. 348; *Re Barber*, 3 Am. Bankr. Rep. 306, 97 Fed. 547; and *Re Sabine*, 1 Am. Bankr. Rep. 322) seems to be that, if a lienor makes use of the machinery of the bankruptcy court to realize on his lien, he may justly be required

to pay the referee's and trustee's commissions on the amount of his claim. These cases were all decided before the amendment of 1903, and seem to have been influenced by the fact that before that amendment no commissions were allowed, except on dividends paid. But the act makes all commissions payable out of the estate, and the estate does not include that portion of the assets necessary to satisfy a valid lien. If the lien were foreclosed in a state court, or enforced by any other legal proceedings, the necessary expenses would be added to the claim secured by the lien, and deducted from the proceeds of the sale of the property. In other words, the general estate has to pay, in any case, the proper expenses of enforcing the lien, as well as the amount due under the lien. I think, moreover, it would be a bad precedent to establish the principle that, if lienors take advantage of the machinery and officers of the bankruptcy court to realize on their lien, they must pay commissions. They should be encouraged to enforce their liens through the bankruptcy courts. If they are driven to suits to foreclose, greater delay and expense will probably be incurred. The authorities cited undoubtedly afford considerable support to the conclusion of the referee, but I think that the bankruptcy court has no power, under the act, to make any deductions from a claim secured by a valid lien.

The referee's order is reversed.

THE ATLANTIC CITY.

(District Court, D. New Jersey. March 31, 1905.)

COLLISION—STEAM VESSELS MEETING—VIOLATION OF RULES.

Two steam vessels meeting in the Delaware river at night, where the channel was 2,000 feet wide, showing each other their green lights, both signaled their intention to pass starboard and starboard, but neither heard the signal of the other. They continued their course and speed, however, without further signals, until close together, when one, in the mistaken belief that the other gave a signal of one whistle, ported her helm, the result being a collision. *Held*, that both were in fault for violation of rule 3 of the supervising inspectors, which required them, when failing to understand the course or intention of the other, to so signify by signal, and to slow down until an agreement was reached and understood, or until they had passed each other.

[Ed. Note.—Collision rules as to signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

In Admiralty. Suit for collision.

Carpenter & Park, for libellant.

Francis C. Adler, James F. Campbell, and John F. Lewis, for claimant.

LANNING, District Judge. This is a libel for damages occasioned by a collision between the steamboat Sylvan Glen and the steam ferryboat Atlantic City at about 11 o'clock in the evening of August 18, 1896, in the Delaware river opposite the city of Philadelphia. The libel was filed January 23, 1897, and the answer on

March 10, 1897. The libellant's first witness, who was the engineer of the Glen, was not examined until November 6, 1899. The next examination of witnesses for the libellant was on February 1, 1900, when the captain and three employes of the Glen and two of her passengers were examined. The last witness for the libellant was a deck hand, who was examined on January 17, 1901. All of these witnesses, except the last, were in the country and in the vicinity of Philadelphia, and could have been subpoenaed at any time after the collision. The witnesses for the claimant were examined on December 12, 1901, and on January 16, 1902. The proofs are conflicting, and in many respects show the impossibility of the witnesses to recall distinctly material facts in the case. This is not at all surprising, since the examination of the witnesses covered a period between three years and five and a half years after the collision. I think, however, the weight of the testimony establishes the following facts: The *Sylvan Glen* left Washington Park, below Philadelphia, about ten and a half o'clock in the evening, bound for the Arch Street Wharf, Philadelphia. She passed up the river, somewhat on the Philadelphia side of the middle of the river. When about opposite the South Street Wharf her pilot sighted the *Atlantic City* coming out from her wharf at Chestnut street, and turning down the river. After straightening out her course, the *Atlantic City* was about in the middle of the river. Each of the vessels showed to the other her green or starboard light. When they were not over a half mile apart, and while each was showing to the other her green light, each of them gave to the other a signal of two whistles, thus indicating the intention of their respective pilots to pass starboard to starboard. Neither of the pilots heard the signal of the other. Notwithstanding this fact, both of the vessels were continued at full speed without the repetition of any signal, and on the apparent assumption that each vessel would continue to show her green light to the other, and that they would pass each other on their starboard sides. After they had reached a position of probably not more than 300 feet apart, the *Glen*, as all her witnesses admit, suddenly ported her wheel, and sheered across the *Atlantic City's* bow. Almost instantly it became evident that there was danger of collision, and the engines of both vessels were stopped and reversed, but too late to prevent a collision. The *Atlantic City* struck the *Glen* near her port bow. Had the two vessels continued their original courses, they would have passed starboard to starboard without danger of collision. The pilot of the *Glen* says that the *Atlantic City*, after first showing her green light to the *Glen*, gave a signal of one blast, starboarded her course, and then, after the *Glen* had starboarded her course, the *Atlantic City* ported her course, and "chased" the *Glen* about the river, and thus caused the collision. The weight of evidence satisfies me that the *Atlantic City* continued her course with a steady wheel, and that the pilot of the *Glen* is mistaken in his statement that the *Atlantic City* in any wise altered her course. The pilot of the *Glen* further says that he ported his wheel and attempted to pass

on the port side of the Atlantic City because of a signal of one blast given to him by the Atlantic City. In this statement the pilot of the Glen is also clearly mistaken. It appears that a steam tug with a car float in tow was crossing the river from Camden to Philadelphia ahead of the Glen. The pilot of the tug says that as he was crossing the river the Atlantic City crossed his bow, and just as the Atlantic City was so doing the Glen gave a blast of one whistle, which he (the pilot of the tug) understood to be for him, and that he responded to it with one blast. By these signals the pilot of the tug understood that the Glen would pass to the stern of the tug. The pilot of the Atlantic City and other witnesses declare that the Atlantic City gave no signal of one blast, and it is quite clear to me that the pilot of the Glen mistook the signal of the tug for the signal of the Atlantic City. The collision occurred a little to the Camden side of the middle of the river, at a point where the river is about 2,000 feet in width.

Such being the material facts of the case, it seems to me that both vessels were at fault. The channel of the river was not so narrow at that point as to require the enforcement of article 21 of the revised international regulations contained in chapter 354 of the Laws of 1885 (23 Stat. 442), which article is as follows:

"In narrow channels every steamship shall when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship."

Rule 3 of the board of supervising inspectors, in force at the date of the collision, is as follows:

"If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously, or from other causes, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam whistle; and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerageway until the proper signals are given, answered, and understood, or until the vessels shall have passed each other."

The proper observance of this rule would have prevented any collision. Neither pilot was properly discharging his duty when he continued on his course with unabated speed after having given his signal of two blasts without having received any response from the other vessel, and without having ascertained the intention of the other vessel. Had either vessel repeated its signal, the error of the pilot of the Glen resulting from the signal given by the tugboat would doubtless not have been made.

I find, therefore, that, as there was fault on the part of both vessels, there must be a division of the damages equally between the two vessels. There will be a decree to this effect, with reference to a commissioner to take testimony.

In re COHEN.

(District Court, S. D. Illinois. March 24, 1905.)

BANKRUPTCY—POWERS OF COURT—WRIT OF NE EXEAT.

Bankr. Act July 1, 1898, c. 541, § 2, subd. 15, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3421], which confers on courts of bankruptcy general powers to make such orders and issue such process as may be necessary for the enforcement of the act, in connection with Rev. St. § 716 [U. S. Comp. St. 1901, p. 580], vests a court of bankruptcy with power to issue a writ in the nature of a writ of ne exeat to restrain a bankrupt within the district where a proper showing of its necessity is made.

In Bankruptcy. Petition for a writ in the nature of a writ of ne exeat.

The petition is supported by affidavit showing that respondent is indebted in the sum of \$140,000; that on March 6, 1905, he conveyed his real estate to his wife, his son, and his daughter; that in the months of January, February, and March, 1905, he shipped from his place of business merchandise of the value of more than \$70,000; that between February 25th and March 9th he collected in cash \$56,000, no part of which was paid to any creditor; and that he is about to leave the district to parts unknown, for the purpose of avoiding the jurisdiction of the court. About two weeks prior to this application respondent was subjected to examination in open court under the provisions of section 9b of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426], and at that time stated that he was insolvent; that he had sold merchandise and made collections to about the amounts stated in petitioners' affidavit; that he had been outside of the district, and had returned with the hope of effecting a settlement with his creditors.

Worthington & Reeves, for petitioners.

Albert Salzenstein and James M. Graham, for respondent.

HUMPHREY, District Judge (after making above statement). This is an application by creditors for an order for a writ in the nature of a writ of ne exeat to restrain the alleged bankrupt from departing the jurisdiction of the court. The respondent had been previously arrested and examined before the court, as provided for in section 9b of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426], and, the 10-days time limit fixed in section 9b being about to expire, this application is urged under the authority of section 2, subd. 15, of the bankrupt law, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3421], and sections 716, 717, Rev. St. [U. S. Comp. St. 1901, p. 580].

I am of opinion that the facts are amply sufficient to justify the issuance of the writ, if the court has the power. It is objected by respondent that the court is without power to order the writ of ne exeat, except upon satisfactory proof that the respondent is about to depart from the United States; that it would be an unwarranted and arbitrary exercise of power to restrain the respondent from departing out of the jurisdiction of this court, and that no reasonable construction of any federal statute can be held to give such power. Counsel for respondent argue that if the court can confine respondent to the Southern District of Illinois it can confine him to any county thereof, or to any smaller range

of territory, and, if so, to any building, and that this would amount to imprisonment for debt. Unless it be found in the statute, the court has not the power. It is a familiar rule that statutes are to be so construed as fairly and reasonably to carry out the purposes of the legislative body. A study of the bankrupt law shows that the purposes of Congress in its enactment were: First, to allow honest bankrupts to be relieved of their debts by surrendering their property for the benefit of creditors; and, second, to compel dishonest bankrupts to surrender their property for the benefit of creditors. In elaborate detail the act specifies the methods by which the bankrupt may himself carry out the first-named purpose, and also the method by which the creditors applying through the judicial arm of the government may carry out the last-named purpose. Congress contemplated that in many instances skillful men would seek to evade the law, and the act gives the court unusual powers to enforce compliance. Section 2 defines the powers of a court of bankruptcy. In 19 subdivisions it enumerates in detail the necessary judicial powers which the legislative body could anticipate, and, although the court is thus specifically clothed with these numerous powers, subdivision 15 is inserted, in the following words: "Make such orders, issue such process and enter such judgments in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act." Here is a sweeping general delegation of power, evidently intended to supply any omission occurring in the various other subdivisions of the section so far as Congress could legally do so. It is clear that Congress intended by this language to give the court every necessary power. It could not give the power to legislate, or to extend the provisions of the act. No power can be exercised which does not clearly reside in the act. But Congress intended to give, and, in my judgment, the above-quoted language does give, every judicial power known to the law which the court may find necessary for the proper enforcement of the bankrupt act. Is the writ here applied for a judicial power known to the law? Certainly the writ of *ne exeat* is a judicial power known to the law. If this application conformed strictly to the provisions of section 717, Rev. St., and asked that the respondent be restrained from departing the United States, counsel say they would not object to it; that it would then be quite within the power of the court. Section 716, Rev. St., is intended to give and does give the courts powers in addition to those specifically defined in 717 and other statutes. It gives the power to issue any necessary writ "agreeable to the usages and principles of law." The writ provided for in section 717 is of time-honored usage. Originally it was based upon the principle that the law might require a party to be restrained within the king's realm. Surely it is equally in accordance with the principles of law that the court may for proper cause restrain a party within such territory that the hand of the court may without embarrassment be laid upon him when he is wanted. I think this power is clearly given by section 716, Rev. St., as one of the equity powers of a bank-

ruptcy court, and, if there could be any doubt on that subject, it is removed by the enactment of section 2, subd. 15, of the bankrupt law. *Lewis v. Shainwald* (C. C.) 48 Fed. 500; *In re Lipke* (D. C.) 98 Fed. 970.

The writ will issue, and bond is fixed in the sum of \$20,000. Upon failure to give bond respondent will be kept in custody by the marshal at the expense of the petitioners, and he will not be imprisoned.

ROSENBERGER v. HARRIS.

(Circuit Court, W. D. Missouri, W. D. April 24, 1905.)

1. POSTAL SERVICE—FRAUD ORDERS—POSTMASTER GENERAL—JURISDICTION.

Under Rev. St. U. S. § 3929, as amended by Act Cong. Sept. 19, 1890, c. 908, 26 Stat. 466 [U. S. Comp. St. 1901, p. 2686], authorizing the Postmaster General to issue fraud orders against any person conducting a scheme to defraud through the post-office establishment, the Postmaster General, though entitled to pass finally on questions of fact raised in such proceedings, has not exclusive jurisdiction to pass on questions of law.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Post Office, § 21.]

2. SAME—STATUTES—INSTRUCTION.

Rev. St. § 3929, as amended by Act Cong. Sept. 19, 1890, c. 908, 26 Stat. 466 [U. S. Comp. St. 1901, p. 2686], authorizes the Postmaster General, on evidence satisfactory to him that any person is engaged in conducting a lottery, gift enterprise, or scheme for distribution of money or any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property through the mails by means of false or fraudulent pretenses, etc., to issue a fraud order against him. *Held*, that such section contemplates three classes of transactions, namely, lotteries and other like games of chance, "confidence games," and schemes which from their very nature, in the light of business experience, are sure to end in financial disaster to their contributors; and does not include an ordinary mail-order liquor business, in which the customers are given a fair commercial equivalent for the price paid, though the seller is guilty of trade puffing and of a false statement in his advertising as to the age of his liquors.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Post Office, § 55.]

On Motion for Preliminary Injunction.

Harkless, Crysler & Histed and J. C. Rosenberger, for complainant.

A. S. Van Valkenberg, U. S. Atty., for defendant.

AMIDON, District Judge (orally). The complainant is now, and has been for about seven years, engaged in the wholesale liquor business at Kansas City, Mo. In the course of that business he has secured a clientage of about 5,000 customers, and his annual sales amount to about \$150,000. The greater part of his trade is what is commonly known as mail-order business. Early in the present year inspectors from the Post-Office Department called upon the complainant for a disclosure as to the methods in which he was dealing with the public. He gave them a state-

ment and furnished them with his trade circulars and literature. Thereafter he was cited by the Postmaster General to show cause in Washington why what is commonly known as a "fraud order" should not be issued against him under the provisions of section 3929, Rev. St., as amended by Act Sept. 19, 1890, c. 908, 26 Stat. 466 [U. S. Comp. St. 1901, p. 2686]. He appeared before an assistant attorney for that department, and made his showing. In this showing he admitted that the circulars which he had sent out to the business community contained certain false statements. None of them are material, however, except those in which he stated that the whiskies which he offered for sale were, in one branch of his business, 14 years old and in the other 9 years old. The other false statements contained in the circulars fall under what may be properly called "trade puffing," and are not such as would have entitled a purchaser of the liquors to rescission in a court of equity. The complainant frankly admitted in his written statement made to the assistant attorney for the Post-Office Department that certain statements contained in his circulars were untrue. He offered to revise his trade literature, and remove from the same all matters which were complained of by the Post-Office Department. The next step in the procedure was the issuance of what is known as a "fraud order" to the postmaster at Kansas City, Mo., which, in effect, forbade that postmaster to deliver to complainant any mail received at the office addressed to him, but directed the postmaster to stamp all such mail as "Fraudulent" on the outside, and, in case the address of the sender appeared upon the envelope, to return the same to the sender, and, in case the address did not so appear, the mail was to be forwarded to the dead letter office at Washington.

From the showing that was made in the Postmaster General's office, and from the showing that has been made to this court, it is established beyond controversy that the liquor which the complainant furnished to his trade was of the fair commercial value in the markets of the country which he charged therefor; in other words, it appears that he gave to his customers in every case a fair commercial equivalent for that which he received from them. In fact, he carried this feature of his business to such an extent that he gave to purchasers with every sale a written guaranty that, if the article furnished was not satisfactory to the customer, it should be returned at the complainant's expense for shipment both ways, and the complainant undertook and agreed to repay to the customer the purchase price which he had received. It is stated in the bill and the affidavits supporting the same that throughout the complainant's course of business only a few transactions—six or seven, I believe—proved unsatisfactory to his customers, and that in each of those he accepted a return of the goods at his own expense, and repaid to the customer the purchase price.

Under this statute the Postmaster General is vested with quasi judicial power to pass upon all questions of fact, and his determination of such questions will be accepted as final by the courts. He cannot, however, be made the final interpreter of the law. In

this government the duty of interpreting the law is devolved upon the courts, and every person whose rights are invaded by an administrative or executive officer has a right to challenge the acts of such an officer upon the ground that they are not authorized by the statute under which the officer purports to act. It is the distinctive feature of English and American constitutional law that every executive officer, when he invades the liberty or property of the citizen, must vouch for his act a valid law. In determining whether his act is thus justified, the executive officer stands in the ordinary courts of justice on an equality with the private citizen. This is the feature of our constitutional law which distinguishes it from the administrative systems which obtain upon the continent of Europe. There an executive officer is himself the interpreter of the law, and, if his act is called in question, the party injured cannot have the question determined in the ordinary courts of justice, but he is brought before an administrative tribunal, whose members are taken from the official class whose acts are challenged, and the whole proceeding is according to administrative methods. It is not so under our system of government. It cannot be so long as our government is a government of laws, and not of men. If an executive officer may himself be both the executor and the final interpreter of the law, then the law becomes what such executive officer declares it to be. *Dacey*, *Law of the Constitution*, 176, 185; *Poindexter v. Greenhow*, 114 U. S. 270, 288, 5 Sup. Ct. 903, 29 L. Ed. 185; *U. S. v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171; *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; *Hare*, *American Con. Law*, 135, 138.

The decisions of the Supreme Court in construing this statute have clearly recognized this distinction. In a case which arose in this circuit—*American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90—the Supreme Court has fully sustained the views which I have expressed. In that case it was held that a representation as to a matter of opinion could not be a fraudulent representation under this statute, however enticing and seductive it might be. The terms “false and fraudulent representations” there employed, as construed by the Supreme Court in that case, are confined to the meaning which they have received in the courts of law and equity.

There has been no decision of the Supreme Court dealing with the other feature of this statute, namely, what constitutes, within the meaning of the statute, a “scheme” or “artifice” to defraud. The duty devolves upon this court in the present case to interpret those terms.

The first part of the statute deals with “any person or company engaged in conducting any lottery, gift enterprise or scheme for the distribution of money or of any real or personal property by lot, chance or drawing of any kind.” The statute then concludes with the general clause under which the present order was issued, namely, “any person or company conducting any other scheme or artifice for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, repre-

sentations or promises," etc. This statute stands in *pari materia* with section 5480 of the Revised Statutes [U. S. Comp. St. 1901, p. 3696], which makes it a criminal offense for any person to use the mails of the United States in the execution of a scheme or artifice to defraud. And in that section, under the specifications as to what constitutes "schemes" and "artifices" to defraud, are found, first, dealings in counterfeit money, and, second, any scheme or artifice to obtain money by or through correspondence by what is commonly called the "sawdust swindle" or "counterfeit money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "bills," "paper goods," "spurious treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles. I think the statute which we are now considering is one to which the maxim *noscitur a sociis* is to be applied, and that the terms "scheme" or "artifice," as used in this statute, are to be interpreted according to the company in which they stand. The classes of transactions that have heretofore fallen under the condemnation of the courts and the Postmaster General in the enforcement of these statutes are as follows:

(1) Lotteries and other like games of chance.

(2) What I will designate, for the want of a better term, as "confidence games." The distinctive feature of these schemes is that their authors obtain from their victims money or property without any intention of ever returning to them anything whatever, or anything at all equivalent in commercial value to that which the authors of the scheme receive.

(3) Schemes that from their very nature, and in the light of business experience, are sure to end in financial disaster, in which their contributors will receive nothing, or substantially nothing, in return for their contributions. To this class belong such cases as *Public Clearing House v. Coyne*, 194 U. S. 497, 24 Sup. Ct. 789, 44 L. Ed. 1092, and *Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709. Under all these schemes the controlling and distinctive feature is that it is the purpose of their authors to obtain from the public money or property with the intention not to return to the public anything whatsoever, or anything at all equivalent in value to that which is received.

The complainant's business and his wrongful conduct are widely separated from all these classes. It comes most nearly to class No. 2. It belongs in that class in one feature, namely, that the complainant in conducting his business has been guilty of false statements—such false statements as would entitle his customers to a rescission in a court of equity. But his business is distinguished from all these classes by the facts (1) that he is dealing in a staple article of commerce, and not in a nostrum, as was the case of *Missouri Drug Co. v. Wyman* (C. C.) 129 Fed. 623; and (2) that he has furnished to his customers in every case a commercial equivalent for the price which he has received.

The order which the Postmaster General has issued in this case, if it is sustained, marks a very great enlargement of his power under

this statute. In my judgment, it was not the intention of Congress by this law to place the integrity of all our business affairs under the guardianship of the Postmaster General. The doctrine of caveat emptor is still in force, and will, in the main, prove an adequate protection to the public against being seduced into purchasing against their will articles that are of the fair commercial value of the price exacted. If the doctrine of caveat emptor proves inadequate, then the courts of justice are open to parties for the redress of their wrongs.

We have lately been informed by the chief government chemist at Washington that 75 per cent. of all articles of food are adulterated; that is, that they do not contain, in fact, what they are represented to contain by those engaged in selling them. Take, for example, canned goods and preserves. This government chemist, and the heads of the food departments of the different states, unite in telling us that these articles, as a rule, are adulterated. They are sold in enormous quantities by our grocers and by those large concerns which carry on what is known as a mail-order business. Does it lie within the scope of the Postmaster General's power to institute an investigation, and, if he finds that a grocer or mail-order dealer is selling canned goods or preserves which have been adulterated, and which in his trade literature he represents to be pure, to issue a fraud order against such grocer or mail-order dealer? I think not. The same may be said in regard to dealers in spices, teas, and coffees. The same would be true as to dealers in prepared paints, which I am informed by a recent trial is a capital source of adulteration. I apprehend that the same doctrine would lie to those mail-order merchants in large cities who send out their circulars representing their cloths to be all wool and a yard wide. If the Postmaster General could institute an investigation, and find that these cloths were not all that they were represented to be, I do not believe it would lie in his power to issue a fraud order against such dealers. The statute, in my judgment, was intended to cover schemes lying outside of ordinary business channels. Such schemes may be properly stricken down in their entirety. They are proper objects for the sweeping condemnation of an executive order. It is "schemes," not ordinary business enterprises, that fall under the ban of this law. Frauds perpetrated in usual trade channels are still to be redressed in the courts, which deal with specific transactions, and inquire as to whether the complainant has been in fact deceived by the misrepresentation, and also damaged thereby; and not by executive orders, which take no account of specific acts, but strike down the entire business enterprise.

If I am mistaken in my interpretation of this statute, it is better that I should give the complainant the advantage of the doubt, for this reason: If the court should, for a brief time, suspend the execution of this fraud order, no great hardship will be entailed upon the government of the United States or upon the public. On the other hand, if my interpretation of the statute is correct, and I still refuse to grant the complainant any relief, his business is

ruined, and the injury which will befall him will be irremediable. I think it is a clear case for the proper intervention of a court of equity; and an injunction pendente lite will be allowed.

CONKLIN et al. v. UNITED STATES SHIPBUILDING CO.

(Circuit Court, D. New Jersey. May 1, 1905.)

1. CORPORATIONS—INSOLVENCY PROCEEDINGS—FOLLOWING RULES IN BANKRUPTCY.

In insolvency proceedings against a corporation in a federal court of equity, the rules in bankruptcy proceedings should be followed so far as applicable, especially where the corporation is one which might, under the present law, have been adjudged a bankrupt.

2. SAME—PROVABLE DEBTS—CONTINGENT LIABILITIES.

The surety on a bond given by an insolvent corporation, who has not been subjected to any loss or required to pay any money by reason of his liability thereon, has no claim against the corporation which is provable as a debt in insolvency proceedings for winding up its affairs and distributing its assets, merely because of the pendency of a suit against him on such bond, in which he denies liability.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insolvency, §§ 157-160.]

3. SAME—DISTRIBUTION.

While a court of equity, in administering the affairs of an insolvent corporation, will allow a claim to be proved after the expiration of the time limited by a general order for the proof of claims, and before distribution, provided it is an equitable one and the claimant is not chargeable with laches, it will not postpone the distribution indefinitely for the mere purpose of insuring against loss parties whose contractual relations with the corporation give rise to no present ascertainable debts.

In Equity. On petition of the United States Fidelity & Guaranty Company for leave to present proof of claim to receiver.

Charles L. Corbin, for petitioner.

Sherrerd Depue, for receiver of the United States Shipbuilding Company.

Robert H. McCarter, for reorganization committee.

LANNING, District Judge. On September 26, 1898, and July 14, 1902, Lewis Nixon and the petitioner, the United States Fidelity & Guaranty Company, executed certain bonds to the United States government, conditioned for the due performance of certain contracts for the building of war vessels by Mr. Nixon for the United States government. On July 20, 1901, the same parties executed two other bonds to the republic of Mexico to secure the due performance of two other contracts for building two war vessels by Mr. Nixon for the Mexican government. On September 15, 1902, the United States Shipbuilding Company, then having purchased the shipyards and property of Mr. Nixon, and assumed all his outstanding contracts, entered into a contract with the petitioner, dated that day, by which it was agreed that the United States Shipbuilding Company should be substituted as principal in the above-mentioned bonds in the place of Mr. Nixon, that that company should

indemnify the petitioner against all loss or liability by reason of the bonds, and that Mr. Nixon should be discharged from liability thereon. On October 6, 1902, and March 3, 1903, the Crescent Shipyard Company and the petitioner executed other bonds to the republic of Mexico and the United States government to secure the due performance of other contracts for the building by the Crescent Shipyard Company of war vessels for those governments. On October 29, 1902, the United States Shipbuilding Company and the petitioner executed another bond to the republic of Mexico to secure the due performance of a contract for the building by the United States Shipbuilding Company of four six-pound guns for the Mexican government. On June 30, 1903, this court, having adjudged the United States Shipbuilding Company to be insolvent, appointed a receiver for it. None of the contracts for building the above-mentioned vessels had then been completed. Some time after the appointment of the receiver, and before July 6, 1904, two suits were commenced by the republic of Mexico in the Supreme Court of New York—one against Mr. Nixon and the petitioner upon the two bonds executed July 20, 1901, and the other against the petitioner upon the bonds executed October 6, 1902, and October 29, 1902—but no judgment has yet been entered in either of those suits, nor has the amount of the liability of the petitioner, if any, upon any of the above-mentioned bonds, been in any wise ascertained or fixed. On December 15, 1903, this court made an order requiring the receiver of the United States Shipbuilding Company to notify the creditors of that company to present their claims within four months from that date. Due notice was given, and on July 11, 1904, an order was made barring all creditors who had not presented their claims within the limited time. On July 18, 1904, the petitioner prepared a claim upon a part of the above-mentioned bonds, but, through oversight, failed to deliver it to the receiver. By its petition now presented it seeks permission to prove its claim for the total amount of the penal sums of all the bonds, including the bonds of the Crescent Shipyard Company; the stock and assets of that company being, the petition alleges, the property of the United States Shipbuilding Company.

The first question presented by counsel upon these facts is whether the claim desired to be presented to the receiver is provable. It has frequently been declared in the courts of the state of New Jersey that the New Jersey statute for administering the affairs of insolvent corporations by means of receiverships is in its essential elements a bankrupt law, and that the rules to be applied to such administration should be those of the bankrupt law. *State Bank v. Receiver of Bank of New Brunswick*, 3 N. J. Eq. 270; *Receivers v. Paterson Gaslight Co.*, 23 N. J. Law, 291, 292; *Receivers v. Paterson Savings Bank*, 10 N. J. Eq. 17, 18; *Stockton v. Mechanics' Bank*, 32 N. J. Eq. 169; *Spader v. Mural Decoration Manufacturing Co.*, 47 N. J. Eq. 19, 20 Atl. 378; *Frost v. Barnert*, 56 N. J. Eq. 292, 38 Atl. 956. In applying these rules the New Jersey courts have nevertheless given a liberal construction to the New Jersey statutes

when considering the rights of creditors. In *Spader v. Mural Decoration Manufacturing Company*, *supra*, and in *Rosenbaum v. Credit System Company*, 61 N. J. Law, 544, 40 Atl. 591, the claimants, who had entered into contracts of employment with corporations for which receivers were appointed, on the ground of insolvency, before the expiration of the terms of employment, were held to have provable claims upon their contracts against the receivers, and the amounts due thereon were declared to be determinable upon issues properly framed and tried by jury in a court of law. In *Lehigh & Wilkesbarre Co. v. Stevens & Condit Transportation Co.*, 63 N. J. Eq. 107, 51 Atl. 446, a claimant for damages resulting from a tort committed before the adjudication of insolvency, but not reduced to judgment until after such adjudication, was admitted as a creditor. In *Grinnell v. Merchants' Insurance Co.*, 16 N. J. Eq. 283, a claimant was permitted to present his claim to the receiver of an insolvent corporation after the expiration of the time limited for the presentation of claims; he having held mortgage security for his claim, and not having been able to secure a sale of the mortgaged premises, so as to ascertain the amount of the deficiency, before the expiration of the time limited for the presentation of claims. The same rule was followed in *Pattberg v. Pattberg & Brothers*, 55 N. J. Eq. 604, 38 Atl. 205. In each of these cases there was, at the time when the claimant insisted upon his right to a distributive share of the assets of the insolvent corporation, an absolute, existing liability, though in some of them the amounts due had not yet been reduced to judgment or otherwise liquidated. None of these cases, therefore, is similar to the one now before me. Here the petitioner is a mere surety upon certain bonds. It is not certain that it will ever be required to pay anything on account of its suretyship. It is at the present time defending the suits brought against it in New York, and denies any liability whatever therein. Its liability upon the bonds is a contingent one, that may never become a debt. Its right is a right of indemnity out of the assets of its principal, but until it has been damnified there is no basis upon which it can ask to be indemnified. Such is the clear rule of the bankruptcy law. In *Riggin v. Magwire*, 15 Wall. 549, 21 L. Ed. 232, the court construed the language of the bankruptcy act of 1841, which allowed "uncertain or contingent demands" to be proven against a bankrupt's estate. It was declared that so long as it remained wholly uncertain whether a contract would ever give rise to an actual duty or liability, and there were no means of removing the uncertainty by calculation, the contract was not provable. In *Dunbar v. Dunbar*, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084, it was held that a claim founded upon an agreement by a husband to pay his wife, from whom he had secured a divorce, a certain sum annually during life or until she should marry, was not provable under the present bankruptcy act, except as to payments due at the time of the adjudication of the husband's bankruptcy.

The affairs of the United States Shipbuilding Company are to be administered in this court in accordance with the court's general

equity powers, rather than by a close adherence to the provisions of the New Jersey statute. *United States Shipbuilding Co. v. Conklin*, 126 Fed. 132, 60 C. C. A. 680. The object of the bankruptcy act is to secure an equitable distribution of a bankrupt's estate. The proceedings in bankruptcy are largely equitable in their nature. Equitable principles are applied. It seems, therefore, that the rules in bankruptcy proceedings, so far as they are applicable to the case now in hand, ought to be observed. Especially is this so, since the United States Shipbuilding Company was a manufacturing company (see *Columbia Iron Works v. National Lead Co.*, 127 Fed. 99, 62 C. C. A. 99, 64 L. R. A. 645, and *In re Marine Const. & Dry Dock Co.*, 130 Fed. 446, 64 C. C. A. 648), and, at any time within four months after this court had put a receiver in charge of its property, might have been forced into involuntary bankruptcy under the authority of section 3a of the bankruptcy act as amended in 1903 (Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 410]). Had that course been pursued, the provisions of the bankruptcy act concerning the character of claims provable against the insolvent company's estate would, without question, have had controlling authority.

But the learned counsel for the petitioner insists that when a corporation is adjudged insolvent, and its property is taken into the custody of the court for conversion into money and distribution amongst its creditors, the corporation, for all practical purposes, is dead, and that natural justice demands that parties occupying positions like that occupied by the petitioner in this case should have preserved to them a right to participate in the distribution. In order that the petitioner here may have preserved to it such a right, it is suggested that the receiver of the United States Shipbuilding Company be required by this court to retain in his hands a sum sufficient to secure the payment of a full dividend to the petitioner upon the amount it may be required to pay on each of the bonds executed by it. In other words, the proposition is that this court shall require its receiver to hold an ample fund for an indefinite period—possibly for years—out of which the petitioner may be indemnified if at some time in the indefinite future it shall suffer loss by reason of its execution of the above-mentioned bonds or any of them. No case has been referred to in which that course was pursued. In *Grinnell v. Merchants' Insurance Co.*, supra, the claimant became bail in error for the insolvent corporation, but, when he sought to be admitted as a creditor, his mortgage security for the amount advanced by him had been foreclosed, and the deficiency due him definitely ascertained. While a court of equity, in administering the affairs of an insolvent corporation, will allow a claim to be proven after the expiration of the period limited by a general order for the proof of creditors' claims, and before distribution, provided the claim is an equitable one and the claimant is not chargeable with laches, it will not postpone the distribution indefinitely for the mere purpose of insuring against loss parties whose contractual relations with the corporation give rise to no

present ascertainable debts. The application of a rule like that now proposed would in many cases tie up insolvent estates for years, and wholly abrogate the long-settled practice of requiring claims to be presented within prescribed periods. If at any time in the future, and before the assets of the United States Shipbuilding Company shall have been distributed amongst the creditors presenting provable claims, the liability of the petitioner shall be established, and the damages recoverable against it definitely ascertained and paid, the petitioner's claim may then possibly be proven, though upon this point no opinion is now expressed.

The view above taken renders it unnecessary to consider the question of laches, or the question concerning the claim against the United States Shipbuilding Company upon the bonds executed by the Crescent Shipbuilding Company, both of which questions were argued by counsel.

The order will be that the petition be dismissed.

THE EAGLE POINT.

(District Court, E. D. Pennsylvania. April 5, 1905.)

No. 73.

1. **COLLISION—MEASURE OF DAMAGES RECOVERABLE BY CARGO OWNER—LAW GOVERNING.**

The right of a cargo owner to be reimbursed for a loss by collision on the high seas does not arise from the statutes of any country, but from the general law maritime; and where both vessels were in fault the measure of his recovery from either one is a matter pertaining to the remedy, and governed by the law of the forum, and not of the flag.

2. **SAME.**

Where two British vessels are both held in fault for a collision on the high seas, in a suit in a court of admiralty of the United States the American rule, which permits a cargo owner to recover his full damages from either vessel, will be applied, and not the English rule, by which he can recover but half his loss from either.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, §§ 246, 296-298.]

3. **SAME—INTEREST.**

Interest allowed to cargo owners as part of the damages recoverable by them on account of a loss by collision.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, § 284.]

In Admiralty. Suit for collision. On final hearing.

Charles C. Burlingham, with Wing, Putnam & Burlingham, for libellant.

Frederick M. Brown, with Butler, Notman & Mynderse, for respondent.

Charles M. Hough, for intervening libellants.

J. B. McPHERSON, District Judge. This is a continuation of the proceeding already reported in 114 Fed. 971, and 120 Fed. 449, 56 C. C. A. 599. Both the Biela and the Eagle Point having now been declared at fault for the collision, which took place upon

the high seas, it remains to decide whether certain owners of the Biela's cargo shall have their damages measured by the English or by the American rule. Some of the owners have settled their claims, others have intervened by leave of court, and the libellant represents the rest that have not been paid. If the English rule is to be applied, the Eagle Point is only liable for one-half the damages: *The Milan*, 5 Law Times (N. S.) 590. If the American rule is the proper test, the owners may recover full damages from either vessel: *The Atlas*, 93 U. S. 302, 23 L. Ed. 863; *The Beaconsfield*, 158 U. S. 303, 15 Sup. Ct. 860, 39 L. Ed. 993; *The New York*, 175 U. S. 209, 20 Sup. Ct. 67, 44 L. Ed. 126, and cases cited in 3 Rose's Notes U. S. Reports, p. 976. Both vessels are British, as are some of the cargo owners; the rest being of American or of other nationality. It does not seem to me, however, that the nationality of the owners should be taken into account. A test should be adopted that will apply uniformly to all owners of cargo that present themselves as suitors before the court; otherwise we should have the absurdity of a recovery in full by one owner because he happens to be American, and a partial recovery by another simply because he happens to be English, while the injury and the loss, the tribunal and the form of procedure, are identical in both cases. The test, I think, must be found either in the nationality of the vessels, or by determining whether the measure of damages is a matter of substantive law or a matter of remedy only. There are many decisions which hold that a vessel upon the high seas is to be regarded as a floating piece of territory, which continues to belong to the nation where she is registered, and is governed by the law of the flag. It may often be the case that an act done or a fault committed upon a vessel on the high seas may give rise to a right which has its source only in the law of the flag; and, when this is the case, such a right will ordinarily be enforced in the tribunals of another sovereignty, even if the law of the forum differs in this respect. For example, if the law of the flag permits recovery for death caused by negligence upon the high seas, such recovery may be permitted in a forum within whose territorial limits the ordinary law denies the right to damages for the death of a human being. But while this is true, the subject need not be pursued, I think, if I am right in believing that the proper measure of damages in the present case is to be found by applying the rule that subjects a suitor to the law of the forum wherever remedies, as distinguished from rights, are concerned. As was said by the Supreme Court in *Northern Pac. Ry. Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958:

"The statute of another state has, of course, no extraterritorial force, but rights acquired under it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired or the liability was incurred will govern as to the right of action, while all that pertains merely to the remedy will be controlled by the law of the state where the action is brought. And we think the principle is the same, whether the right of action be *ex contractu* or *ex delicto*."

See, also, Story, Conflict of Laws (7th Ed.) §§ 556-558.

The origin of a cargo owner's right to be compensated for his loss is not a British statute, or any peculiar doctrine of English jurisprudence, but the common law, or the general law maritime, as it prevails in the courts of English-speaking communities. A tort committed on the high seas, by which damage is inflicted upon property, gives rise at once to a right of action against the wrongdoer in favor of the injured owner, and this right may be enforced in any tribunal having common law or admiralty jurisdiction that will undertake to settle the dispute. The owner's right is to recover full compensation for his loss, so far as there may be available property of the wrongdoer amenable to the process of the court, but the remedy by which satisfaction is sought may differ according to the practice of different tribunals. In a British court, a cargo owner who has suffered loss by the concurring fault of two vessels must pursue them both, if he is to obtain full satisfaction, and can only recover one-half of his loss from either, while an American court permits him to choose whichever wrongdoer he pleases, and to force full satisfaction from him alone. But this concerns the remedy, and not the right. In both courts the right is the same—a right to be compensated in full—although the method of obtaining such compensation differs. By the custom of one tribunal, two executions must be issued—one against each wrongdoer—while the custom of the other permits complete satisfaction to be obtained upon a single process against one of the offending ships alone. But this is a difference of remedy only, and both the English and the American courts recognize that their differences in this respect are differences in practice, and not in substantive law. In *The Milan*, supra, Dr. Lushington said:

"First, it is clear that, when A. B. has received a loss from the misconduct of C. D. and E. F., A. B. ought to be entitled to a full and complete recovery; but it is not so clear that A. B. should be entitled to recover from one the whole amount of damage occasioned by the acts of both. Strict justice would say that the burden of making good the loss should fall in proportion to their responsibility, but that, in the case supposed, is impossible to be ascertained. The only inference that I can draw from this view of the case is that, beyond all doubt, an action would be maintainable, though to what extent damage might be recovered might be a question of doubt. Secondly, the practice of the court of admiralty appears to have been uniform on this point, namely, that where both ships are to blame, and where the provisions of the statute do not interfere, the owners of cargoes, equally with the owners of ships, recover a moiety of the damage."

The court then referred to the case of *Hay v. Le Neve*, 2 Shaw (Scotch Appeals Cases) 395, and other decisions, and proceeded:

"The question which now engages my attention is this: Whether it is consonant with justice that the owner of a cargo, who is not the owner of the ship, should recover only a moiety from one of two ships, both in fault. I am aware that much may be said on this point, but perfect justice, if it could be administered, would afford a remedy in proportion to the culpability of each. That, in cases of collision, where both are to blame, is, generally speaking, impossible, and therefore, as a kind of *judicium rusticorum*, the party sued is liable to one half the damage only, and the innocent owner of the cargo is left, as to the other half, to sue the owner of the ship on board which his goods were carried. It might be that the form of the

action would be different in another court. I do not see injustice in this arrangement. Thirdly, is there any principle of the common law, or are there any adjudged cases, which ought to lead me to either of the two following conclusions—either to refuse to give any damages at all, or to decree the full amount of the loss sustained? As to the refusal to decree any damages at all, I must first be satisfied that the case at common law is so strong that I ought to overrule what was done in *Hay v. Le Neve*; admitting, however, that the point was not specially raised and considered. With respect to the authority of the superior courts, and of their decisions, upon the court of admiralty, I apprehend the rule to be that the court of admiralty implicitly obeys the decision of the House of Lords and the privy council or judicial committee; that it also follows the courts of common law in all constructions of statutes (I have lately done so, though with great doubt); that it would always decide in consonance with a series of cases adjudged at common law, but that it would not be bound by one or two cases, especially if they had been doubted by the profession. Then what help can I derive from the rules and decisions of common law? First, there is the general rule that in cases of collision a party injured may recover from the owner of the ship causing the loss the whole damage, but then he must not have been guilty of any error or misfeasance himself, contributing to cause the damage. There is, I think, no case which applies to that of the owner of a cargo on board one of two delinquent ships. The principle, I apprehend, of this rule of common law, is that a party shall not recover where he himself is in any degree to blame for the loss. Independently of cases, can it be reasonably contended that the owner of a cargo is responsible for the acts of the master and crew of the vessel in which his goods are laden; he himself not being the owner or part owner of the ship? It is undoubtedly clear that he (the owner of the cargo) cannot on any supposition have contributed to the loss—certainly not by himself personally, certainly not by his agents—for the master and crew are in no respect under his control. It is difficult to conceive upon what principle it can be contended that he is *particeps criminis*, when he is not so either as principal or agent.

* * * * *

"I am therefore clearly of opinion that, to the extent of one-half the damage, the owner of this cargo is entitled to compensation. There is, I apprehend, no doubt at common law that he could recover damages for the whole loss if he could recover at all; but I must be governed, where they apply, by the rule and practice of the court of admiralty. It is true that the owner of the cargo is to be considered a perfectly innocent person, and that he does not stand in the same position as a plaintiff, being the owner of one of two delinquent ships, and, if these were the only facts that were taken into consideration, it might well be that the owner of the cargo would recover the whole; but this is not the view taken by admiralty law. It endeavors—whether wisely or not, I do not say—to administer more equitable justice, and, where both parties are delinquent, to divide the whole loss; it being impossible to ascertain the proportionate culpability. I apprehend that, carrying out this principle according to its practice, the court of admiralty would say, 'The innocent owner of a cargo, proceeding against one only of two delinquent ships, shall recover only a moiety of the damage, because the court can affix to the vessel proceeded against only a moiety of the blame; and, with respect to the other half of the loss, the owner shall be left to his remedy against the other vessel, which has been held to be equally delinquent.' It may be very true that this principle is not altogether reconcilable with the rules and practice of common law, and much might be said as to the equity of its operation and effect; but still I think that this resolution of the question is most conformable to the case of *Hay v. Le Neve* and other cases, and therefore my decree must be that the plaintiff do recover a moiety of the damage only."

And the Supreme Court, in *The Atlas*, *supra*, is quite as distinct:

"Satisfaction to the libellant for the injury sustained is the true rule of damages in a cause of collision, by which is meant that the measure of com-

pensation shall be equal to the amount of injury received, and that the same shall be calculated for the actual loss occasioned by the collision, upon the principle that the sufferer is entitled to complete indemnification for his loss, without any deduction for new materials used in making repairs, as is prescribed in the law of maritime insurance.

* * * * *

"Two admissions are made by the court in the case of *The Milan* which it is important to notice, as they are undoubtedly correct, and will afford much aid in disposing of the question involved in the present record: (1) That the owner of the cargo, in such a controversy, could recover for his whole loss in an action at law; (2) that the owner of the cargo, in such a case, is to be considered as a perfectly innocent party.

"Nothing is more clear than the right of a plaintiff, having suffered such a loss, to sue in a common-law action all the wrongdoers, or any one of them, at his election; and it is equally clear that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss. He may proceed against all the wrongdoers jointly, or he may sue them all or any one of them separately; but if he sues them all jointly, and has judgment, he cannot afterwards sue them separately, or if he sues one separately, and has judgment, he cannot afterwards sue them all in a joint action, because the prior judgment against one is, in contemplation of law, an election, as to that one, to pursue his several remedy, but it is no bar to the suit for the same wrong against any one or more of the other wrongdoers.

* * * * *

"Contributory negligence on the part of the libellant cannot defeat a recovery in collision cases if it appears that the other party might have prevented the disaster, and that he also did not practice due diligence, and was guilty of negligence, and failed to exercise proper skill and care in the management of his vessel. Proof of the kind will defeat a recovery at common law, but the rule in the admiralty is that the loss in such a case must be apportioned between the offending vessels, as having been occasioned by the fault of both; but the rule of the common law and of the admiralty is the same where the suit is promoted by an innocent party, except that the moiety rule may be applied in the admiralty, if all the parties are before the court, and each of the wrongdoers is able to respond for his share of the damage. Subject to that qualification, the remedy of the innocent party is substantially the same in the admiralty as in an action at law; the rule being that in both he is entitled to an entire compensation from the wrongdoer for the injury suffered by the collision.

* * * * *

"Even suppose that the case of *The Milan* is a correct exposition of the admiralty law as administered in the jurisdiction where the decision was made; still it cannot control the question before the court, for the reason that the rule of practice here is different, as is clearly shown by the judgment of this court delivered at the last term of court. *The Alabama* and *The Gamecock*, 92 U. S. 695 [23 L. Ed. 763]."

This being so, it seems to me that the question under consideration is to be disposed of by applying the well-settled rule that the remedy of the forum is to control, where this differs from the remedy given by the law of the place where the tort was committed, which I shall assume for present purposes to be the law of Great Britain, since both ships were British, and the collision occurred on the high seas.

Much reliance is placed by the respondent upon a dictum of Justice Bradley to be found in his opinion delivered in *The Scotland*, 105 U. S. 24, 26 L. Ed. 1001. The principal question for decision in that case was whether a British steamship was entitled to the benefit of the American limited liability statutes, which restrict the

obligation to respond for injury done by collision to the value of the offending vessel and her freight after the collision occurs. As preliminary to the consideration of that question, the court proceeded to lay down certain general propositions, and in the course of such statement used the language relied upon, which I have italicized in quoting the following paragraph:

"In administering justice between parties, it is essential to know by what law or code or system of laws their mutual rights are to be determined. When they arise in a particular country or state, they are generally to be determined by the laws of that state. Those laws pervade all transactions which take place where they prevail, and give them their color and legal effect. Hence, if a collision should occur in British waters, at least between British ships, and the injured party should seek relief in our courts, we would administer justice according to the British law, so far as the rights and liabilities of the parties were concerned, provided it were shown what that law was. If not shown, we would apply our own law to the case. In the French or Dutch tribunals they would do the same. But if a collision occurs on the high seas, where the laws of no particular state have exclusive force, but all are equal, any forum called upon to settle the rights of the parties would *prima facie* determine them by its own law, as presumptively expressing the rule of justice; *but, if the contesting vessels belonged to the same foreign nation, the court would assume that they were subject to the law of their nation, carried under their common flag, and would determine the controversy accordingly.* If they belonged to different nations, having different laws, since it would be unjust to apply the laws of either to the exclusion of the other, the law of the forum (that is, the maritime law as received and practiced therein) would properly furnish the rule of decision. In all other cases each nation will also administer justice according to its own laws. And it will do this without respect of persons—to the stranger as well as to the citizen. If it be the legislative will that any particular privilege should be enjoyed by its own citizens alone, express provision will be made to that effect. Some laws, it is true, are necessarily special in their application to domestic ships, such as those relating to the forms of ownership, charter party, and nationality. Others follow the vessel wherever she goes, as the law of the flag—such as those which regulate the mutual relations of master and crew, and the power of the master to bind the ship or her owners. But the great mass of the laws are, or are intended to be, expressive of the rule of justice and right applicable alike to all."

I think it is evident, on considering this whole paragraph, that the court was not discussing remedies at all, but rights, and that what is said concerning the applicability of the law of the flag should be so understood. If this view is correct, Justice Bradley's language is not opposed to the conclusion which I have felt obliged to reach.

Other aspects of the question decided in this case were argued by counsel, both orally and upon their careful and satisfactory briefs, but it is not necessary to go into them, if my conclusion upon the principal point is correct. As to the allowance of interest, not *eo nomine*, but as part of the damages, I see no reason why it should not be added to the principal sums that have been agreed upon by the parties.

A decree may be entered in accordance with this opinion, with costs to the libellant.

THE ARIZONAN.

(District Court, E. D. New York. May 3, 1905.)

1. SALVAGE—PERSON ENTITLED TO AWARD—OWNER AND CHARTERER.

The owner of a tug contracted to furnish to a charterer the "services of the tugboat * * * fully manned and equipped" at a stipulated hire per day. While towing for the charterer under such charter party the master of the tug moored his tow, and went to the assistance of a burning steamship, to which the tug rendered salvage services, remaining with her until the next day; the charterer in the meantime completing the towage with another vessel. *Held*, that since the charter was not a demise under which the charterer became responsible for the risks taken by the master in engaging in the salvage service, or for any negligent or wrongful act committed by him, it was not entitled to an award made for the salvage, which belonged to the owner and crew.

2. SAME.

The legal status of the parties was not changed by the fact that the master of the tug at the time was by agreement taken from regular employes of the charterer, since he was for the time the servant and agent of the owner who paid him.

3. SAME—ESTOPPEL.

The fact that the owner accepted the per diem hire for the full time the tug was employed by the charterer, including that while she was engaged in the salvage service, did not estop him from claiming the salvage award; it not appearing that such matter was taken into consideration.

In Admiralty. Suit to recover for salvage services.

Avery F. Cushman, for Commercial Union Towboat Co.

Benedict & Benedict (R. D. Benedict, of counsel), for Merritt & Chapman Derrick & Wrecking Co.

THOMAS, District Judge. The Commercial Union Towboat Company owned the tug Unique. The Merritt & Chapman Derrick & Wrecking Company chartered the tug pursuant to the following letters:

"New York, October 25th, 1904.

"The Commercial Union Towboat Co., Messrs. Smith & Briggs, Agents, 45 South Street, City—Gentlemen:

"We herewith accept your verbal proposition to furnish this Company with the services of the tugboat Unique, for a week more or less, at \$80.00 per day of twenty-four hours, fully manned and equipped.

"It is understood and agreed that you will make use of as many of our night crew as can be spared, and that they are to be employed and paid by you.

"Please acknowledge receipt of this letter, and oblige,

"Yours very truly, Merritt & Chapman Derrick and Wrecking Co.,

"Isaac E. Chapman,

"Vice-President."

"New York, October 26th, 1904.

"Mess. Merritt & Chapman Dk. & Wkg. Co., 17 Battery Place, City—Gentlemen: We herewith acknowledge receipt of yours of the 25th and note the acceptance by you of our tug Unique, for charter, for a week more or less, at the rate of \$80.00 per day of twenty-four hours, boat to be manned and equipped, we also to employ and pay your Capt. and two extra men, during the time of said charter.

"Yours very truly,

Commercial Union Towboat Company,

"Smith & Briggs, Agts.

"A. W. S."

The tug was employed by the charterer on the night of October 28th, towing for the charterer two derricks loaded with marble, when the captain discovered the steamship *Arizonan* on fire, and went to her rescue, mooring his tow at a neighboring dock. The tug aided in salving the *Arizonan*, and, while the immediate and substantial services was short, she remained with the salved vessel until the following day, and did not deliver the derricks at their destination. The charterer made such delivery by other means. The charterer paid the stipulated hire for the tug during the time she was rendering the salving services. Owner and charterer each claim the sum awarded for the salving services of the tug. The general rule is that the owner is entitled to such award, unless there is a demise of the tug, or the contract of hiring stipulates to whom it shall belong. In the case at bar the owner agreed to furnish the charterer "with the services of the tug-boat * * * fully manned and equipped," and paid the members of the crew for their services. They were the servants of the owner. The fact that the owner selected them, in whole or in part, from the charterer's night crew, did not change the legal relation. The charterer urges that the agreement gave it the exclusive right to the services of the tug, and thereby excepts the case from the general rule above stated. But a charter party contemplates that the charterer shall have the whole and exclusive use of the vessel, whether or not there be a demise of the ship. In case of a demise the charterer has possession, whereby right of use is given. If the charter party is less than a demise, the charterer is entitled to exclusive use, but not to possession. Here the owner did not undertake to furnish possession, but to furnish the services of its servants and a vessel retained in its possession. Therefore it is concluded that the mere fact that the charterer was entitled to the exclusive use does not differentiate it from rights under a charter amounting to a demise or less than a demise. It would be entitled to exclusive use in either case. The charterer's contention that its right of use is as exclusive as if it accrued under a demise is correct, but the vice of the argument, as applied to the claim to the award, is that the charter party is assumed to be tantamount to a demise. If the Merritt Company stood to the owners and tug in the relation of a lessee, it was subject to grave liabilities, which the contract does not impose, and which the charterer would disclaim. Certainly, for the negligent acts, and, within the scope of his employment, the wrongful acts, of the master, the charterer would not admit responsibility. Would the charterer deem the owner relieved from liability for culpable faults of navigation on the part of the master or crew, and acknowledge itself as the party liable to respond therefor? Would the charterer admit that the legal status of each contracting party was what it would be in the case of a demise? If the master, after tying up the tow, negligently collided with another vessel while going to or rendering the salvage service, would the charterer admit liability to the owner or a third person injured thereby? The contract imposes no such liability, and it is quite certain

that the charterer would disclaim it. The charterer, in its present contention, seeks to gain the profit accruing from a certain legal status, while absolved from the legal duties and liabilities that pertain to such status. But they may not be disjoined. The charterer did not send the tug to the fire, nor assent thereto. The use to which the master put the tug was not a use which the charterer designated, nor was the master's act incidental to such use. There can be no salvage service unless the thing salvaged be in danger, and the master of the tug voluntarily put himself, his crew, and the tug under the influence of such danger. The charterer took no risk of it. It did not command it. The master exercised the authority impliedly conferred upon him by his principal. The owner was such principal. The master acted for his principal. He hazarded his principal's servants and property, and per chance his insurance. He involved his principal in all liability for injury to any person whomsoever, flowing from any unlawful act of his. The very danger of the tug in salving a burning ship is one of the elements considered in ascertaining the award. The risk was not that of the charterer, whether it pertained to the persons or property involved in the service. These considerations are fundamental, and illustrate the legality of the charterer's present claim, measured by his actual and legal relation to the tug and crew that did the acts which earned the award. It is urged that the owner accepted the per diem compensation for the time occupied by the salving service. But it is thought that the owner is not thereby estopped from claiming the award. For all that appears it was an oversight. It does not appear that there was any controversy between the parties in that regard, or that the owner, in terms, asserted that the tug was at the time in the charterer's service, and that it was legally bound to pay the stipulated hire. Liability to passengers, freighters, or charterers by deviation or delay by reason of diversion to perform a salving service is an element considered in fixing the award. If the charterer has suffered legal damage, the owner must respond for the same; and if, under a mistake of fact, the charterer has paid for unearned service of the tug, that may be recovered.

Pursuant to these views, the decree will provide for the payment of the award to the owner and crew in the proportion heretofore directed.

INTERNATIONAL SILVER CO. v. RODGERS BROS. CUTLERY CO. et al.

(Circuit Court, W. D. Michigan, S. D. February 17, 1905.)

1. TRADE-MARKS—UNLAWFUL COMPETITION—TRADE-NAMES.

Complainant's predecessors having created a large business in the manufacture and sale of tableware under the trade-names "Rogers Bros.," "Rogers Cutlery Co.," and other names in which the word "Rogers" or "Rogers Bros." appeared, defendants organized a corporation for "buying, selling and dealing in cutlery and tableware at wholesale and retail," in which two of the original incorporators were named "Rodgers," and immediately placed on the market knives manufactured by an independent corporation, stamped, "RoDgers Bros. Cutlery Co." At this time neither the corporation nor the individuals composing it had any skill in manufacturing tableware, and no established business therein, and, had they eliminated the word "RoDgers" from their trade-mark, there would have been nothing to recommend their goods, other than the excellence of the product. *Held*, that defendants' use of such name was prima facie fraudulent, entitling complainant to a preliminary injunction.

[Ed. Note.—Unfair competition, see notes to *Scheuer v. Miller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

2. SAME.

The names "Rogers" and "RoDgers" being idem sonans, the mere capitalization of the "d" for the purpose of calling attention to the distinction between the names was insufficient to prevent confusion and deception of the public as to the manufacture of the goods.

In Equity. Opinion on application for preliminary injunction.

Bartlett, Brownell & Mitchell, for complainant.

Clarence A. Goldsborough, in pro. per.

Stephen H. Clink, for other defendants.

WANTY, District Judge. This is a suit brought by the complainant, the successor of several companies which have for many years carried on an extensive business in manufacturing tableware, spoons, forks, and knives, under the trade-names of "Rogers Bros.," "Rogers Cutlery Co.," and other trade-names in which the word "Rogers" or "Rogers Bros." has appeared, until the goods manufactured by the complainant have come to be known as "Rogers goods" and "Rogers Bros. goods." The defendant corporation was originally composed of Lincoln Rodgers, John Rodgers, and Clarence A. Goldsborough, and was formed for the purpose of "buying, selling and dealing in cutlery and tableware at wholesale and retail." It has placed upon the market knives manufactured by the Muskegon Cutlery Company, on which is stamped:

"RoDgers Bros. Cutlery Co.
"1751—Cronstedt—1751
"Muskegon, Mich."

The complainant asks that the defendant be enjoined from making, marking or selling, or in any manner disposing of any spoons, forks or knives, or other table ware stamped with the mark "RoDgers Bros. Cutlery Co.," or any other mark or marks on which the word "Rogers" or "Rogers Bros." (spelled with or without the "d") are a characteristic part, and from using any such mark upon

or in connection with such goods, or on the boxes, wrappings, or labels containing or designating the same, and also from using the corporate name "Rodgers Bros. Cutlery Co." in the manufacture, procurement, or selling of tableware.

The authorities which have been cited by counsel for complainant and defendant are very numerous, but are all to the effect that no man has a right to sell his goods as and for the goods of another, and thereby work a fraud upon both the public and his rival in trade, nor has he the right to willfully place it in the power of another to do so. The difficulty has been in applying this rule to the various facts appearing in the different cases. The authorities are gathered in the notes to *Scheuer v. Muller*, 74 Fed. 225, 20 C. C. A. 165, and *Lare v. Harper Bros.*, 86 Fed. 481, 30 C. C. A. 376, and in the *Rogers' Cases*, where this trade-name and trade-mark have been a fruitful source of litigation. In the case of *Royal Baking Powder Company v. Royal* (C. C. A.) 122 Fed. 337, we find a review of the cases, and the principles upon which the judgment in this case must go, and it is not necessary to repeat the reasoning there so well set out by Judge Lurton.

In the case at bar neither the corporation defendant, nor the individuals composing it, have any skill in the manufacturing of cutlery or tableware, and no established business therein. If they had taken any other name for the corporation, or had left out the word "Rodgers" from their trade-mark, there would have been nothing to recommend the goods they sell, except the excellence of the product, which in time might give any trade-mark they chose to put upon their goods a value in the trade. They, however, chose a trade-mark which already had a value, and the property in which was in the complainant, for the word "Rodgers," connected with cutlery and tableware, has come to have a secondary significance which is entitled to protection. The defendant does not manufacture the product it sells, and if the Muskegon Cutlery Company, which does manufacture it, should use the name "Rodgers" on any of its goods, the reason for such use would be so apparent that it could scarcely be argued that the complainant had not the right to have such use enjoined. I can see very little difference in the stamping and selling of these same goods by the defendant. They are not selling "Rodgers goods," nor their own, but they are selling the Muskegon Cutlery Company's goods, masquerading under the trade-name which indicates they are manufactured by the Rodgers Bros. Cutlery Company. It cannot be supposed that the corporation defendant, in stamping the name "Rodgers Bros. Cutlery Co." on its goods, could have any other purpose than inducing the public to believe that the product made for it by the Muskegon Cutlery Company is "Rodgers goods." This is apparent when it is understood that neither it, nor any stockholder in it, has had any design of making the goods so stamped, but stamped the goods of another manufacturer for the purpose of selling them, not as the goods of the corporation that made them, but as the goods of the Rodgers Bros. Cutlery Company. This must have been done to have the

goods appear to be "Rogers goods," and "Rogers goods" are known to the consumer to be those of the complainant, not those of the Muskegon Cutlery Company or the defendant. The wholesalers, jobbers, and retailers would probably not be deceived by this trade-mark; but the ultimate purchaser, the housewife, and other customers of the retailer who want and call for "Rogers goods," can be furnished with the goods manufactured by the Muskegon Cutlery Company, and stamped for and sold by the defendants with this stamp, as readily as they can with articles manufactured by the complainant, bearing the "Rogers" trade-marks. This is not the case of a man using his surname in a business open to him, and the numerous cases upholding such a right do not apply, but the controversy here is ruled by the principles laid down in such cases as *Garrett v. T. H. Garrett & Co.*, 78 Fed. 472, 24 C. C. A. 173, where corporations have many times been enjoined from the use of a name taken from that of its stockholder or officer. The fact of a manufacturing corporation taking a name which has already become descriptive of the origin of the goods to be sold may of itself be sufficient evidence of an intent to mislead. But here the very purpose of adopting the name used by this corporation for a trade-mark was to sell the product of a manufacturing company as the goods of another.

It is claimed that the stamp is put on the goods by the defendant because the word "Rodgers" means honest dealing and superior workmanship in Michigan, Wisconsin, and Minnesota, where sawmill machinery which has for many years been made by the members of the family of Rodgers in Muskegon has gone. What influence the reputation as manufacturers of sawmill machinery could have in the cutlery and tableware trade is not apparent. It would require some inquiry to find that the Rodgers Bros. Cutlery Company has for a stockholder any of the sawmill manufacturers, and further inquiry to ascertain that such stockholder controls the business of the corporation, even if any one in the cutlery and tableware trade ever heard the name of any manufacturer of a sawmill at Muskegon. The name "Rogers" in the tableware and cutlery trade could scarcely be thought to point to the manufacturers of sawmills, but the defendant knew it did point to the "Rogers goods," so called, and showed their appreciation of the fact by capitalizing the "d" in the name as stamped on the knives put out by it. This was probably done to show a distinction between the names, from which it might be inferred that there was no design to appropriate the good will belonging to the complainant; but the names are *idem sonans*, and this change would not prevent the confusion which is certain to exist where the goods of complainant and defendant come into competition.

Counsel for the defendant urged on the hearing and in his brief the cases of *The Knights of Pythias*, 113 Mich. 133, 71 N. W. 470, 38 L. R. A. 658, *Royal Baking Powder Co. v. Royal*, 58 C. C. A. 499, 122 Fed. 337, *International Silver Co. v. Simeon L. and George Rogers* (C. C.) 110 Fed. 955, and *International Silver Co. v. Wm. H. Rogers*

Corporation (N. J. Ch.) 57 Atl. 1037, as holding that defendants could not be enjoined under the circumstances of this case. I have examined those cases carefully, but find nothing in them in conflict with the conclusion here reached.

A preliminary restraining order against the defendant corporation may be entered upon the filing of a bond by the complainant, in the sum of \$5,000, to pay what damages the defendant corporation may suffer by reason of such order if it be hereafter held that the order should not have been made.

MEMORANDUM DECISIONS.

BRUCE v. BRYAN, Attorney General of Maryland, et al. (Circuit Court of Appeals, Fourth Circuit. May 10, 1905.) No. 574. Appeal from the Circuit Court of the United States for the District of Maryland. Thos. Ireland Elliott (Richard B. Tippet and Wilson J. Carroll, on the brief), for appellant. Edgar Allan Poe, for appellees. Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

PER CURIAM. The judgment rendered in this case by the court below is without error. The opinion of Judge Morris (132 Fed. 390) has our approval. Affirmed.

DARNAL v. UNITED STATES. (Circuit Court of Appeals, Sixth Circuit. May 3, 1905.) No. 1,380. In Error to the District Court of the United States for the Western District of Kentucky. W. M. Smith, for plaintiff in error. R. D. Hill, for the United States. Before SEVERENS and RICHARDS, Circuit Judges.

PER CURIAM. The defendant in this case was convicted of the offense of mailing an obscene letter in violation of the provisions of section 3893 of the Revised Statutes [U. S. Comp. St. 1901, p. 2658]. The only question for our determination of any importance is whether the letter was of the character of matter made nonmailable by the statute, and of this we have no doubt. The letter is not fit for publication, and we must, therefore, forbear a discussion of its contents. The judgment of the lower court is affirmed.

STANDARD LIFE & ACCIDENT INS. CO. v. SALE. (Circuit Court of Appeals, Sixth Circuit. March 19, 1904.) No. 1,269. In Error to the Circuit Court of the United States for the Western District of Tennessee. H. R. Boyd, M. B. Trezevant, Keena & Lightner, for plaintiff in error. Patterson, Neely & Henderson, for defendant in error. No opinion. Affirmed, with costs. See 121 Fed. 664, 57 C. C. A. 418, 61 L. R. A. 337.

GABLER v. PICACHO BLANCO MIN. CO. et al. (Circuit Court, S. D. New York. February 27, 1905.) On Motion for Preliminary Injunction. A. A. Michell, for the motion. Abram J. Rose, opposed.

LACOMBE, Circuit Judge. In view of the conflicting sworn statements as to the facts, the status quo should be preserved until final hearing. Com-

plainant may, therefore, take an order for injunction in the form of the original stay order, as modified by the order filed November 28, 1904, and with such further modifications as may be necessary to permit the operation of any of the properties.

ISRAEL v. ISRAEL. (Circuit Court, E. D. Pennsylvania. April 18, 1905.) No. 24. Motion by Defendant for Judgment upon Reserved Point Notwithstanding the Verdict. Beck & Robinson, for plaintiff. David Wallerstein, for defendant.

J. B. McPHERSON, District Judge. Certain aspects of this case have already been heard by Judge Holland—first, a demurrer to the plaintiff's statement; and, second, a motion for judgment for want of a sufficient affidavit of defense. The affidavit was pronounced sufficient (134 Fed. 1023); but upon the recent trial of the case no effort was made to prove the facts thus set up, and the only defense relied upon was the proposition that this court had no jurisdiction of a suit brought to recover arrears of alimony that had accrued under an order made by a court of the state of New York. This, however, is the question that was considered and decided upon the demurrer, as will appear from the report of Judge Holland's opinion in 130 Fed. 237. This is, of course, the end of the matter, so far as the Circuit Court is concerned, and I shall say nothing more upon the subject, except what is necessary to carry his order into full effect. The defendant's motion for judgment notwithstanding the verdict is refused, and judgment may be entered in favor of the plaintiff for the sum determined by the jury.

KLAW et al. v. LIFE PUB. CO. (Circuit Court, S. D. New York. February 21, 1905.) On Motion for New Trial. Frank S. Black, for the motion. Spencer, Ordway & Wierum, opposed.

WALLACE, Circuit Judge. I am not satisfied that error was committed in the rulings upon the trial, or in the instructions to the jury, which are complained of by the defendants, and as there is an opportunity for review by the Circuit Court of Appeals, and there are several questions of such novelty and interest in the law of libel that it is not to be expected that my decision will be accepted as final, conclude that a new trial ought not to be granted, even though there may be some doubt whether my rulings upon all of them were correct.

DODD et al. v. WILSON et al. (District Court, E. D. Pennsylvania. May 10, 1905.) No. 72. In Admiralty. Howard M. Long, for libellant. Joseph Hill Brinton, for respondent.

J. B. McPHERSON, District Judge. Personally I am satisfied that the libellants have a just claim against the respondents for nearly the whole of the sum for which suit is brought. The moral evidence to sustain the claim is ample; but, as the respondents have chosen to stand rigidly on their legal rights and to insist on the lack of legal proof, I am obliged to sustain their defense, and to hold that the evidence to establish the correctness of the sums advanced to the crew as wages after the wreck is insufficient. The libellants' case, therefore, breaks down at a vital point. The libel must be dismissed, but without costs, except those of the clerk.